THE

ONTARIO REPORTS,

VOLUME XVI.

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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JAMES F. SMITH, Q. C.

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QUEEN'S BENCH DIVISION.....E. B. BROWN.
CHANCERY DIVISION.....A. H. F. LEFROY, GEORGE A. BOOMER,
COMMON PLEAS DIVISION.....GEORGE F. HARMAN,
BARRISTERS-AT-LAW.

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JUDGES

OF THE

HIGH COURT OF JUSTICE

DURING THE PERIOD OF THESE REPORTS.

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ERRATA.

Page 105, head-note, line 10, for G. read M.

" 233, head-note, line 8, for "on" read "no."

" 321, head-note, line 15, for "C's mortgage" read "the plaintiffs mortgage."

" 372, head-note, line 7, for "ch. 183" read "ch. 184."

REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[QUEEN'S BENCH DIVISION.]

REGINA v. ROE.

Canada Temperance Act—Police Magistrate, jurisdiction of—County and town—R. S. C. ch. 106, sec. 103 b.—R. S. O. (1887), ch. 72, sec. 11—Information and summons—Irregularity.

A person having a commission as police magistrate for the county of H., such commission not excluding the town of W., and also having a separate commission as police magistrate for the towns of W., C., G., and S., respectively, all being in the county of H., convicted the defendant at W., of an offence against the Canada Temperance Act committed at W., but upon an information taken and summons issued by him at the town of C.

Held, having regard to the provisions of sec. 103 *b.* of the Canada Temperance Act, R. S. C. ch. 106, and of R. S. O. (1887) ch. 72, sec. 11, that the magistrate had jurisdiction by virtue of his commission for the county over the offence committed at W., and had also jurisdiction by virtue thereof to take the information and issue the summons at C.; and the fact that he described himself in the information and summons as police magistrate for the town of W. did not deprive him of the jurisdiction which he had as police magistrate for the county.

Regina v. *Young*, 13 O. R. 198, not followed.

Quære, whether the defendant could object to the regularity of the information and summons, he having appeared in obedience to the summons, and pleaded not guilty.

May 21, 1888. *Aylesworth*, for the defendant, supported an order *nisi* to quash a summary conviction for an offence against the Canada Temperance Act.

Delamere, for the complainant, shewed cause.

The facts appear in the judgment.

May 28, 1888. ARMOUR, C. J.—The defendant was on the 19th October, 1887, convicted before one Williams, a police magistrate in and for the town of Wingham in the county of Huron, for that he in the town of Wingham in the county of Huron, unlawfully did between the first day of September and the twenty-ninth day of September, 1887, sell intoxicating liquor contrary to the provisions of the second part of the Canada Temperance Act, then in force in the said county.

The information upon which the said conviction was founded was laid before the said police magistrate in and for the town of Wingham in the county of Huron, and was so laid before him at the town of Clinton in the county of Huron.

The summons issued to the defendant upon the said information required the defendant to appear at the town hall in the town of Wingham, and was issued by the said police magistrate at the town of Clinton.

The defendant appeared at the Town Hall in the town of Wingham in obedience to this summons, and objected that the procedure was irregular, because the information was taken and the summons issued in the town of Clinton; and pleaded not guilty.

The objections taken by the order *nisi* to quash the conviction were that "the information upon which the said conviction proceeded was laid at the town of Clinton, and the summons to the defendant and witnesses were signed and issued at and from the same place, and the said police magistrate for the town of Wingham, before whom the said information was so laid, and by whom the said summonses were so issued, had no jurisdiction, when not within the territorial limits of the said town of Wingham, to take or receive the said information or to issue the said summonses in respect of an offence charged to have been committed within the said town of Wingham, and that the information having been laid before a person who had no jurisdiction to receive the same, the police magistrate by whom the said conviction was made never had any jurisdiction to inquire into the said charge or to make the said conviction."

Upon the return of the order *nisi* an affidavit was filed on the part of the Crown shewing that the said police magistrate was on the third day of May, 1887, appointed, by commission, police magistrate in and for the county of Huron, and on the twelfth day of July, 1887, was by a separate commission appointed police magistrate for the towns of Wingham, Clinton, Goderich, and Seaforth, respectively, and that all such commissions were still in full force.

It may be doubtful whether this objection is open to the defendant, he having appeared upon the charge in obedience to the summons, and having pleaded not guilty thereto; but it is unnecessary for us to decide this point. See *Regina* v. *Hughes*, 4 Q. B. D. 614.

By section 103 *b.* *of the Canada Temperance Act, R. S. C. ch. 106, prosecutions under the said Act may be brought, "In the Province of Ontario, before any stipendiary magistrate or before any two justices of the peace for the county, city or district wherein the offence was committed; or, if the offence was committed in any county, city or town having a police magistrate, then before such police magistrate or, in his absence, before the mayor or any two justices of the peace; or, if the offence was committed in any city or town not having a police magistrate, then before the mayor thereof, or before any two justices of the peace."

In *Regina* v. *Young*, 13 O. R. 198, I held that under this provision a town was to be held to have a police magistrate which had a police magistrate having jurisdiction therein, although such his jurisdiction was not limited to the town, but extended beyond the limits of the town, and included territory outside the town. My view was not then concurred in by the rest of the Court, but subsequently the Chief Justice† authorized me to say that he had become convinced that his view in that case was wrong, and that mine was right.

* This section has now been repealed by 51 Vic. ch. 34, sec. 6, and a new section substituted therefor.

† WILSON, C. J.

Following my view in that case, and assuming that instead of the same person having been commissioned as police magistrate for the county of Huron and the town of Wingham, two different persons had been respectively so commissioned, the town of Wingham would then have had two police magistrates, one having jurisdiction in the whole county of Huron, including the town of Wingham, and the other having jurisdiction in the town of Wingham only.

This offence would then have been committed, committed as it was in the town of Wingham, in a town having two police magistrates, either of whom would have had jurisdiction over the prosecution therefor.

But the police magistrate, having jurisdiction in the town only, could have exercised his jurisdiction only in the town; whereas the police magistrate having jurisdiction in the whole county could have exercised his jurisdiction anywhere in the county.

There is nothing in the Canada Temperance Act which requires that, if the offence is committed in a town, the prosecution therefor shall be had only within the town.

In my opinion, therefore, the person commissioned as police magistrate for the county of Huron had jurisdiction to take the information in the prosecution of this offence, which was committed in the town of Wingham in the county of Huron, at the town of Clinton, which is also in the county of Huron, and to issue thereat summonses to the defendant and to witnesses to appear at the town hall in Wingham.

The fact that he described himself in the information and summonses as police magistrate for the town of Wingham, did not deprive him of the jurisdiction which he had as police magistrate for the county of Huron.

Moreover, R. S. O. (1887) ch. 72, sec. 11, provides that "The commission appointing a police magistrate for a county or district, may exclude any city or town which has a police magistrate, and otherwise a police magistrate appointed for a county or district shall have jurisdiction in the whole of the county or district, inclusive of every city or town therein, whether such city or town has or has not

also a police magistrate of its own;" and the commission appointing the convicting police magistrate, police magistrate in and for the county of Huron, did not exclude the town of Wingham.

In my opinion, therefore, the motion must be dismissed with costs.

FALCONBRIDGE and STREET, JJ., concurred.

Order nisi discharged with costs.

[QUEEN'S BENCH DIVISION.]

REGINA EX REL. JOHNS V. STEWART.

Municipal corporation—Controverted election—R. S. O. (1887) ch. 184, secs. 187, 188—Corrupt practices—Procedure—Quo warranto—Summons or information.

All proceedings taken to contest the validity of any election mentioned in sec. 187 of the Municipal Act, R. S. O. (1887) ch. 184, whether for bribery, corrupt practices, or any other cause, should be commenced by writ of summons in the nature of a *quo warranto*, as provided by sec. 188, and not by information in the nature of a *quo warranto*, or otherwise.

AN appeal by the respondent from the *fiat* of MacMahon, J., for the issue of a writ of summons in the nature of a *quo warranto*, under the Municipal Act of Ontario, to contest the validity of the election of the respondent as Mayor of Ottawa, and from an order of Rose, J., referring to the County Judge of Carleton to take evidence of the corrupt practices alleged against the respondent.

May 29, 1888. The appeal was argued.

McCarthy, Q. C., for the respondent. The question raised by the appeal is whether proceedings to void a municipal election on the ground of bribery can be taken under the ordinary writ of summons in the nature of a *quo warranto*, provided for by the Municipal Act; the respondent con-

tends they cannot. I refer to the Municipal Act, R. S. O. (1887) ch. 184, secs. 187, 188, 190, 193, 197, and to *Regina ex rel. McKeon* v. *Hogg*, 15 U. C. R. 140; *Regina ex rel. McGouverin* v. *Lawlor*, 5 P. R. 209; *Shortt* on Informations, 113, 114. Although there is no appeal from the single Judge in municipal election cases, the Court will always interfere to prevent the abuse of its own process: see *In re Sproule*, 12 S. C. R. 140.

Aylesworth, for the relator. No appeal lies from the single Judge in this matter. On the question of the right of appeal, I refer to *Regina ex rel. Grant* v. *Coleman*, 7 A. R. 619; *Harrison's* Municipal Manual, 151. On the question of the proper procedure where bribery is charged, I refer to secs. 177, 178, 187, and 200 of the statute; *Regina ex rel. White* v. *Roach*, 18 U. C. R. 226; *Kelly* v. *Macarow*, 14 C. P. 313, 457; and to the universal practice since the Act of 1872.

McCarthy, in reply, referred to *Martin* v. *Mackonochie* 3 Q. B. D. 730; 4 Q. B. D. 697; 6 App. Cas. 424.

June 23, 1888. ARMOUR, C.J.—The question to be determined in this case is, whether, where the validity of the election of a mayor, warden, or reeve or deputy reeve, alderman or councillor, is contested upon the ground of corrupt practices only, the proceeding to try the validity of such election should be by writ of summons in the nature of a *quo warranto* issued under the provisions of the Municipal Act, or should be by an information in the nature of a *quo warranto*.

The provision of 12 Vic. ch. 81, sec. 146, was that at the instance of any relator having an interest as a candidate or voter in any election to be held under the authority of that Act, a writ of summons in the nature of a *quo warranto* should lie to try the validity of such election, which writ should issue out of Her Majesty's Court of Queen's Bench for Upper Canada, upon an order of that Court in term time, or upon the *fiat* of a Judge thereof in vacation, upon such relator shewing upon affidavit to such Court or Judge

reasonable grounds for supposing that such election was not conducted according to law, or that the party elected or returned thereat was not duly or legally elected or returned.

The Legislature gave this proceeding to try the validity of such an election as a substitute for the proceeding by information in the nature of a *quo warranto*, the office being an annual one, and the object being to give an expeditious, convenient, and less expensive remedy: *Regina ex rel. White* v. *Roach*, 18 U. C. R. 226.

If, therefore, an information in the nature of a *quo warranto* would have lain to try the validity of such an election on the ground that the person elected thereat had been so elected by bribery, (and I am of opinion that it would have: *Rex* v. *The Mayor of Tiverton*, 8 Mod. 186;) it follows that a writ of summons in the nature of a *quo warranto* issued under the authority of 12 Vic. ch. 81, sec. 146, would have lain to try the validity of such an election on the ground that the person elected thereat had been so elected by bribery; for if he had been elected by bribery, he would not have been "duly or legally elected."

There is no ground for any argument from the provisions of the Act 12 Vic. ch. 81, that the summons in the nature of a *quo warranto* issued under its authority would not have lain to try such a question, but the contrary; for sec. 150 of that Act gave the Judge all the powers necessary for the trial of such a question; for it provided that he should inquire into the facts to be established by personal evidence, either by affidavit or affirmation, or by oral testimony taken before him as at Nisi Prius, or by issues to be framed by him for that purpose, and to be sent to be tried by jury by writ of trial to be directed to such inferior Court of civil jurisdiction as should be named by him for that purpose, or by one or more of those methods of inquiry, as he should deem the ends of justice to require.

Nor is there anything against this view to be found in *Regina ex rel. McKeon* v. *Hogg*, 15 U. C. R. 140. Upon

examining the papers on file in this Court in that case, it appears that it was not alleged that Hogg had been elected by bribery, but evidence was given on the trial by one Burtch that Wheelan asked him to vote for him; that he told him he could not vote for him, but would vote for Hogg, and that Wheelan then said to him, "If you want thirty dollars, you can have it"; that he said nothing about returning it.

The learned Judge of the County Court before whom the case was tried gave judgment unseating Hogg and seating Wheelan, and it may be that he disbelieved this evidence.

The judgment of this Court refusing the rule *nisi* must be read in the light of these facts, and so reading it, I do not understand this Court to have held that a writ of summons in the nature of a *quo warranto* issued under the authority of 12 Vic. ch. 81, sec. 146, would not lie to try the validity of such an election on the ground that the person elected thereat was so elected by bribery.

If a writ of summons in the nature of a *quo warranto*, issued under the authority of 12 Vic. ch. 81, sec. 146, would have lain to try the validity of such an election on the ground that the person elected thereat had been elected by bribery, a writ of summons in the nature of a *quo warranto* issued under the authority of 29 & 30 Vic. ch. 51, sec. 131, would have so lain for the same purpose.

Then was passed 35 Vic. ch. 36 (O.) an Act for the prevention of corrupt practices at Municipal Elections.

There was nothing in that Act to shew any intention upon the part of the legislature that a different method for the trial of the validity of an election, where corrupt practices were charged, than by writ of summons in the nature of a *quo warranto*, issued under the provisions of the Municipal Act, should be adopted; but, on the contrary, sec. 5 of that Act clearly shews that the intention of the legislature was that the trial of the validity of such an election, where corrupt practices were charged, should be by that method; for it provided that where the writ of

summons in the nature of a *quo warranto* was returnable before one of the Judges of the Superior Courts of Law, in case any question as to whether the candidate or any other voter had been guilty of any violation of sections 1 and 2 of that Act, affidavit evidence should not be used to prove the offence, but it should be proved by *viva voce* evidence.

It is true that by sec. 4 of that Act it was provided that any candidate elected at any municipal election who should be found guilty by the Judge, upon any trial upon a writ of *quo warranto*, of any act of bribery, or with using undue influence as therein aforesaid, should forfeit his seat, &c.; but it is plain, I think, that what was there meant by "a writ of *quo warranto*," was a writ of summons in the nature of a *quo warranto*, issued under the authority of the Municipal Act, and not an information in the nature of a *quo warranto*, nor least of all the ancient and obsolete writ of *quo warranto*.

That Act was by 36 Vic. ch. 48 consolidated with the Municipal Act, and the 144th section of the consolidated Act provided that any person whose election was complained of might, unless such election was complained of on the ground of corrupt practices on the part of such person, disclaim by a disclaimer to the following effect: "I, A. B., upon whom a writ of summons in the nature of a *quo warranto* has been served," &c., shewing plainly that an election might be complained of by a writ of summons in the nature of a *quo warranto* on the ground of corrupt practices.

The different provisions to which I have adverted are substantially the same as those contained in R. S. O. (1887) ch. 184, under which the election in question was held: the same considerations will therefore apply to its provisions.

The question raised in this case was principally founded upon the words made use of in the Act R. S. O. (1887) ch. 184, to denote the method to be adopted in taking proceedings to contest elections held thereunder.

In section 188, the words made use of are, "a writ of summons in the nature of a *quo warranto*."

The words in section 212 are: "in an application in the nature of a *quo warranto*." These words clearly refer to proceedings by writ of summons in the nature of a *quo warranto*, and this is apparent from a reference to the origin of section 212, which is contained in 35 Vic. ch. 36, section 5, already referred to.

The words in section 213 are, "a writ of *quo warranto*," which must be taken to mean "a writ of summons in the nature of a *quo warranto*," as I have already pointed out in dealing with the origin of this section, which is 35 Vic. ch. 36, sec. 4.

In section 220 the words used are: "all proceedings other than an application in the nature of a *quo warranto*." And in section 178 "proceedings by *quo warranto*, as provided by sections 187 to 208, both inclusive," are the words used, clearly pointing to the writ of summons in the nature of a *quo warranto*.

I am of opinion that, having regard to the provisions of the R. S. O. (1887), ch. 184, respecting controverted elections, the legislature intended that all proceedings taken to contest the validity of any election mentioned in section 187, whether for bribery, corrupt practices, or any other cause, should be commenced by writ of summons in the nature of a *quo warranto*, as provided by section 188, and not by information in the nature of a *quo warranto*, or otherwise.

The motion must, therefore, be dismissed with costs.

STREET, J., concurred.

FALCONBRIDGE, J., took no part in the judgment, having been at the time of the argument engaged in holding Single Court.

Motion dismissed.

[QUEEN'S BENCH DIVISION.]

REGINA V. CATON.

Municipal corporations—Transient traders—42 Vic. ch. 32, sec. 22—Municipal by-law—Conviction.

The by-law under which the defendant was convicted, provided that "no transient trader or other person occupying a place of business in the town of M., for a temporary period less than one year, and whose name has not been duly entered on the assessment roll for the current year, shall * * offer goods, wares, and merchandize for sale * * within the limits of the town of M., without, or until he shall have first duly obtained a license for that purpose." The conviction was for that the defendant, being a transient trader, occupying a place of business in the town of M., did sell certain goods, wares, and merchandize, contrary to the by-law.

Held, that the by-law was sufficiently within the powers given by 42 Vic. ch. 31, sec. 22, to warrant the conviction; and that the words in the by-law, "less than one year," were but a limitation of the words "temporary periods," used in the statute, and did not vitiate the by-law; but

Held, that the want of an allegation in the conviction that the defendant was a transient trader whose name had not been duly entered on the assessment roll for the current year, was fatal.

THE defendant was on the 23rd December, 1887, at the town of Mount Forest, in the county of Wellington, convicted before J. H. Halstead, a justice of the peace of the said county, for that he, being a transient trader occupying a place of business in the said town of Mount Forest, did on the 20th and 21st days of December, 1887, at the said town of Mount Forest, sell certain goods, wares, and merchandize, contrary to a certain by-law of the municipality of the town of Mount Forest, in the said county of Wellington, passed on the 25th June, 1880, and entitled a by-law for licensing, regulating, and governing transient traders, and numbered 12, and an amendment of said by-law passed on the 14th September, 1887, and entitled a by-law to amend by-law number 12 of said town, regulating and governing transient traders, and numbered 123.

The convicting justice had drawn up a conviction of the defendant, and had on the 6th January, 1888, returned it to the clerk of the peace, and after notice of

application for a writ of *certiorari*, he drew up another conviction, and on the 2nd January, 1888, returned it to the clerk of the peace.

Both convictions were returned to this Court upon the writ of *certiorari*, and on 1st June, 1888, *J. B. Clarke* obtained an order *nisi* to quash the said convictions on the following grounds: 1. That as to the first mentioned conviction, no offence was shewn, inasmuch as it did not appear that the defendant committed any act prohibited by the said by-laws; 2. That as to the alleged amended conviction, the same was made after the first conviction had been returned to the clerk of the peace; and that at the time of the making of the same there was not any finding or adjudication that the defendant was guilty of any offence within the meaning of the said by-law; 3. That as to both said convictions no offence was shewn by the evidence before the magistrate on which the convictions were based, inasmuch as there was no evidence that the defendan was a transient trader within the meaning of the said by-laws; and that he occupied premises in Mount Forest for a temporary period less than one year; but, on the contrary, the evidence established that the defendant was not a transient trader within the meaning of the said by-laws; 4. That the amended conviction was bad in law, inasmuch as it did not state that the defendant occupied premises in Mount Forest for a temporary period less than one year.

June 8, 1888. *Aylesworth* shewed cause, and *J. B. Clarke* supported the order *nisi*.

June 23, 1888. ARMOUR, C. J.—The by-law under which this conviction was made provided that, "No transient trader or other person occupying a place of business in the town of Mount Forest, for a temporary period less than one year, and whose name has not been duly entered on the assessment roll for the current year, shall by himself or his agent, offer goods, wares, and merchandize for sale,

or trade, barter, or sell goods, wares, or merchandize, directly or indirectly, or offer goods or merchandize of any description for sale by auction, conducted by themselves or by a licensed auctioneer or otherwise, within the limit of the town of Mount Forest, without or until he shall have first duly obtained a license for that purpose, as hereinafter provided."

This by-law was passed on the 25th June, 1880, under the provisions of 42 Vic. ch. 31, sec. 22, (O.) repealing R. S. O. (1877), ch. 174, sec. 466, sub-sec. 53, and substituting therefor the following; "For licensing, regulating, and governing transient traders and other persons who occupy premises in the city, or town, incorporated village, or township, for temporary periods, and whose names have not been duly entered on the assessment roll in respect of income or personal property for the then current year; and who may offer goods or merchandize of any description for sale by auction conducted by themselves or by a licensed auctioneer or otherwise."

The words of the statute "who occupy premises," clearly apply to the words "transient traders," as well as to the words "and other persons."

The by-law appears to me to be sufficiently within the powers given by the statute, so far as the offence charged against the defendant is concerned, to warrant the conviction.

The use of the words in the by-law "less than one year" serve but as a limitation of the words "temporary periods" used in the statute, and do not in my opinion vitiate the by-law.

It is essential that a conviction under this by-law should shew that the offender against the by-law is within the description of persons required by the by-law to be licensed.

Now, although the defendant is described in the conviction as a transient trader, and as occupying a place of business in the town of Mount Forest, yet he is not described as, nor is it alleged that he was, a transient trader whose

name had not been duly entered on the assessment roll for the then current year.

This is a fatal objection, and as both convictions are open to it, both must be quashed.

STREET, J., concurred.

FALCONBRIDGE, J., having at the time of the argument been engaged in holding Single Court, took no part in the judgment.

Conviction quashed without costs.

[QUEEN'S BENCH DIVISION.]

RE BRITISH CANADIAN LOAN AND INVESTMENT COMPANY AND RAY.

Mortgage—Vendor and purchaser—Power of sale—Variation from Short Forms Act—Notice of sale to incumbrancers.

The vendors were selling land under the following power of sale contained in a mortgage made under the Short Forms Act: "Provided that the company (the mortgagees) on default of payment for two months may, without any notice, enter on and lease or sell the said lands." After more than two months' default the mortgagees entered, and after having done so made the contract for sale, and served notice of exercising the power of sale on some of the subsequent incumbrancers personally, and upon the solicitors of others.

Held, that if the Act were applicable, the power of sale was properly exercised; if the Act were not applicable, then, taking the words in their strictest sense, the vendors had done all that the power required; and the fact that they did give notice to some of the subsequent incumbrancers did not oblige them to give notice to all.

Quære, whether the variations in the power from the statutory form prevented the Short Forms Act from applying.

A PETITION under the Vendor and Purchaser Act.

The facts appear in the judgment.

June 12, 1888, the petition was argued.

R. Grant, for the vendors.

Middleton, for the purchaser.

June 20, 1888. STREET, J.—This is a petition under sec. 3 of ch. 112, R. S. O. (1887), the Vendor and Purchaser Act, upon a question arising under a contract of sale into which the petitioners, the British Canadian Loan and Investment Company, who are the vendors, have entered with W. H. Ray, the purchaser.

The sale is made in pursuance of a power contained in a mortgage made to the vendors by one H. P. Harrison. The mortgage is declared to be made under the Act respecting Short Forms of Mortgages, and contains a power of sale in the following words:

"Provided that the company on default of payment for two months, may, without any notice, enter on and lease or sell the said lands."

It is shewn that after default had been made for two months and upwards, the company, who are the mortgagees, did enter upon the lands in question, and after having done so, entered into the contract of sale in question.

The objection made by the purchaser to the title is that certain of the subsequent incumbrancers are not shewn to have been personally served with notices of sale, which the mortgagees, for the sake of greater caution, did proceed to give, but that such notices of sale were served on the solicitors, or persons professing to be solicitors, for these subsequent incumbrancers.

It may be a matter of doubt whether the variations in the power of sale in this mortgage from the form given by the Act, are such as to entitle the vendors to treat the Act as being applicable; if the Act is applicable, then I do not see any ground upon which it can be held that the power has not been properly exercised, because a power to sell without any notice, after a certain period of default, is as good as one which requires a notice to be given.

If the Act is not applicable, then the vendors must take the bare words in which their power is framed; and taking them in their strictest sense as requiring entry to be made before a sale takes place, they have done all that the power requires.

The fact that they did give notice to some of the subsequent incumbrancers, does not oblige them to give notice to all.

I therefore determine that upon the statements in the petition of the vendors, and the evidence given in support of them, the objections of the purchaser to the manner in which the power of sale has been exercised should be disallowed; the answers of the vendors to the purchaser's requisitions are incomplete, because they do not shew that the mortgage was in default for two months before the sale, and they should, perhaps, have stated the fact of entry before sale, but these omissions have been corrected by the amendments to the petition.

By the terms agreed on by counsel the vendors are to pay the costs of both parties.

[QUEEN'S BENCH DIVISION.]

STODDART V. WILSON ET AL.

Bankruptcy and insolvency—Preference—Chattel mortgage to insolvent's wife—Application of wife's property to payment of creditors—R. S. O. (1887) ch. 124.

W., being in insolvent circumstances, and pressed by one of his creditors, G., procured his wife to convey her house and lot to G., who, by consent of Mrs. W., applied part of the purchase money in payment of W.'s debt to him, and paid the balance to W., who made a chattel mortgage on his stock-in-trade to his wife for the amount of the purchase money which she should have received.

Held, [reversing the judgment of ROSE, J., at the trial,] that the chattel mortgage was void as against W.'s creditors under R. S. O. (1887) ch. 124, and that it did not come within any of the exceptions in sec. 3.

Per STREET, J. The necessary preference of a particular creditor placed the transaction outside of the class which it was the intention of the Legislature to protect.

MOTION by the plaintiff to set aside the judgment entered for the defendants by Rose, J., at the Hamilton Spring Sittings, 1888, and to enter judgment for the plaintiff.

The facts are stated in the judgment.

May 28, 1888. The case was argued before the Divisional Court.

Gibbons, for the plaintiff.

James Parkes, for the defendant.

June 23, 1888. STREET, J.—The plaintiff is the assignee of the estate of Robert Wilson under 48 Vic. ch. 26, (O.) now chapter 124, R. S. O. (1887) and brings this action against Ellen Wilson, the wife of the assignor, to set aside a chattel mortgage given by him to her on the 26th March, 1887, the assignment to the plaintiff being made in July of the same year.

The defendant, Ellen Wilson, was the owner of a house in Hamilton purchased with money she had received from her father; it was subject to a mortgage for $650. In February, 1887, Robert Wilson was indebted to the firm of

Griffith & Co. in $1,550, for payment of which they were pressing him. The defendant, being urged by her husband to do so, agreed with William Griffith, one of the firm of Griffith and Co., to sell him her house for $2,300, and at the same time agreed with him that the $1,550 due from her husband to the firm of Griffith & Co. should be paid and accounted for out of the purchase money, to that firm, by Wm. Griffith; that he should also pay off the mortgage, and that only the balance of the purchase money, being $100, should be paid in cash. In accordance with this arrangement she made a conveyance to William Griffith of the property on 25th February, 1887, and he registered it the next day, the consideration expressed in it being $2,300. Possession was not given of the house for upwards of a month afterwards, the explanation of this given being that the defendant's children were ill. The credit which Wm. Griffith had promised to give on Messrs. Griffith & Co.'s books for the $1,550 was not given until two or three days before the 26th March, and in the meantime it is said that William Griffith, having come to the conclusion from a stock-taking which had taken place that Wilson's position was stronger than he had supposed, had proposed to withdraw from the agreement he had made to buy the defendant's property. Wilson appears to have been very anxious to hold him to it, however, and, in order to remove his objections to the price of the property, gave him his note at a year for $100, and the matter was finally closed two or three days before the 26th of March, and Messrs. Griffith & Co. then gave to Wilson a receipt for the $1,550 which he owed them, and paid him the $100 in cash, and thus, with the $650 mortgage which Wm. Griffith assumed, made up the purchase money of $2,300 expressed in the conveyance.

On 26th March, Wilson made the chattel mortgage which is attacked, to his wife, to secure $1,650, being the amount of the receipt given by Griffith & Co. for their account and the $100 in cash which Wilson had received. The chattel mortgage, it is said, was given in pursuance of

a promise made by Wilson to his wife at the time she agreed to sell the property to Griffith, in order to induce her to part with the property for his benefit.

I think it is abundantly plain that Wilson was insolvent and unable to pay his debts in full at the time the chattel mortgage was made, and the chattel mortgage cannot stand unless it can be supported under some of the saving provisions in sub-sec. 1 of sec. 3 of chapter 124, R. S. O. (1887.)

Until Griffith & Co. gave credit to Wilson for the $1,550 he received no benefit from the transfer by his wife of her property: the books of that firm were not produced to shew when as a fact the credit was given to Wilson of this amount, and we have only his evidence, which is uncontradicted, and is to the effect that the credit was not given until two or three days before the date of the chattel mortgage, and the learned Judge who tried the case seems to have treated this as a fact which he considered established. Had the transaction been closed and the consideration been received by Wilson at the date of the conveyance to William Griffith on 25th February, I do not think it could be held that the consideration passing from Mrs. Wilson was a present one, so as to bring the chattel mortgage given on the 26th March within the saving of the Act. But treating the consideration as having been received by Wilson on 23rd or 24th March, I think the delay of two or three days would not be fatal, the promise of the chattel mortgage being one of the terms upon which the wife parted with her property, and the performance of this promise having been pressed by the wife from the time her husband received the benefit of the consideration which passed out of her until the chattel mortgage was actually given.

It was argued that although no cash actually passed, the mortgage must be treated as having been given in consideration of "a present actual *bonâ fide* payment in money," in the words of the statute.

It appears, however, to be reasonably clear from the evidence that William Griffith only agreed to purchase the property upon the distinct understanding that he was not to pay for it in cash excepting to the extent of the $100; he purchased only in order to secure payment of his firm's debt against Wilson, and the purchase money was not to reach Mrs. Wilson at all. If the defendant had brought an action for the purchase money, the answer would have been that she had agreed that no money should be paid to her beyond this $100; so that if the persons concerned had met together and passed the $1,550 in cash from one to the other, it would have been doing something which the agreement between William Griffith, Robert Wilson, and the defendant, his wife, had never contemplated. It appears plain that none of them ever intended that William Griffith should pay any money to the defendant, or that the defendant should pay any money to her husband. The Act protects "any *bonâ fide* transfer * * of any goods, &c., which is made in consideration of any present actual *bonâ fide* payment in money, or by way of security for any present actual *bonâ fide* advance of money, or which is made in consideration of any present actual *bonâ fide* sale or delivery of goods or other property."

It is true that this saving clause does not expressly provide that the payment or advance of money, or the sale or delivery of goods must be made to the person making the transfer of goods which the Act protects, but that must be the intention; otherwise preferences would be rendered easier than ever by the intervention of a third person, and the whole effect of the 2nd sec. of the Act would be done away with. Where a debtor receives an advance of money or a supply of goods in such a manner as to leave him untrammelled in his action with regard to them, his assets are naturally increased to that extent for the general benefit of his creditors at large, and nothing is withdrawn from them when he gives back on the spot a security for the advance or for the value of the goods which have been supplied to him. But where the alleged advance, either

never comes to the debtor's hands at all, or comes to them only in such a way that it must at once pass through them into the hands of a favoured creditor, I think the transaction cannot be treated as a *bonâ fide* payment or advance of money to the creditor.

The distinction, therefore, between a transaction such as that between Wm. Griffith and Mr. and Mrs. Wilson, and the transactions which are protected by the saving provisions in the Act, is a substantial and not a mere technical one. Under the transaction now in question there could be only one way in which the value of the property could be applied, and that was in paying off the claim of this particular firm of Griffith & Co.; no other creditor could possibly obtain any benefit from the transfer of Mrs Wilson's property; and it is this necessary preference of a particular creditor which places the transaction outside of the class of transactions which, I conceive, it was the intention of the legislature to protect. If the result of the action of the wife had been to place her husband in possession of a sum of $1,650 in cash, he might, and probably would have given to some other creditors some benefit from it; but the nature of the stipulation made by the purchaser of the property rendered this impossible; and I think the transaction cannot be held to be protected as an advance of money. For the same reasons I do not think it is protected by the other part of the saving provision as a sale or delivery of goods or other property. I think this must be limited to a sale or delivery of goods to the assignor himself, and not to any creditor in such a way as to enable the creditor to retain to himself the whole benefit of the transaction.

I think the motion should be allowed with costs, and that judgment should be entered for the plaintiff, and the chattel mortgage should be declared fraudulent and void as against him, and that the defendant should be ordered to pay the costs.

ARMOUR, C. J.—I entirely agree. It is quite clear that Robert Wilson was in insolvent circumstances when he

made the chattel mortgage which is the subject of this controversy, and that it was null and void against his creditors under R. S. O. (1887,) ch. 124, unless it can be brought within the exceptions in that Act contained, and I am of opinion that it does not come within any of them.

It was not made in consideration of any present actual, *bonâ fide* payment in money, nor by way of security for any actual *bonâ fide* advance of money, nor was it made in consideration of any present actual *bonâ fide* sale or delivery of goods or other property.

It is plain, having regard to the purpose of the Act that the "payment," "advance," "sale," and "delivery" here referred to mean "payment," "advance," "sale," and "delivery" to the maker of the "gift, conveyance, assignment, or transfer, delivery over, or payment" which is impeached as being void by section 2 of the Act, and that the "payment" or "advance" must be in actual cash and not in money's worth.

Any different holding would soon have the effect of rendering futile the purpose of the Legislature in passing the Act.

FALCONBRIDGE, J., having been engaged at the Toronto Assizes, took no part in the judgment.

Judgment for plaintiff.

[QUEEN'S BENCH DIVISION.]

YARWOOD V. HART.

Husband and wife—Breach of promise of marriage—Evidence—Corroboration—R. S. O. (1887) ch. 61, sec. 6.

In an action for breach of promise of marriage the plaintiff swore to the promise, and the defendant denied it, and alleged that the plaintiff had been his mistress, which she denied. Witnesses were called on her behalf who shewed that the parties were of the same social rank; that there was nothing unreasonable or improbable in their becoming engaged to be married; that he formed her acquaintance in 1880, and then commenced and continued for about six years to pay her attention, during which time his visits to her were constant; that he took her out driving frequently; that she received the attentions of no other man during that period, nor did he pay attention to any other woman; that he was received by her family as a lover; that he went to see and sat up with her father during his last illness; and that he made her frequent presents of jewellery, wearing apparel, and money. Letters also were put in by the plaintiff, written by the defendant to her about the time it was alleged he had broken off their engagement, addressing her in loving terms. The jury found that there was a contract, and a breach by the defendant, and that the defendant had failed to prove his defence; and they gave the plaintiff damages.

Held, that the evidence given was material evidence in support of the promise to marry, and that it furnished the corroboration of the plaintiff's testimony required by R. S. O. (1887) ch. 61, sec. 6.

It was contended that the evidence was as consistent with the keeping by the defendant of the plaintiff as his mistress, as it was with an engagement to marry.

Held, that the presumption was in favor of the moral and against the immoral relationship; and the fact that the defendant set up the immoral relationship as a defence did not render the evidence less material in support of the promise.

THE plaintiff sued the defendant upon an agreement to marry within a reasonable time, and a breach thereof by the defendant.

The defendant denied the agreement, and said that if such there was, it was rescinded by mutual consent before breach; and he also said that after the alleged agreement he discovered that the plaintiff had been guilty of gross immorality, of which he was ignorant at the time of such agreement, and of material misrepresentation as to her previous life.

Issue.

The cause was tried before O'Connor, J., and a jury at Picton in the autumn of 1887.

The plaintiff swore to the promise to marry; the defendant denied the promise, and said that during the alleged period of courtship the plaintiff had in fact been his mistress. Certain other evidence, which is summarized in the judgment of Armour, C. J., was given on behalf of the plaintiff.

At the conclusion of the plaintiff's case the trial Judge expressed the opinion that there was no corroboration of the plaintiff's evidence, as required by 45 Vic. ch. 10, sec. 3 (O.), but allowed the case to proceed, and after the defence was closed, in order to avoid any miscarriage, he submitted certain questions to the jury, and reserved his judgment as to corroboration.

The questions submitted to the jury with the answers were as follows:

1. Laying aside the question of corroboration, which I must deal with myself, what do you say upon the evidence, as it is before you; was there or not a contract of marriage between the plaintiff and defendant? A. Yes.

2. If there was a contract of marriage, has there been a breach of it by the defendant? A. Yes.

3. Has the defendant, in your opinion, proved or failed to prove the 3rd paragraph of his statement of defence? A. Failed.

4. Assuming that the plaintiff is entitled to recover in this action, to what amount of damages is she, in your opinion, entitled, under all the circumstances of the case? A. $800.

O'Connor, J., having died before giving judgment, application was made to Galt, C. J., sitting in Court at Toronto, who directed judgment in favour of the plaintiff in accordance with the findings of the jury for the sum of $800 and costs.

May 23, 1888. *Ritchie*, Q.C., for the defendant, obtained an order *nisi* to set aside the findings of the jury and the judgment entered thereon, and to dismiss the action, or for a new trial, on the ground that the plaintiff's evidence in support of the alleged promise was not corroborated by any

other material evidence, and on grounds of non-direction and the improper reception of evidence; and also gave notice of motion to the same effect.

June 1, 1888. *Clute* shewed cause, and *Ritchie*, Q. C., supported his order *nisi* and motion.

June 23, 1888. ARMOUR, C. J.—The plaintiff, by her own evidence, established the promise by the defendant to marry her, and the first question raised is, whether her testimony was corroborated by some other material evidence in support of such promise.

Witnesses were called on her behalf who shewed that the plaintiff and the defendant were of the same social rank, that there was nothing unreasonable or improbable in their becoming engaged to be married; that he formed her acquaintance in the fall of 1880, and commenced to pay her attention at that time, and continued to pay her attention for about six years; that during that time his visits to her were constant; that he took her out driving frequently; that she received the attentions of no other man during that period, nor did he pay attention to any other woman; that he was received by her family as a lover; that he went to see and sat up with her father during his last illness (he died in February, 1886); and that he made her frequent presents of jewellery, wearing apparel, and money. Letters also were put in by the plaintiff, written by the defendant to her, about the time it was alleged he had broken off their engagement, addressing her in loving terms.

Where a promise by words to marry could not be proved, and before the parties were admissible as witnesses in their own behalf, the evidence given by these witnesses was just the kind of evidence that was always relied on as evidence from which a jury might infer a promise to marry.

The change of the law rendering the parties admissible witnesses in their own behalf had not the effect of rendering such evidence less efficient in tending to support the promise to marry, than it was before the change was made.

This evidence was, therefore, material evidence in support of the promise to marry corroborating the plaintiff's testimony, and the learned Judge would have erred had he ruled that in point of law there was no material evidence in support of the promise corroborating the plaintiff's testimony.

It was urged that this evidence was as consistent with the keeping by the defendant of the plaintiff as his mistress, as it was with an engagement to marry, but the *primâ facie* presumption of law would be, until rebutted, against the immoral relationship, and in favour of the moral one.

The defence, indeed, that the defendant set up was that the relationship was the immoral one only, but this had to be determined by the jury, and was by them determined adversely to the defendant.

But the fact of the defendant setting up this defence did not render this evidence the less evidence that must have gone to the jury as material evidence in support of the promise corroborating the plaintiff's testimony; if however, the jury had thought that the relationship was, as the defendant contended, the immoral one only, this evidence would have had but little weight with them in point of fact.

[The learned Chief Justice then proceeded to discuss the other matters in question, which it is not considered necessary to refer to here, and concluded:]

In my opinion, the order *nisi* must be discharged and the motion dismissed with costs.

STREET, J.—I agree in the conclusions at which the Chief Justice has arrived upon this motion.

The undisputed facts established by evidence, apart entirely from that of the plaintiff herself, which are referred to in the charge of the learned Judge at the trial, and are stated in the judgment of the Chief Justice, were in my opinion evidence upon which the jury might have properly found a promise to marry to have been made without regarding the plaintiff's own statement: *Hickey* v. *Cam-*

pion, 20 W.R. 752; *Willcox* v. *Gotfrey*, 26 L. T. N. S. 328; *Blackburn* v. *Mann*, 85 Illinois 222.

At p. 82 of the evidence the defendant is asked:

Q. Do you remember swearing to this; "matrimony may have been mentioned?" A. Yes.

Q. Did you talk of matrimony on more than one occasion? A. I have no recollection of talking matrimony; it is possible that it may have been mentioned in a slight manner.

Q. But you don't remember? A. No.

Q. All of the plaintiff's family knew of your frequent visits? A. Undoubtedly.

Q. But of no improper relations? A. No, I think not.

Q. They thought simply that you were an honorable suitor? A. I can't tell what they thought, or what their suspicions were.

Q. So far as you know? A. So far as I know.

The defendant, in fact, throughout, does not deny the existence of circumstances from which a promise of marriage might legally and properly be inferred, but he seeks to avoid the conclusions to be drawn from them by alleging that improper relations existed between him and the plaintiff. The plaintiff denies that these improper relations existed, and the jury were entitled to believe her story upon this point; if they did, then the circumstances were sufficient corroboration of her evidence of the promise of the defendant to marry her. The Act does not require corroboration to be given of the plaintiff's evidence upon this head, for the effect of this part of her evidence is only to contradict the defendant as to the facts which he sets up for the purpose of rebutting the inference otherwise attaching to certain undisputed facts.

[The remainder of the learned Judge's opinion it is considered unnecessary to report.]

FALCONBRIDGE, J., having been engaged at the Toronto Assizes, took no part in the judgment.

Order nisi discharged, and motion dismissed.

[CHANCERY DIVISION.]

RE HARGIN AND FRITZINGER.

Will—Devise—"Properties"—Real estate covered—Occupation of tenant—Possession of testator.

A testator by his will, provided as follows: "I will and bequeath to * * * C. H., all properties, moneys, and personal effects now in my possession, for her own and sole use, to be disposed of as she may see proper."

Held, that the devise passed real estate.

Held, also, that real estate in the occupation of a tenant at the time of the testator's death, was in the possession of the testator.

THIS was an application under the Vendor and Purchaser Act, R. S. O. (1887) ch. 112, sec. 3, by Catherine Hargin as vendor, against Mary Ann Fritzinger, as purchaser.

The question was, whether the land, agreed to be sold, passed under a devise in the will of the vendor's husband, in these words: "I will and bequeath to my beloved wife Catherine Hargin, all properties, moneys, and personal effects now in my possession, for her own and sole use, to be disposed of as she may see proper." The land at the time of the testator's death, was occupied by a tenant.

The petition came on for argument on June 27th, 1888, before Ferguson, J.

Hoyles, for the vendor. The land passed under the will, as there is no clear intention expressed to confine the property to personal property: *Jarman* on Wills, 8th ed., 721-722. Real estate will pass under terms or words capable of including both real and personal estate: *Jarman*, 728, and cases there collected; *Doe d. Morgan* v. *Morgan*, 6 B. & C. 512; *Doe l. Wall* v. *Langlands*, 14 East 370; *Theobald* on Wills, 3rd ed., 352; *Smyth* v. *Smyth*, 8 Ch. D. at p. 566. As to the words "now in my possession," they mean "of which I am now possessed. They do not import personal occupation; *Dart* on Vendors and Purchasers, 6th ed., 145.

C. J. Holman, for the purchaser. The words "personal property, estate and effects," do not pass real estate: *Theobald* on Wills, 151. The word "effects," with the words, "both real and personal," passes real estate: *Theobald*, 3rd ed., 158, so without these words, it does not pass. Here the testator was distinguishing between moneys and personal effects. "Personal effects" means personal belongings, and not all personal property. When the property is limited by the words, "now in my possession," the meaning is still further restricted. A devise in the words "and all other my *personal* estate, *property*, chattels, * * to which I am now *seised*, possessed," &c., does not pass real estate; *Jones* v. *Robinson*, 3 C. P. D. 344. [FERGUSON, J., but in that case the word "personal," is prefixed and qualifies all.] Yes, but the word "seised," which follows, goes further than a reference to personal property only. The word "personal," was merely explanatory. I refer also to *Belaney* v. *Belaney*, L. R. 2 Eq. 210. [FERGUSON, J., but the word "personal" here, seems to apply to and qualify the word "effects" only.]

FERGUSON, J.—[At the close of the argument]. There is no doubt in my mind that the will passed the real estate. The words are very plain; and if I had entertained any doubt, it would have been removed by the cases referred to on the argument. I must order and direct that the vendor has a good title as far as the will is concerned, and must give judgment in his favor on that point. I also find that the property was in the possession of the testator when occupied by his tenant. The purchaser must pay the costs.

G. A. B.

[CHANCERY DIVISION]

RE THE TRUSTEES OF THE EAST PRESBYTERIAN CHURCH AND McKAY.

Church—Sale by trustees of Church property—Publication of notice—Weekly paper—Daily paper—R. S. O. (1887) ch. 237, sec. 13.

Trustees in selling some Church property under R. S. O. (1887) ch. 237, sec. 13, advertised on the same day of the week for four successive weeks in a daily paper.

Held, not a sufficient compliance with the provision of the statute directing publication in a "weekly paper," to make a proper sale of the lands, and that the purchaser had good ground for refusing to accept the title offered.

THIS was a petition under the Vendor and Purchaser Act R. S. O. (1887), ch. 112 by the Trustees of the East Presbyterian Church for a declaration that they could make a good title in fee simple, and that the purchaser Robert McKay be ordered to complete the purchase thereof.

It appeared that the trustees had sold an old church property under the provisions of R. S. O. (1887), ch. 237, sec. 13, and in advertising it had inserted their advertisement in the Toronto *Evening Mail* newspaper on four consecutive Saturdays, viz., March 24th and 31st, and April 7th and 13th, 1888, which paper was a daily paper; and the question was whether such advertising was a compliance with the provision in said section 13, viz. "publication of notice for four successive weeks in a *weekly* paper, &c."

The petition came on for argument on March 2nd, 1888, before Ferguson, J.

Geo. Bell, for the vendors. All that was intended by the statute was to give reasonable public notice, and that was done, and a good price has been obtained for the property. A daily paper is a better medium to advertise in than a weekly paper, and a daily paper is a weekly paper, although a weekly paper is not a daily paper. [FERGUSON, J.—Is it

admitted by counsel for both parties that there is no power to sell outside of the statute, R. S. O. ch. 237]? Yes.

T. P. Galt, for the purchaser. The provision of the Act should be strictly followed, and publication in a daily paper is not publication in a weekly paper: *In re Jarvis* v. *Cook*, 29 Gr. 303.

June 21, 1888. FERGUSON, J.—On the argument it was agreed and admitted, by both counsel, that the mode of publication of the notice adopted was the most effective one, in this particular instance, for the purpose of giving public notice with the object of bringing intending purchasers or bidders together. This mode was by inserting the notice on the same day in each week, for four successive weeks, in the *Evening Mail* newspaper, a daily paper, and not a weekly one.

It was also agreed that without the authority given by the statute, there existed no power to sell and make title, and each counsel said that he had been unable to find any precedent governing the case. I have not found any authority that I can consider in point, or even affording a fair analogy of any force, and I am to say whether or not this publication is a publication in a weekly paper, so as to satisfy the requirements of the statute and enable the vendors to sell and make title so far as the publication of notice is concerned.

The words of the Act are: "After publication of the notice for four successive weeks in a weekly paper published in or near the place where the lands are situated," and applying this language to the condition and situation of religious institutions throughout the length and breadth of the country, as one understands them, it would seem, at all events it seems to me, that the Legislature employed the words, "weekly paper," advisedly, and with the intention that the meaning should be taken to be just what is said, and so that there should in this respect be a literal compliance with the Act in order to make a proper sale of the lands. This, in the present instance, has not taken place, and I am

of the opinion that the purchaser has good ground for refusing to accept the title that is offered.

The judgment will be for the purchaser, with costs of and incidental to the petition.

Judgment accordingly.

G. A. B.

[CHANCERY DIVISION.]

LOCKING ET AL. V. HALSTED.

Mortgage—Solicitor and client—Sale under power—Recovery of deposit.

Plaintiff was a purchaser under a power of sale in a mortgage for $200 taken by a solicitor for costs, only $30 of which had been incurred at the date of the mortgage. The power was exercised to collect the full amount of the mortgage and interest. Before the purchase was completed the mortgagee's right to sell was raised as a question of title by the plaintiff who had become aware of these facts. Before the objections were removed, the property was sold again under a prior mortgage.

Held, that the mortgage was a valid security for no more than $30; that the plaintiff having become aware of the vexatious user of the power, was justified in refusing to complete the purchase, and was entitled to recover back the deposit paid by him.

THIS was an appeal from the report of a local Master, in a suit brought by Amelia Locking and Alexander Locking against J. A. Halsted, for the recovery of a deposit paid on a purchase made at a sale held under a power of sale in a mortgage.

The evidence shewed that the mortgage had been taken by a solicitor from his client for the sum of $200, to secure the costs in a pending suit, of which only about $30 had been incurred, at the time of the taking of the mortgage:*

*The mortgage had been assigned by the solicitor to the defendant, but he declined to take it, and no reassignment was ever executed, and as it was admitted that if anything was found against the defendant he would be entitled to be indemnified by the solicitor, the Master, as far as this action was concerned, dealt with it in the same manner as if the solicitor was the defendant.—REP.

that a sale was had under the power of sale in the mortgage, and the property was purchased by the plaintiff Alexander Locking, as agent for his co-plaintiff, Amelia Locking, and a deposit of $164 paid down: that the question of the mortgagee's right to sell was raised as a question of title, and some correspondence on the subject passed between the respective solicitors, but nothing further was done in the way of making title by the mortgagee until the property was sold again under the power of sale in a prior mortgage to another mortgagee.

The Master held that as the purchaser had notice that the mortgage was taken to secure costs he was entitled to satisfactory evidence that the costs, or some part thereof, had been earned at the time the security was taken, and that as that had not been given previous to the sale under the prior mortgage, the plaintiff was entitled to recover back the deposit paid.

From this finding the defendant appealed, and the appeal was argued on March 20th before BOYD, C.

Hoyles, for the appeal contended that a good title was made on the sale, and that the evidence shewed that the plaintiff was to take the property subject to the prior mortgage under which the second sale was had, and referred to *Jeffreys* v. *Evans*, 14 M. & W. 210; *Thomas* v. *Cross*, 10 Jur. N. S. 1163; *Fry's* Specific Performance of Contracts, 2nd ed., par. 892; *Galbraith* v. *Irving*, 8 O. R. 751.

Bain, Q. C., and *Field*, supported the Master's finding, and cited *Snyder* v. *Proudfoot*, 15 U. C. R. 532; *Gibb* v. *Davidson*, 12 C. P. 588; *Atkinson* v. *Gallagher*, 23 Gr. 201; *Robertson* v. *Furness*, 43 U. C. R. 143; *Hope* v. *Caldwell*, 21 C. P. 241; *Miller* v. *Pilling*, 9 Q. B. D. 736; *Pegler* v. *White*, 33 Beav. 403.

March 7, 1888. BOYD, C.—No sufficient ground has been disclosed for disturbing the Master's conclusion that the deposit should be repaid. Besides the matters to which

he has adverted, I am very strongly of opinion that the exercise of the power of sale cannot in this case be supported so as to give title to the purchaser. Putting the facts most favourably for the defendant, his mortgage is a valid security for no more than $30 : it purports to be for $200, and he assumes to exercise the power of sale in order to raise this sum with interest.

The defendant is not only bound to exercise that care in selling which attaches to the ordinary mortgagee, but he is also, as solicitor of the mortgagor, (holding security for untaxed costs, the greater part of which were to be incurred when the mortgage was given and as to which it is clearly void) especially bound to act with due regard to the rights and interests of his client. He is supposed to know the inherent vice of his security, which is not known to the client, and he is in every aspect required so to deal with this security as not to prejudice the mortgagor by a harsh and oppressive exercise of the power of sale. Surely it was highly unreasonable to force a sale in order to collect the whole $200 and interest, while only $30 was really and legally due.

But the purchaser became aware of this vexatious user of the power before the sale was completed, and he thus occupies no better position than the solicitor-mortgagee in the eye of this Court.

A foreclosure by default for the full amount could not have been upheld for a moment, as against the application of the mortgagor to pay what was really exigible under the security, nor could a purchaser from the mortgagee under the power stand in a better position, so long as he had notice of the abuse or misuser of this power, as in the present case. Given these circumstances, then the plaintiff was justified in refusing to complete, and no Court would force such a title on an objecting purchaser.

There is no case precisely in point, but the following decisions are valuable as supplying the principles which the Court applies in dealings between solicitor and client, where there appears to be anything savouring of oppression

or undue advantage to the solicitor to the detriment of his client: *McLeod* v. *Jones*, 24 Ch. D. 289; *Eyre* v. *Hughes*, 2 Ch. D. 148; and *Ward* v. *Sharp*, 32 W. R. 584. See also as to the exercise of the power *Jenkins* v. *Jones*, 2 Giff. 99, and *Richmond* v. *Evans*, 8 Gr. 508. Also *Atkinson* v. *Gallagher*, 23 Gr. 201.

Costs of this appeal must be given against the defendant.

G. A. B.

[CHANCERY DIVISION.]

TELFER V. JACOBS ET AL.

Way—Easement—Appurtenant to particular property—Restriction of user—Adjoining land.

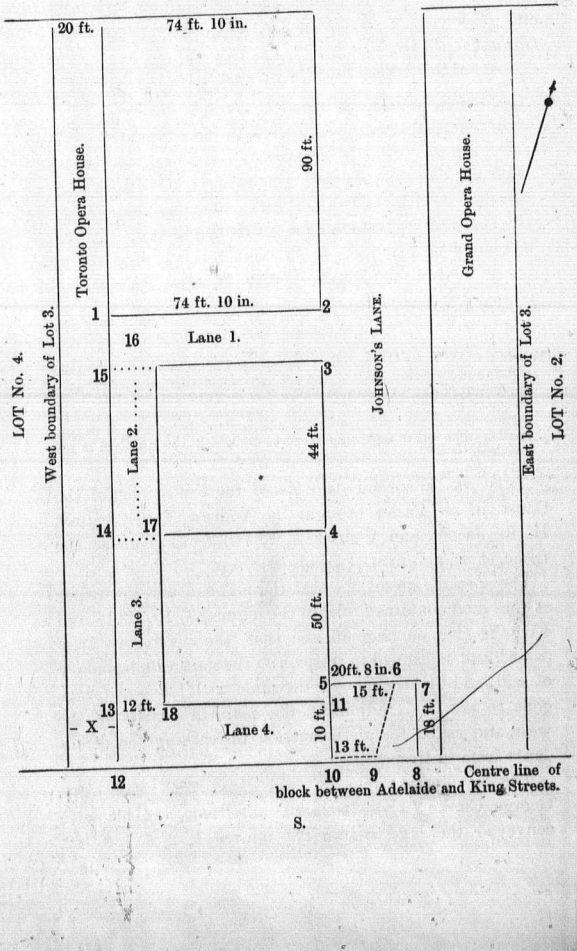
Where a right of way is granted as appurtenant to certain lands, there is a right of unrestricted user of the way in connection with the beneficial enjoyment of the premises to which it is appurtenant by every part-owner of the property, but such part-ownership confers no right to further burden the land over which the way exists by using it in connection with other adjoining property to which the privilege is not annexed.

THIS was a special case stated for the opinion of the Court in an action brought by Andrew Telfer against H. R. Jacobs and Charles A. Shaw, trading under the name, style, and firm of Jacobs & Shaw.

The special case set out that the plaintiff was the owner of the land contained within the figures 4, 10, 12, 14 and 4 on the plan on page 36, and that the defendants trespassed, and continued to trespass on the southerly boundary of said land by passing over the same with teams and waggons to the lands adjoining the plaintiff's lands on the west, and asked for an injunction restraining the defendants from so trespassing.

The facts were: that by deed dated 20th May, 1884, George Clarke (whose title was admitted), and his wife conveyed the land within the figures 1, 2, 5, 7, 8, 12,

N.


Adelaide (formerly Newgate) Street.
20 ft.
74 ft. 10 in.
90 ft.
Toronto Opera House.
Grand Opera House.
74 ft. 10 in.
1
2
16
Lane 1.
LOT No. 4.
West boundary of Lot 3.
Johnson's Lane.
East boundary of Lot 3.
LOT No. 2.
15
3
Lane 2.
44 ft.
14
17
4
Lane 3.
50 ft.
20ft. 8 in.
6
5
15 ft.
7
13
12 ft.
18
11
Lane 4.
10 ft.
18 ft.
13 ft.
X
12
10
9
8
Centre line of block between Adelaide and King Streets.
S.

and 1 on the plan to Thomas Pells in fee: that by deed dated 10th June, 1884, the said Thomas Pells and his wife conveyed the land within the figures 4, 10, 12, 14, and 4 to the plaintiff Andrew Telfer, and James Harold, together with a right of way to the said Telfer and Harold, and the owners or occupiers of the lands so granted on and over lanes 1 and 2, and on and over the small piece of land at the south east corner of said property contained within the figures 5, 6, 9, 10, and 5, but reserving a right of way to the said Thomas Pells and *his heirs*, "being the owners or occupiers of the land, immediately to the north of the land granted," on and over lanes 3 and 4: that by deed dated in June, 1885, reciting the deed of June, 1884, and that by mistake the right of way over lanes 3 and 4 had been limited to Pells and his heirs, and the words "and assigns" were omitted, and to rectify said mistake the said Telfer and Harold granted the right of way over lanes 3 and 4 to Pells and his heirs, *and assigns*, being owners of the lands lying immediately to the north of the lands conveyed by said deed of June, 1884: that by deed dated June 1, 1887, James Harold and his wife conveyed and released all his interest in said lands and rights of ways to the plaintiff Telfer, whereby the plaintiff became the owner thereof: that by deed dated June 16, 1885, the said Pells and his wife conveyed the land within figures 3, 4, 14, 15, and 3, on the plan to W. F. Shaw, together with rights of way on lanes 1, 2, 3, and 4, and out of 4: that the defendants were lessees of the Toronto Opera House property to the west of and adjoining lanes 2 and 3: that by deed dated May 16th, 1887, W. F. Shaw conveyed the west part of lane 2 within figures 14, 15, 16, 17, and 14, to Samuel Perrin and Charles Albert Shaw, subject to rights of way, &c.: that the said Perrin and Shaw were the owners of the Toronto Opera House property: that the defendants were the lessees of the Toronto Opera House and the said west part of lane 2: that Johnson's lane on said plan was a public highway: that the defendants used lanes 3 and 4 for the purpose of bringing in material and articles on waggons and drays to the said

Toronto Opera House at a door marked X on the plan, and in doing so blocked up and impeded traffic in said lanes, and claimed to be entitled so to do.

The case was argued on March 21st, 1888, before Boyd, C.

J. K. Kerr, Q. C., for the plaintiff. The defendants have no right to use the lanes for the benefit of other lands to the west just because they are owners of a small part of the lane. If they had not that part, they had no right, and its mere acquisition does not give them the right. The right of way was an easement, restricted to the property in respect of which it was granted, and that property cannot be burdened for the extra service to the other land. An easement is limited by user or grant in whichever way it originated. It may be limited for certain purposes, or for access to a certain particular property. The burden cannot be increased: *Henning* v. *Burnet*, 8 Ex. at p. 193; *Maughan* v. *Casci*, 5 O. R. 518; *Cannon* v. *Villars*, 8 Ch. D. 415; *Wood* v. *Saunders*, L. R. 10 Ch. D. 582.

James Maclennan, Q.C., for the defendants. The limit of user of a right of way may vary. In prescription it is limited by the user within the time the prescription was acquired and the parties cannot increase it. In grant the language of the grant limits it. In this case the language of the grant is as large and comprehensive as could be used. These are the words used: "Together with the right of way with free ingress, egress, and regress, at all times to (the grantee) his heirs and assigns, his and their tenants and under-tenants being the owner or owners, occupier or occupiers of the lands lying immediately to the north of the lands conveyed by the said deed of * * or any portion thereof, and their families, visitors, friends, servants, or agents with carts, vehicles, carriages, horses or cattle as to him or them shall be necessary or convenient at all times and seasons forever into, along and upon, and over a lane, &c." There is no restriction. All persons who own the land *or any part thereof* have it, and the extent

of the right is not limited. If the defendants own part they have the right, and they own the west part of lane 2. Pells owned the fee simple of lanes 1 and 2, subject to the bare right of way, and the defendants became owners of a part in connection with which the right of way was reserved. There should be no different construction put upon a right of way appurtenant, and a right of way in gross: *Skull* v. *Glenister*, 16 C. B. N. S. 81; *Tudor's* Leading Cases Real Property; *Sury* v. *Pigot*, at 205, 219, and 220. The lanes here are narrow so the deed must be construed that the intention of user was to go all the way round as no vehicles could turn in them and go back. The case of *Cannon* v. *Villars*, supra, depended upon the wording of the grant.

Kerr, Q.C., in reply. The restriction of the easement to Pells, &c., *as owners*, shews the intended limitation. I refer also to *Williams* v. *James*, L. R. 2 C. P. 577; *Gale* on Easements, 5th ed. 88; *Clifford* v. *Hoare*, L. R. 9 C. P. 362.

April 9, 1888. BOYD, C.—I think that the proper construction of the reservation of the right of way in the conveyances of the 10th June, 1884, and of June, 1885, (which are to be read together) was to connect the use of the lanes with the beneficial enjoyment of the premises mentioned in those conveyances; and that it was not intended to embrace a general right of user for all purposes; *Ackroyd* v. *Smith*, 10 C. B. 187. There is the right of unrestricted user so far as the particular property is concerned, which would be enjoyed by every part owner of that property how small soever his parcel might be; *Watson* v. *Bioren*, 1 Serg. & R. (Pa.) 227. But it does not follow that the user can be extended for the more commodious enjoyment of adjoining land belonging to one of the part owners of this particular property. See case of A PRIVATE ROAD *from Lazaretto Road to the River Delaware Road*, 1 *Ashmead*, (Pa.) 417; *Bailey* v. *Stephens*, 12 C.B.N.S. 91.

Skull v. *Glenister*, 16 C. B. N. S. 81, though much criticised, is to be taken as good law for this proposition, that if there is a private right of way to one

close it must not be used colourably with the real intention of going to a different, though adjoining close. This reading of the C. B. case is given in *Finch* v. *Great Western R. W. Co.*, 5 Ex. D. 254, at p. 264.

In this case the right of way granted by the conveyance of 10th June, 1884, and the subsequent deed of rectification, was appurtenant to the lands described in the special case, other than the Toronto Opera House premises, and the rule appears to be well established that the user of a right of way for the accommodation of other parcels than the specific one to which it is appurtenant, is in excess of the right: *Goddard's* Law of Easements, 3rd ed. p. 362, and *Washburn's* Easements and Servitudes, 4th ed. 101.

The defendants' ownership and occupancy of part of the land to which the easement is appurtenant, gives them the right of way for any purposes connected with the enjoyment with that part of the property, but it confers no right upon them to burden the lanes over which the right of way exists by using them in connection with the adjoining property (the Toronto Opera House block) to which this privilege is not annexed: *Wood* v. *Saunders*, L. R. 10 Ch. 582.

I therefore answer the case in the plaintiff's favour, and judgment will be entered for him, with costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

REGINA V. BROWN.

Canada Temperance Act—Disqualifying interest of magistrate—Rejection of evidence to shew interest—Award of costs—Inspector's fee—Interpreter's fee—Evidence of prior conviction—Jurisdiction of magistrate—Certiorari.

Upon a motion to quash a conviction by a police magistrate for a second offence against the Canada Temperance Act:—

1. It was contended that the magistrate had a disqualifying interest in the prosecution, because he had employed and paid agents to secure convictions under the Act, and because he was a strong temperance advocate, with an alleged bias in favor of the prosecution in cases under the Act. It was not shewn that the magistrate was interested or engaged in promoting or directing the prosecution of this offence, or defraying the expenses of it, or paying agents for evidence to be given upon it.

Held, that it was not to be inferred from anything alleged to have been done by the magistrate in other prosecutions, that the same was done by him in this; and that the statements were of too loose and vague a character to support a finding that the magistrate was disqualified from sitting.

2. At the hearing the defendant attempted to shew by witnesses that the magistrate had a disqualifying interest in the case, but the magistrate refused to admit such evidence.

Held, that the evidence was inadmissible, and even if admissible, the rejection of it would not afford ground for quashing the conviction.

Regina v. *Sproule*, 14 O. R. 375, not followed.

3. It was also contended that the magistrate exceeded his jurisdiction by ordering the defendant to pay $3 as inspector's fee, $2 for an interpreter, and $1 justice's costs.

Held, that the fees to be paid to witnesses in prosecutions such as this are not established by any law, and such are to be allowed, under sec. 58 of the Summary Convictions Act, as to the justice seems reasonable; and an interpreter may properly be treated as a witness.

In any case, however, the award of costs was within the jurisdiction of the magistrate, and *certiorari* would not therefore lie (being taken away by the statute under which the conviction was made) on the ground of want of jurisdiction; and the erroneous allowance of certain items of costs would not warrant the quashing of the conviction.

4. The information specifically charged that the defendant had been previously convicted under the Act, and the affidavit filed by the defendant did not deny the fact, but only the evidence of it.

Held, that the question whether the defendant had been previously convicted or not was a matter within the jurisdiction of the magistrate, and his finding as to it was conclusive.

Held, also, that the provisions of sec. 115 of the Canada Temperance Act are directory only.

THE defendant was on the 29th November, 1887, at the town of Barrie, in the county of Simcoe, convicted of a second offence against the Canada Temperance Act, 1878, before John T. Partridge, police magistrate in and for the county of Simcoe, and town of Barrie, for that he, the defendant, on or about the 24th October, 1887, at the town

of Barrie, being a place wherein the second part of the Canada Temperance Act, 1878, and amendments, then was in force, unlawfully did sell intoxicating liquor, &c. * * J. W. Morrow, inspector, being the informant; and it appearing to the said police magistrate that the defendant was previously duly convicted of having unlawfully * * sold intoxicating liquor * * the police magistrate adjudged the offence of the said defendant firstly mentioned to be his second offence against the Canada Temperance Act, 1878, and amendments; and he adjudged the said defendant for his said second offence to forfeit and pay the sum of $100, to be paid and applied according to law, and also to pay to the said J. W. Morrow the sum of $14.93 for his costs in that behalf; and if such sums should not be paid forthwith distress was to follow, and in default of sufficient distress, imprisonment.

December 6, 1887, an order was made by Galt, C. J., in Chambers for a *certiorari* to bring up this conviction; and a return to the *certiorari* having been made and filed, February 16, 1888, *Hewson* obtained an order *nisi* to quash the conviction upon the following grounds:

1. That the police magistrate was disqualified from sitting to hear and adjudicate upon the case, as he was interested and engaged in promoting and directing the prosecution for offences against the Canada Temperance Act, and defraying the expenses of such prosecutions, and paying agents for evidence to be given upon prosecutions for offences against the Act on which he should sit and adjudicate.

2. That the police magistrate had no jurisdiction, and exceeded his jurisdiction in ordering the defendant to pay to J. W. Morrow the sum of $3 as inspector's fees, and for attending adjournments, and also the sum of $2 paid interpreter, two days, and also the sum of $1 as justice's costs.

3. That the said conviction was bad in that the defendant was condemned to be imprisoned for the non-payment of the several sums thus illegally ordered to be paid; and upon further grounds disclosed upon the affidavits and the

papers returned with the writ of *certiorari* and filed; and upon the further ground that there was no evidence of a prior offence committed by the defendant, and that he should not have been convicted of a second offence.

On the motion for a *certiorari* the affidavit of one Rathborne was filed, shewing that he was employed by the convicting magistrate for the purpose of visiting hotels in the county of Simcoe, purchasing liquor where he could obtain it, and then lodging informations against the persons from whom he obtained it, and afterwards as a witness proving cases against such persons; that he entered upon such employment and was paid by the magistrate for his work; that others were employed by the magistrate to do the same kind of work; that the magistrate was a pronounced temperance man, and the deponent had frequently heard him say that "before Christmas he would have all the hotelkeepers in Simcoe in gaol"; that the deponent had consulted with the magistrate as to and talked over with him the evidence he could give in cases to come on for trial before him; that he believed the magistrate was so biassed in his opinions in cases under the Act as to be unable to give an impartial judgment; that a commission had been issued by the Ontario Government to investigate the conduct of the magistrate in relation to the matters deposed to.

An affidavit was also filed of one McDonald, who swore that one Blain, a deaf and dumb man, had given him to understand that he, Blain, had received $5 for giving his testimony in Scott Act cases.

Mr. Creswicke, who acted as counsel for the defendant before the magistrate, also made an affidavit, in which he stated that the only witness against the defendant was the deaf mute, Blain, who gave his evidence through an interpreter; that in cross-examining this witness he asked him certain questions for the purpose of ascertaining if he had been paid or promised anything directly or indirectly by the magistrate for his evidence, but the magistrate refused to allow the witness to answer such questions, or to allow

the inspector or prosecutor to be sworn for the purpose of asking him similar questions; that an investigation had been held upon the charges against the magistrate by a commissioner appointed by the Ontario Government: that there was no inquiry as to a prior offence or proof of any kind that a prior offence had been committed; and that the inspector, the prosecutor, resided at Barrie, where the case was heard and disposed of.

A second affidavit of Mr. Creswicke, filed on obtaining the order *nisi*, shewed that the magistrate had since the hearing of this case been removed from office, and exhibited a published report of the findings of the commissioner who investigated the charges against him.

The return to the *certiorari* included the information, depositions, proceedings, and conviction; the information shewing that the defendant was previously convicted as alleged in the conviction; a bill of the items of the costs charged and ordered to be paid was also returned.

May 28, 1888. *Aylesworth* and *Hewson* supported the order *nisi*, and referred to *Regina* v. *Sproule*, 14 O. R. 375; *Re Holland*, 37 U. C. R. 214; *Regina* v. *Washington*, 46 U. C. R. 221; *Regina* v. *Tooke*, 32 W. R. 753; *Regina* v. *Edgar*, 15 O. R. 142; *Regina* v. *Clark*, 15 O. R. 49.

Delamere shewed cause, and cited *Regina* v. *Alcock*, 37 L. T. 829; *Regina* v. *Handsley*, 8 Q. B. D. 383; *Regina* v. *Klemp*, 10 O. R. 143; *Regina* v. *Langford*, 15 O. R. 52.

June 23, 1888. ARMOUR, C. J.—The affidavits filed do not shew that the police magistrate was interested or engaged in promoting or directing the prosecution of this offence, or defraying the expenses of it, or paying agents for evidence to be given upon this prosecution; and we cannot infer from anything alleged to have been done by him in other prosecutions that the same was done by him in this.

The statements made by Rathborne in his affidavit that the police magistrate was a pronounced temperance man, and that he had frequently heard him say that before

Christmas he would have all the hotel-keepers in Barrie in gaol, and that he was so strongly biassed in his opinions in cases of this nature as to be unable to give an impartial judgment, are of too loose and vague a character to warrant us in holding that they afford ground for our determining that the police magistrate was disqualified from sitting in this case.

Besides, Rathborne, according to his own shewing, was at one time employed by the police magistrate as a detective and informer, and at the time of making this affidavit had preferred charges to the Government against the police magistrate, and according to the findings of the commissioner appointed by the Government put in by the defendant, his evidence was rejected by the commissioner except where it was corroborated by some other credible witness, and one is not disposed, therefore, to place much reliance upon his statements.

The law upon this point is to be found in the judgment of Wilson, C. J., in *Regina* v. *Klemp*, 10 O. R. 143, in which all the cases up to that time are reviewed by the learned Chief Justice in dealing with facts somewhat similar to those presented in this case.

I here refer to *Regina* v. *Farrant*, 20 Q. B. D. 58; *S. C.*, 4 Times Law Reports 43 and 87; and *Regina* v. *The Justices of Cumberland*, 4 Times Law Reports 294, as cases which have occurred since the judgment in that case.

The rejection of evidence by the police magistrate was argued before us as a ground for quashing the conviction, although this was not a ground specially taken in the order *nisi*; but I am of the opinion that the rejection of such evidence as was rejected, even if admissible, would not afford ground for quashing the conviction. See *Rex* v. *Justices of Cambridgeshire*, 1 D. & R. 325; *Rex* v. *Justices of Carnarvon*, 4 B. & Ald. 86; and *Regina* v. *Dunning*, 14 O. R. 52.

But I am of opinion that the evidence rejected was wholly inadmissible for the purpose for which it was offered.

It was offered avowedly for the purpose of attempting to shew that the police magistrate had a disqualifying interest in this prosecution.

No such issue was raised, nor could be raised in this prosecution, and therefore the evidence offered was wholly irrelevant.

No doubt a prohibition will lie to prevent a magistrate having a disqualifying interest in a prosecution from taking part in it, and if he does take part in it, the conviction or dismissal made therein will be quashed, but the question whether he has such disqualifying interest cannot be raised or tried upon the trial of the prosecution itself.

Recusation, which was a personal challenge of the Judge for cause, was known to the canon and civil law, but not to the common law, and it would certainly be a novelty in our law if, when a person was placed on trial to ascertain whether he was guilty or not guilty of the offence with which he was charged, that he should be at liberty to try whether the Judge was guilty or not guilty of having a disqualifying interest in his prosecution, and the question naturally arises who would be the Judge to determine it?

True it is that by our law a person so charged "shall be admitted to make his full answer and defence thereto," but this does not permit his making a counter-charge against the Judge that he has a disqualifying interest in his prosecution. *Regina* v. *Sproule*, 14 O. R. 375, is opposed to this my view, but there being no appeal from our decision, we must give our independent judgment upon the matter.

Next, as to the 2nd and 3rd grounds taken in the order *nisi*: "Till the statute 18 Geo. III. ch. 19 was passed, there was no general power enabling the convicting magistrate to award costs to either party, though such a provision had occasionally been inserted in different Acts:" *Paley*, 6th ed., 298. By that Act it was provided that it should and might be lawful to and for any justice or justices of the peace who should have heard and determined the matter of any complaint, to award such costs to be paid by either of the parties, and in manner and form as to him and them should seem fit, to the party injured.

The authority for awarding costs in cases under the Summary Convictions Act, which is made applicable to the Canada Temperance Act, is by sections 58 and 59 of the first mentioned Act; section 58 providing that, "In every case of a summary conviction, or of an order made by a justice, such justice may, in his discretion, award and order in and by the conviction or order, that the defendant shall pay to the prosecutor or complainant such costs as to the said justice seems reasonable in that behalf, and not inconsistent with the fees established by law to be taken on proceedings had by and before justices."

The fees to be taken by justices of the peace are established by R. S. O. 1887, ch. 78, which provides a penalty for wilfully receiving a larger amount of fees than by law are authorized to be received, and the fees to be paid to witnesses in cases of assault, trespass, or misdemeanour, are also established by section 4 of that Act, but the fees to be paid to witnesses in prosecutions such as this are not established by any law, and such therefore are to be allowed as to the said justice seem reasonable, and an interpreter may properly be treated as a witness.

R. S. O. (1887,) ch. 194, sec. 117, does not seem to apply, as the inspector lived within three miles of the Court, and the allowance to him could only be justified under the general power of the justice to award to the prosecutor such costs as to the justice seem reasonable in that behalf.

I am of opinion, however, that the award of costs was within the jurisdictiction of the police magistrate, and that *certiorari* would not therefore lie (*certiorari* being taken away by statute in this case), on the ground of want of jurisdiction in the police magistrate, and that the erroneous allowance of certain items of costs, he having general jurisdiction over the costs, would not warrant the quashing of the conviction.

If I had come to a different conclusion, I would have had to consider whether it would not have been our duty to disallow such items of costs, if any, as were not properly allowable, and to amend the conviction under sections 117

and 118 of the Canada Temperance Act: *Regina* v. *Brady*, 12 O. R. 358.

The only other ground taken in the order *nisi* was that there was no evidence given that the defendant had been previously convicted. The information charged it specifically, and as specifically as it is alleged in the conviction, and the affidavit filed alleging that no evidence was given of it does not deny the fact, but only the evidence of it. The question whether the defendant had been previously convicted or not was a matter within the jurisdiction of the police magistrate, and his finding as to it is, in my opinion, conclusive: *Brittain* v. *Kinnaird*, 1 B. & B. 432: *Regina* v. *Wallace*, 4 O. R. 127.

I may add that the provisions of the Canada Temperance Act, sec. 115, seem to me to be directory only: there is no such reason for the procedure thereby directed, as is pointed out in *Regina* v. *Triganzie*, 15 O. R. 294, to exist in case of an indictment; for the justice knows from the beginning, it being stated in the information, that the defendant was previously convicted; and no provision is made for the case of the trial proceeding in the absence of the defendant.

In my opinion, the order *nisi* must be discharged, but, as there were decisions which warranted the motion, without costs.

STREET, J., concurred.

FALCONBRIDGE, J., having been engaged at the Toronto Assizes, took no part in the judgment.

Order nisi discharged.

[QUEEN'S BENCH DIVISION.]

BRADY ET AL. V. SADLER ET AL.

Crown patent—Construction of—Reservation of drowned lands—Use of bracket boards on mill-dam—Prescription—Evidence.

A crown patent, issued in 1852, conveyed to the plaintiff M. B. a tract of land "containing by admeasurement sixty acres, be the same more or less," and otherwise known as lot 9 in the 4th concession of the township of Ops, "exclusive of the lands covered by the waters of the S. river, which are hereby reserved, together with free access to the shore thereof for all vessels, boats, and persons." The lot actually contained 200 acres, but the dry part was only 60 acres. At and before the issue of the patent, there was a certain mill-dam on the S. river, which raised the waters of the river and flooded a portion of lot 9: the plaintiffs did not object to the flooding of lot 9 by the dam, but brought this action to restrain the defendants from still further flooding the lot to the extent of about four acres, by the use of bracket boards upon the dam, which raised the water about a foot.

The two Judges composing the Divisional Court agreed in reversing the judgment of PROUDFOOT, J., 13 O. R. 692, and in holding that the defendants had no prescriptive right to overflow the plaintiffs' lands by means of the bracket boards, but disagreed as to the construction of the patent; as to which it was

Held, per ARMOUR, C. J., that the words in the grant, "containing by admeasurement sixty acres, be the same more or less," did not control or affect the description of the land granted, that description being plain and unambiguous; that the words "exclusive of the lands covered by the waters of the S. river, which are hereby reserved," meant the waters of the river S. in its natural channel, the waters between its shores in its natural condition; and therefore that B. took under the patent, not only the dry part of lot 9, but also the drowned land excluding the channel of the river; and the plaintiffs had established their title to the land upon which the water was penned back by the use of bracket boards upon the dam.

Per STREET, J.—The language of the description in the patent admits of two different constructions, and that should prevail which would make the quantity of land conveyed agree with the quantity mentioned in the patent; and therefore the patent should be construed as if it excluded all the drowned land both within and without the actual channel of the river; the extent of the drowned land being measured by reference to the height of the water as maintained by the dam without the bracket boards.

Remarks upon the admission of extrinsic evidence to aid in the construction of a Crown patent.

AN appeal by the plaintiffs from the judgment of Proudfoot, J., 13 O. R. 692, where and in the present judgments the facts are fully stated.

February 7 and 8, 1888, the appeal was argued by *Moss*, Q.C., and *Hugh O'Leary*, for the plaintiffs.

S. H. Blake, Q. C., and *T. Stewart*, for the defendants.

May 23, 1888. ARMOUR, C. J.—The first question to be determined is what is the proper construction to be placed upon the grant from the Crown to the plaintiff Michael Bra dy on the tenth day of January, 1852, granting to him in fee, "All that parcel or tract of land, situate, lying, and being in the township of Ops, in the county of Victoria, in our said Province, containing by admeasurement sixty acres be the same more or less; which said parcel or tract of land may be otherwise known as follows, that is to say, being composed of lot number nine in the fourth concession of the aforesaid township of Ops, exclusive of the lands covered by the waters of the Scugog river, which are hereby reserved, together with free access to the shore thereof for all vessels, boats, and persons"?

The same rules as to the admission of extrinsic evidence and as to the construction of a written instrument apply equally to a grant from the Crown as to a grant from a subject: *Lord* v. *Commissioners of Sydney*, 12 Moo. P. C. C. 473; and Mr. Taylor says: "It may be laid down as a broad and distinct rule of law, that extrinsic evidence of every material fact, which will enable the Court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words, to identify the persons and things to which the instrument refers, must of necessity be received:" *Taylor* on Evidence, 8th ed., sec. 1194.

Extrinsic evidence was admissible in this case, no doubt, to show the circumstances under which this grant was made, to identify the subject matter of it, to show the boundaries of the land granted and the position upon it of the Scugog river; but this evidence being given, it is the duty of the Court to construe the grant according to its language and according to the plain primary meaning of the words used, according to the meaning of the words written in the grant, not of what was intended or may be surmised to have been intended to have been written: *Taylor* on Evidence, 8th ed., secs. 1201 and 1202, and the opinions of Tindal, C. J., and Parke, B., in *Shore* v. *Wilson*, 9 Cl. & F. at p. 556, *et seq.*

There was no dispute as to the boundaries of the lot named in the grant, nor as to the position upon it of the Scugog river; but it was contended that the language of the grant must be controlled by the extrinsic evidence which is hereinafter set forth.

The plaintiff Michael Brady petitioned to be allowed to become the purchaser of the lot named in the grant and procured Mr. Dennehy to make a survey of the lot, which he did upon the 22nd day of June, 1846, and to give the following certificate: "I hereby certify that I have surveyed lot No. 9 in the fourth concession, township of Ops, for Michael Brady, occupant. This lot is broken by the river Scugog on the west, and East Cross creek and marsh on the south. All the dry land, including some of the marshy or low land, which could be brought into a state of usefulness, is 60 acres and 21 perches, which I have valued at 10 shillings per acre: the remaining 139 acres, 3 roods, 21 perches, including drowned land, marsh, and water, is of little or no use whatever, and might be included in the patent at the nominal value, say, of £5 which is about 8½ pence per acre, and which the said Michael Brady is willing to pay. I beg leave to state that all patents that may be issued for lands along the Scugog river and East and West Cross creeks, as they are called, should have a reference to the dam at Lindsay, in order to stay any claims for future compensation that might arise. Michael Brady has made a clearance on this of over 35 acres, with usual log buildings." Appended to this certificate was a diagram shewing the quantity of dry land in lot No. 9 in the fourth concession of Ops, with bearings and distances.

On the 28th day of May, 1847, the Crown Lands agent at Peterborough wrote to the Commissioner of Crown Lands as follows: "I have the honour to submit herewith a memorial from Michael Brady to His Excellency the Governor-General in Council, praying to be allowed to purchase lot 9 in fourth concession of Ops, on which he and his father went without leave in 1832. His assertion is supported by the affidavit on oath of two residents of the township, and

further by the diagram and actual survey of D. P. S. Dennehy, with certificate attached, shewing that there is only 60 acres of reclaimable land on the entire lot of 200 acres, which he values at 10 shillings per acre * * * I may also mention that Michael Brady has made a deposit in this office of £30 of scrip, subject to an order in council appearing in his favor and approval of his application or receiving back his deposit."

On the 17th of August, 1847, the Assistant Commissioner of Crown Lands recommended that the petitioner be allowed to purchase, at 10 shillings per acre, the north-easterly sixty acres of the lot in question, but neither marshy land or land covered with water can be included in the patent, unless by actual purchase.

On the 24th August, 1847, a report of the committee of the Executive Council was made, and approved by the Governor-General in Council on the 25th August, 1847, as follows:

"On the petition of Michael Brady, of the township of Ops, yeoman, to be allowed to purchase lot number nine in the fourth concession of the said township of Ops, on which he resides, and of which he has thirty-five acres cleared, the Assistant Commissioner reports that Mr. Dennehy, Deputy Provincial Surveyor, has accompanied his certificate by a sketch to show that in consequence of the position of Scugog river and East Cross creek, there are but about sixty acres of dry land, which he values at 10 shillings per acre, and he suggests that the whole lot be granted to petitioner on payment of the sum of £30 for those sixty acres. The committee recommend that petitioner be allowed to purchase at 10 shillings per acre the north-easterly sixty acres of the lot in question; but that neither the marshy land nor the land covered with water can be included in the patent, unless under an actual purchase of the same."

On the 5th day of May, 1851, the Crown Lands agent at Peterborough wrote to the Commissioner of Crown Lands as follows: "I have the honor to transmit herewith a dia-

gram of lot number nine in the fourth concession of the township of Ops, with Mr. Dennehy's certificate of the value of 140 acres of it. The remaining sixty acres were purchased some time ago by Mr. Michael Brady, who is desirous of obtaining a deed for the full lot, provided Mr. D.'s valuation will be accepted for the drowned land. You will oblige by informing me the result of this application in order that Mr. B. may pay in the amount and thereby prevent the necessity of the issuing of two deeds." The certificate and diagram in this letter referred to were the same certificate and diagram enclosed in the letter of the 28th May, 1847, from the Crown Lands agent at Peterborough to the Commissioner of Crown Lands.

On the 13th day of May, 1851, the Commissioner of Crown Lands wrote to the Crown Lands agent at Peterborough, as follows: "I have to acknowledge the receipt of your letter of the 5th inst. and in reply to inform you that the department will have no objection, upon the payment of £5 in addition, to grant a patent to Michael Brady for the whole lot, reserving all the land covered by waters, as they at present exist, formed by the mill-dam on the river Scugog."

On the 24th October, 1847, Michael Brady paid the £30, and on the 31st August, 1851, the additional £5.

I cannot see upon what principle the plain language of this grant from the Crown can be controlled by this extrinsic evidence.

It is common knowledge that grants of township lots, such as the one in question, are generally made according to the plan of the original survey of the township; and there is nothing to shew that this grant was made according to any other plan; and in the absence of evidence to the contrary, it must be taken to have been made according to the plan of the original survey of the township; and there is certainly nothing to warrant an inference that it was made according to Mr. Dennehy's diagram. The diagram made and certificate given by Mr. Dennehy were made and given solely for the purpose of enabling the Crown

Lands department to settle the price which Brady was to be required to pay for the land, and were not made and given for the purpose of describing the land for patent. Mr. Dennehy suggested in his certificate that all patents that might be issued for lands along the Scugog river and the East and West Cross creeks should have reference to the dam at Lindsay, and the Commissioner of Crown Lands had this suggestion before him, probably, when he wrote the letter to the Crown Lands agent at Peterborough on the 13th May, 1851, that the department would have no objection, upon the payment of £5 in addition, to grant a patent to Michael Brady for the whole lot, reserving all the land covered by the waters, as they at present exist, formed by the mill-dam on the river Scugog.

No reference whatever is made in this grant to the mill-dam on the river Scugog, or the waters formed by the mill-dam on the river Scugog, and this requirement of the commissioner was not carried out, for what reason cannot now be told; he, however, seems from his letter to have been conscious of the distinction between the waters of the river Scugog and the waters formed by the mill-dam on the river Scugog.

It must be further observed that when Dennehy made his survey and gave his certificate and diagram, there were no bracket boards on the mill-dam at Lindsay, nor were there any on it until after the 5th June, 1847, so that his suggestion had no reference to the "dam at Lindsay," with bracket boards on it; nor can the letter of the Commissioner of the 13th May, 1851, be fairly read as referring to "the mill-dam on the river Scugog" with bracket boards on it, least of all with bracket boards only allowed to be put upon it on the terms contained in the letter of the 5th of June, 1847, from T. A. Begley to Hiram Bigelow.

I have been unable to find any evidence to warrant the finding that bracket boards were being used upon the dam at Lindsay on the 13th May, 1851; on the contrary the whole of the evidence tends to show that bracket boards

were never used upon the dam until after that time of the year.

Nor do I find any evidence to warrant the conclusion that any bracket boards were being used upon the dam at the date of the grant.

If the language of the grant could be held to be controlled by the letter of the Commissioner of Crown Lands of the 13th May, 1851, it could not, in my opinion, be controlled to any greater extent than by the express words of that letter; and the word "mill-dam" in that letter could not be extended to include bracket boards occasionally used thereon, upon the terms contained in the letter of the 5th June, 1847.

If the construction which has been placed upon this grant be the correct one, it is difficult to understand what the Crown was granting to Michael Brady for the £5 which he paid to it.

It seems very clear from the evidence that the Crown was selling and granting to him for the £5 "the marshy land and the land covered with water," referred to in the order in council of the 25th August, 1847, which the Crown at that time refused to include in the patent "unless under an actual purchase of the same."

A river is defined to be "a running stream, pent in on either side with walls and banks; and beareth that name as well where the waters flow and reflow (with the tide), as where the waters have their current one way": *Callis*, 77.

The Scugog is a well defined and well known river, and has received legislative recognition as such in Cons. Stats. of Can. ch. 28, schedule A., and in Cons. Stats. U. C. ch. 47, sec. 1. See *McHardy* v. *Ellice*, 37 U.C.R. 580; 1 A.R. 628.

Every river consists of (1) the bed, (2) the water, (3) the banks or shores, and it also has a current: *Gould's* Law of Waters, sec. 41; *Angell's* Law of Watercourses, sec. 4, note 4.

The words used in the grant "containing by admeasurement sixty acres, be the same more or less," do not control

or affect the description of the land granted, that description being, in my opinion, plain and unambiguous.

The words used in the grant, "exclusive of the lands covered by the waters of the Scugog river, which are hereby reserved," in my opinion, clearly mean the waters of the river Scugog flowing in its natural channel, the waters between its shores in its natural condition, and, in my opinion, the words immediately following these words "together with free access to the shore thereof for all vessels, boats, and persons," shew this to be their undoubted meaning. See *Kirchhoffer* v. *Stanbury*, 25 Gr. 413.

It would be doing violence to the plain language of this grant to hold that "waters of the Scugog river" meant "waters *from* the Scugog river," and to hold that "waters from the East Cross creek" were "waters from the Scugog river" and so were "waters *of* the Scugog river." See *Smith* v. *Barnham*, 34 L. T. 774.

The plaintiffs, in my opinion, established their title to the land upon which the water was penned back by the use of bracket boards upon the dam at Lindsay, and shewed not only damage in law, but damage in fact from the water being so penned back.

The question remains to be determined whether the defendants have established any defence to the action.

The right of the defendants to use the water from the dam at Lindsay was derived by them under William Purdy, Hazard Wilcox Purdy, and Jesse Thomas Purdy, who acquired the same under an indenture made the 8th day of December, 1843, by and between the said Purdys and "the Board of Works," established by 4 & 5 Vic. ch. 38, by which indenture it was provided that it should and might be lawful for the Purdys, their heirs and assigns, and for the tenants of the mills therein mentioned from time to time and at all times thereafter to draw off, make use of, and apply to their own purposes so much of the water of the river Scugog accumulated by the dam therein mentioned as should not be required for the purposes of the navigation.

On the 5th June, 1847, one Hiram Bigelow, having acquired the said mills from the Purdys, obtained from the department of the Commissioners of Public Works, appointed under 9 Vic. ch. 37, the following letter: "In reply to your request to be permitted to raise the water in Lake Scugog one foot higher than last year during the season of low water, I am directed by the Commissioners to state that you may do so, provided it will not subject the department to claims for damages from individuals owning property in the vicinity of the lake, and that you do the work at your own expense. Should the department from any cause find it necessary to lower the water to its former level, you will be required to remove any planking or timber work which you may have put on, without remuneration for either labour or materials.

Under this authority bracket boards were put upon the dam during the season of low water and were from time to time kept upon the dam till 1880, when they were removed under the authority of the Ontario Government, and were not replaced until the 2nd June, 1885, when they were replaced under the authority of the following letter from the department of Public Works to the defendants: "Having reference to your petition, dated 23rd January last, transmitted to this department by J. K. Dundas, M. P., praying that the brackets removed from the dam at Lindsay be replaced, I am directed to inform you that the original brackets were not placed on the dam by this department, but by one Hiram Bigelow, by permission of the department. I am to state that the Hon. the Minister of Public Works is willing to allow you to replace these brackets on the same terms as were granted to Mr. Bigelow, which terms are stated in the annexed copy of a letter dated 5th June, 1847, from the secretary of the department to Mr. Bigelow."

The letter of 5th June, 1847, did not authorize, nor did it affect to authorize, the raising of the water so as to injure the property of individuals, and, so far as the raising of the water had that effect, it was unauthorized; and

the department of Public Works did not then claim, nor does it now claim, the right to raise the water by means of bracket boards, or otherwise, to the injury of individuals owning property in the vicinity.

I do not see how the defendants can claim a right in respect of this dam which the Crown, the owner of the dam, does not claim, namely, the right to raise the water by means of bracket boards to the injury of individuals owning property in the vicinity.

The Crown could not be answerable for the injury so caused; for the Crown never authorized the causing of it.

The right of the defendants and of those under whom they claim to make use of the water of the dam was an incorporeal hereditament, in respect of which they could acquire no right to pen back the water upon plaintiffs' land.

Even if the easement claimed could be gained by reason of the ownership of this incorporeal hereditament, I do not think it was gained; for the enjoyment of it could not be said to be as of right and without interruption, and the enjoyment could not be said to be other than contentious: *Eaton* v. *Swansea Waterworks Co.*, 17 Q. B. 267.

The interruption of the enjoyment acquiesced in by the defendants from the year 1880 to the year 1885 puts an end to the prescriptive right claimed by the defendants; for the period of enjoyment required by the Prescription Act must be the period next before some suit or action wherein the claim shall be brought into question: *Parker* v. *Mitchell*, 11 A. & E. 788; *Lowe* v. *Carpenter*, 6 Ex. 825; *Hollins* v. *Verney*, 13 Q. B. D. 304.

It may be said that the Crown was the owner of the lot granted at the time the letter of the 5th June, 1847, was written, and the writer of that letter was the Crown, and the Crown thus gave permission to pen back the water upon its own land; but the grant from the Crown was either a revocation of that license, or, if not, the grantee of the Crown became the licenser, so far as the land granted was concerned, and only licensed the raising of the water provided it worked him no injury.

The defendants, in argument, invoked the aid of R. S. O. (1877) ch. 113, sec. 15, but they did not plead it, and if they had done so, it would not, in my opinion, have availed them, because I do not think that section could be used so as to make the word "dam," therein used, include bracket boards used as these were, and under the terms upon which they were used, and because the purchaser in this case Michael Brady, although he obtained a reduction in the price of part of the land granted, by reason of its being overflowed by reason of the dam, obtained no reduction by reason of its being overflowed by the use of bracket boards.

In my opinion, the plaintiffs are entitled to recover in this action, and they may have a reference, if they so desire it, as to the damages, and a perpetual injunction restraining the defendants from raising the water by any artificial means higher than it is at present raised by the existing dam built by the Government; and the plaintiffs must be paid their costs of this suit.

STREET, J.—(after stating the facts.)—The plaintiffs do not complain that any damage has been done to them by the retaining of the water by the dam itself; their sole ground of complaint is, the additional height to which it has been raised by the bracket boards. My brother Proudfoot, before whom the action was tried, dismissed the action upon the ground that the plaintiffs' rights were only to so much land as was not usually covered by water at the time the sale by the Government to Michael Brady was agreed upon, which was on 13th May, 1851, and that, inasmuch as the use of the bracket boards had been practised for a long time, the height of the water when the bracket boards were on the dam was that by which the plaintiff Michael Brady's rights under his patent were to be regulated.

In construing the description in the patent we are not allowed to go beyond the meaning of the words used in it; but, inasmuch as there is no work upon the ground itself,

we are at liberty, in order to ascertain the location and description of the lot, and what the meaning, in that sense, of the words which are used in the patent is, to look at the surrounding circumstances. The plan marked H. made by Thomas J. Dennehy, P. L. S., dated 22nd June, 1846, was made before the patent was issued, and its substantial correctness, so far as the quantity of dry land upon the lot in question is concerned, has been proven. The facts shewn by this plan are, that at the time of the issue of the patent there were from 60 to 70 acres of dry land, some 30 acres more were covered by the waters of the Scugog river proper, and some 100 acres more covered by other waters, apparently being the waters of the Cross creek, which here join those of the Scugog river, forming a bay or inlet from 20 to 30 chains in width, bounding the dry land on the south. If the language of the patent is absolutely free from doubt, it cannot be controlled by the circumstance that the quantity of land passing by the description is much greater or much less than the quantity stated in it as passing by it; but if the language of the description admits of two different constructions, the one of which would make the quantity of land conveyed agree with the quantity mentioned in the deed, and the other would make the quantity altogether different, the former construction must prevail: *Herrick* v. *Sixby*, L. R. 1 P. C. at 452.

Treating the waters of the Cross creek as part of those of the Scugog river, of which it is an affluent, the quantity of land mentioned in the patent as passing by it agrees with the quantity of land actually passing by it. Treating the waters of the Cross creek as not being part of those of the Scugog river, the quantity of land mentioned in the patent is less by upwards of 100 acres than would actually pass by it; that is to say, the whole of the lot, excepting the portion of it covered by the waters of the Scugog river proper, contains 160 to 170 acres instead of the "sixty acres," more or less, mentioned in the patent. It being physically impossible to say whether the waters at the junction

of the Scugog river and the Cross creek, where these lands are situate, and where the natural channels of both have widened into a bay, are waters which properly belong to the Scugog river or to the Cross creek, I think they must, under the circumstances, for the purpose of construing the patent, be treated as being those of the Scugog, in other words, that the patent should be construed as if it excluded the lands covered by the waters of the Cross creek as well as those covered by the Scugog river. If the plan, exhibit H., can be treated as being the plan from which the patent was framed, and as being therefore incorporated into it, in the same way in which every deed which describes the lands passing by it merely by lot and concession incorporates into the description some plan shewing the position of the lot and concession referred to, then this construction of the patent in question is greatly strengthened. But the plan H. is referred to in the correspondence merely as a sketch and seems to have been prepared for the purpose only of shewing to the Crown Lands department, for the purposes of this sale, accurately, the quantity of dry land upon the lot in question, and should, therefore, I think, be treated, not as being incorporated into the patent, but only as a piece of evidence, its accuracy being otherwise established, of the actual quantity of land not covered by water at the time the patent issued. The other question which arises in interpreting the description in the patent is, whether the words "exclusive of the lands covered by the waters of the Scugog river, which are hereby reserved," should be taken as applying to the lands covered by the waters of the river in its natural state or when dammed back and raised by the Government dam. The dam was intended as a permanent structure, and had already been in existence for some ten years when the patent issued; it had been erected by the Board of Works, a body of Government officials who then had the control and supervision, on behalf of the Government, of works of this nature, and they had covenanted with the Purdys in the deed which has been referred to, to maintain and keep it in repair for all

time to come, and its existence was known to the patentee. The patent is to be construed most favourably to the Crown, and I think it would be contrary to the intention of the Crown, as gathered from the language of the description, to treat it as applying, not to the height of the water as constantly maintained by this permanent structure, which had been in existence for ten years, and was intended to be maintained for the future, but to the height at which the water had stood ten years before, when no dam was in existence. Here again, I think the plan and the evidence of the substantial accuracy of the plan may be considered as helping the construction of the words of the description in the patent.

The acreage passing by the patent would be greatly in excess of that stated in it, if it were to be held that the natural and not the artificial height of the water in the Scugog was that intended by the description; it would substantially agree with the quantity stated in the patent if it is construed to mean the height of the dam with or without the bracket boards. The bracket boards, however, were not permanent; they were put up at one season of the year and taken down at another; they were not a part of the permanent structure which the Government was bound to maintain; and their effect upon the height of the water was of too uncertain a character to render it probable that the height to which they occasionally brought it was intended to be taken into account. In fact, between the date of the application by Brady for the land and the issuing of his patent, these boards must have been put up and lowered many times. The result of the additional height which these boards gave to the dam being admittedly as shewn by the defendants' map, to increase the height of the water to such an extent as to cover some four acres of the plaintiffs' land which would have been dry had the dam remained only at its permanent height, the defendants must be liable unless they are able to shew a right to raise the water in this way; because although Dennehy's plan may be looked at to the extent I have indicated, it is not to be

taken to bind the plaintiffs' rights down to the actual limits of the dry land shewn upon it, for that might be contrary to the language of the patent, but only for the purpose of shewing the principle upon which his rights are to be ascertained.

The defendants set up a prescriptive right to overflow the plaintiffs' lands by means of these bracket boards under secs. 34 to 39 inclusive, of cap. 108, R. S. O. (1877); but the interruption of the exercise of the right they claim between 1881 and 1885 is fatal to this defence; *Earl de Warr* v. *Miles*, 17 Ch. D. 535. The right was exercised as a mere matter of favour, and not of right as between the Government and the defendants, so far as these bracket boards were concerned, and in the year 1881 the privilege of maintaining them seems to have been withdrawn by the Government until restored in 1885 upon the defendants' petition. Had the boards been removed by the defendants themselves because of any increase in the volume of water coming down the river, a question might have arisen as to whether the interruption, being a voluntary one on the part of the defendants, was an interruption within the meaning of the 37th section of the Act: *Carr* v. *Foster*, 3 Q. B. 581; but it is clear from the evidence of the defendant, Thomas Sadler, that it was strongly against his will that the boards were removed in 1881.

This circumstance renders it unnecessary to consider whether or not under their peculiar position the defendants could have obtained a right by prescription to flood these lands by means of the bracket boards; their own right to the water obtained by the use of them, and their own right to maintain them being of the most uncertain and precarious character, and being subject to the condition that by using them the defendants should not do injury to the lands of any of the riparian proprietors.

The defendants at the argument, though not upon the pleadings, asked to be allowed the benefit of the provisions of sec. 15 of ch. 113, R. S. O.

The land, however, which, as I construe the patent, is included in it, was not a part of the land in respect of which a reduction in price was made by the Crown in consequence of its being drowned land; the patent does not, I think, cover any of the wet or drowned land at all.

I agree with the result at which the Chief Justice has arrived, viz: that the plaintiffs should have a perpetual injunction, and a reference to ascertain the damages caused by the damming back of the water by means of the bracket boards, and their costs of the action and motion, and that the motion should be granted, with costs.

FALCONBRIDGE, J., was not present at the argument, and took no part in the judgment.

Judgment for the plaintiffs.

[QUEEN'S BENCH DIVISION.]

REGINA v. GORDON.

Liquor License Act, R. S. O. (1877) ch. 181—Summary conviction—Absence of police magistrate from city—Jurisdiction of justices of the peace.

The defendant was convicted by the police magistrate of the city of Toronto, for an offence committed at Toronto against the Liquor License Act, R. S. O. (1877) ch. 181, sec. 39.

Section 68 of that Act makes such magistrate the proper tribunal for the trial of such offence; but the information was taken before a single justice of the peace, who was acting for the police magistrate in his absence and at his request, and upon such information the defendant was brought before two justices of the peace and remanded till the day on which he was convicted.

Held, that the information was properly taken before one justice under the provisions of sec. 6 of the Summary Convictions Act, which is made applicable both by R. S. O. (1877) ch. 181, sec. 68, and R. S. O. (1877) ch. 74, sec. 1; and two justices being the tribunal substituted for the police magistrate in the case of absence, by 41 Vic. ch. 4, sec. 7, the defendant was legally convicted.

THE defendant was on the 1st September, 1887, at the city of Toronto, in the county of York, convicted before George T. Denison, police magistrate in and for the city

of Toronto, for that she, the defendant, on the 9th July, 1887, at the city of Toronto, in the county of York, unlawfully did sell liquor without the license therefor by law required.

This conviction was founded upon an information laid on the 4th August, 1887, before John Baxter, a justice of the peace in and for the city of Toronto, acting upon the written request and for George T. Denison, the police magistrate for the city of Toronto.

Upon this information the defendant was brought up on the 11th August, 1887, and remanded till the 18th August, 1887, when she was again brought up and remanded till the 25th August, 1887.

The said police magistrate was absent within the meaning of R. S. O. ch. 72, sec. 6, at the time when the said information was laid, and up to the 25th August, 1887, and on the several remands of the defendant on the 11th and 18th August, two justices of the peace in and for the city of Toronto were present.

Upon the 25th August, 1887, the defendant was brought before the said police magistrate, and it was thereupon objected that the said John Baxter had no jurisdiction to take the said information, and this objection being overruled, the defendant pleaded not guilty, and upon hearing evidence, the police magistrate made the said conviction.

This conviction so made being brought into this Court upon a writ of *certiorari*, *Murdoch*, on the 29th November, 1887, obtained an order *nisi* to quash the said conviction, on the ground that John Baxter and the other justice or justices of the peace had no jurisdiction to adjudicate upon or hear cases arising under the Liquor License Act, notwithstanding the illness, absence, or at the request of the police magistrate for the city of Toronto.

On 1st June, 1888, *Badgerow* shewed cause, and *Murdoch* supported the order *nisi*.

June 8, 1888. ARMOUR, C. J.—The offence for which the defendant was convicted was an offence against R. S. O. (1877) ch. 181, sec. 39; and sec. 68 of that Act provides that all prosecutions for the punishment thereof may take place in cities and towns where there is a police magistrate, before the police magistrate of the city or town, who shall have authority to hear and determine any case in which the offence is alleged to have been committed within the county (for judicial purposes), wherein such city or town is situate, in a summary manner, according to the provisions and after the forms contained in and appended to the Act of Parliament of Canada, entitled "An Act respecting the duties of justices of the peace out of Sessions, in relation to summary convictions and orders," which Act and the Acts already passed, or which may be hereafter passed, amending the same, shall be held to apply to all prosecutions and proceedings under this Act, so far as consistent with this Act.

R.S.O. (1877) ch. 72, sec. 6, provides that no other justice, of the peace shall admit to bail, or discharge a prisoner, or adjudicate upon, or otherwise act in any case for any town or city where there is a police magistrate, except at the Courts of General Sessions of the Peace, or in the case of the illness, absence, or at the request of the police magistrate.

41 Vic. ch. 4, sec. 7, (O.), provides that in case of the absence, or illness, or at the request of a police magistrate, any two or more justices of the peace may act in his place in any matter within the jurisdiction of such police magistrate, and the said justices of the peace, or a majority of them, shall in such case have all the powers which by any statute are given to such police magistrate; but this section shall not be construed to prevent one justice of the peace from acting for the police magistrate, wherever by law one justice of the peace would heretofore have jurisdiction in that behalf.

The Summary Convictions Act, R. S. C. ch. 178, sec. 6, provides that any one justice may receive the infor-

mation or complaint, and grant a summons or warrant thereon, and issue his summons or warrant to compel the attendance of any witnesses for either party, and do all other acts and matters necessary, preliminary to the hearing, even if by the statute in that behalf it is provided that the information or complaint shall be heard and determined by two or more justices.

And R. S. O. (1877) ch. 74, sec. 1, provides that the proceedings for the recovery of a penalty imposed under the authority of any statute of the Province of Ontario, shall be the same as, under the statutes of the Dominion of Canada, might be had and should be performed, if such penalty had been imposed by a statute of Canada, unless in any Act hereafter passed imposing such penalty, it is otherwise declared.

Now the police magistrate was the tribunal prescribed by R. S. O. (1877) ch. 181, sec. 68, to try the offence for which the defendant was convicted.

But the police magistrate being absent, two or more justices of the peace were the tribunal substituted for him in case of such absence, by 41 Vic. ch. 4, sec. 7. (O.)

And the Summary Convictions Act being made applicable to the proceedings to recover the penalty for the offence of which the defendant was convicted, both by R. S. O. (1877) ch. 181, sec. 68, and R. S. O. (1877) ch. 74, sec. 1, the information was properly taken by one justice under the provisions of sec. 6 of that Act.

I am, therefore, of the opinion that the defendant was legally convicted, and that the order *nisi* must be discharged with costs.

FALCONBRIDGE, J.—I concur in this judgment. It seems to be unnecessary to decide the question whether an enlargement is an adjudication, inasmuch as at the several adjournments herein prior to the return of the police magistrate, two justices of the peace were present.

STREET, J., concurred.

Order nisi discharged.

[QUEEN'S BENCH DIVISION.]

CLARKE v. JOSELIN.

Mistake—Rectification of contract—When ordered—Evidence—Exchange of mortgages—Liability of assignors.

In order to secure the rectification of an instrument, the clearest evidence is required to be adduced. If the Court, after considering all the circumstances surrounding the making of the instrument, whether it accords with what would reasonably and probably have been the agreement between the parties, gauging the credibility of witnesses, paying due regard to their interest in the subject matter, and weighing their testimony, is satisfied beyond reasonable doubt that the instrument does not embody the true agreement between the parties, it should rectify it.

The transaction between the plaintiff and defendant was an exchange of mortgages. The plaintiff in assigning his mortgage to the defendant guarded himself against personal liability; but the defendant in assigning her mortgage did not do so, and the plaintiff sued her upon the covenant in her assignment that the mortgage assigned was a good and valid security, alleging that it was not so.

Held, upon the evidence, that the true agreement was that neither the plaintiff nor the defendant should be personally liable in respect of the mortgage which each assigned to the other; and rectification according to such agreement was adjudged.

The plaintiff by his statement alleged:

1. That on the 23rd June, 1887, Lydia M. Wales, wife of William R. Wales, and William R. Wales, in consideration of $1,500, granted and mortgaged to the defendant certain lands in the city of Toronto.

2. That the mortgage money, with interest at 6 per cent. per annum, became payable in four months after the date thereof, and was not paid.

3. That the said mortgage was made in pursuance of the Act respecting short forms of mortgages, and contained the usual statutory covenants by the mortgagors; (1) for payment of the mortgage money and interest; (2) for good title in fee simple to the said lands; (3) for right to convey; (4) for quiet enjoyment free from all incumbrances; (5) for further assurance; and (6) that the mortgagors had done no act to incumber the said lands.

4. That on or about the 28th June, 1887, notices of sale under power of sale contained in a prior mortgage on said lands were served on the defendant, and such proceedings

were had thereunder as resulted in the sale and conveyance of said lands free and clear of any lien or claim under said mortgage of the 23rd June, 1887, and the latter mortgage had, subsequent to the assignment to the plaintiff, but through no neglect or default of the plaintiff, ceased to exist as an incumbrance on the said lands, even if it had up to that time existed as an incumbrance thereon, which the plaintiff did not admit.

5. That on the 24th August, 1887, by an indenture of assignment of mortgage the defendant for a valuable consideration, after reciting the said mortgage of the 23rd June, 1887, granted and assigned the same and the said lands to the plaintiff to have and to hold to the use of the plaintiff, his executors, administrators, and assigns, absolutely forever, but subject to the terms contained in the said mortgage.

6. That in and by the said indenture of assignment of mortgage the defendant covenanted with the plaintiff that the said mortgage thereby assigned was a good and valid security, and that the sum of $1,500 and interest was owing and unpaid, and that the said defendant had not done or permitted any act, matter, or thing whereby the said mortgage had been released or discharged, either partly or in entirety, and that she would upon request do, perform, and execute every act necessary to enforce the full performance of the covenants and other matters therein contained.

7. That at the time of the execution of the said indenture of assignment the plaintiff and defendant were aware that the said mortgage, though purporting to be a first mortgage, was not so in fact, and the plaintiff expressly stipulated for the personal liability of the defendant; and though the defendant was aware of the said sale proceedings, the plaintiff was not aware of the same until after the execution of such assignment.

8. The plaintiff submitted that, even if the said mortgage should be held to have been at one time a lien upon the said lands, the defendant, under the said mortgage and

assignment, was liable either to pay the $1,500 and interest secured by said mortgage or to make it a first mortgage and a good and valid security existing on said lands.

9. That the said Lydia M. Wales and William R. Wales never had any estate or interest in the said lands proposed to be mortgaged by them, and the said mortgage never was a lien or charge upon the said lands, and the plaintiff submitted that the defendant was therefore liable to him in the sum of money thereby proposed to be secured, together with interest for the same from the day of the date of the said mortgage.

And the plaintiff claimed $1,500 and interest from 24th October, 1887, and further relief.

The defendant by her statement:

1. Admitted the allegations in the first three paragraphs of the plaintiff's statement of claim.

2. She denied the allegations contained in the fourth paragraph of the statement of claim (except the fact that sale proceedings under said mortgage had commenced), and put the plaintiff to the proof thereof.

3. And the defendant said that at the time of the execution of the said assignment of mortgage the plaintiff was aware that the sale proceedings had been taken, and the defendant never concealed such fact from him, and with full knowledge of the same the plaintiff accepted the said assignment.

4. That it was not stipulated that she should be personally liable for the payment of the said mortgage money, but that it was understood and expressly agreed between the plaintiff and the defendant that the plaintiff should take the said assignment and the security thereby assigned for what they were worth, and should not look to the defendant for payment of the said moneys or any part thereof.

5. That she denied her liability to pay the said mortgage moneys.

6. She submitted that the plaintiff should look to the said mortgagors for payment of the said moneys, but the

plaintiff had made no effort to compel payment of the same by the said mortgagors.

7. That the said assignment was made in consideration of the assignment by the plaintiff to the defendant of a certain mortgage of the east half of lot number 14 in the 10th con. of the township of North Orillia, in the county of Simcoe, made by one Valentine Edward Ottaway to William Joseph Ward, dated 18th January, 1882, to secure the payment of $900, with interest at 8 per cent. per annum.

8. That at the time of the assignment of the said mortgage by the plaintiff the lands therein comprised were not, and were not then, of any value, and as a security were at such time and then were worthless, which facts the plaintiff at the time of such assignment well knew; that long before the said assignment the said lands had been sold for taxes due thereon, and had become the property of the purchaser at such sale freed from the said mortgage, and at the time of such assignment the said mortgage had ceased to be and was not a lien upon the said lands, which fact was also well known to the plaintiff at such time; that the plaintiff, although aware of such facts, concealed the same from the defendant, who was ignorant thereof, and induced the defendant to believe that the said lands were of value, and that such mortgage was a valid charge thereon; and the negotiation between the plaintiff and defendant proceeded, and the agreement for the exchange was made by the defendant, on such basis and understanding, and relying thereon, the covenants of the mortgagor being of no value, as was well understood by both plaintiff and defendant; and the defendant claimed that the plaintiff, having obtained said assignment under the circumstances set out, was not entitled to make any claim against the defendant thereunder.

Issue thereon.

The cause was tried at the Spring Sittings of this Court, 1888, at Toronto, before Street, J.

It appeared that certain lands in the city of Toronto were owned by one Essery, who mortgaged them to one

Holmested for $5,100; that Essery then conveyed them to one Clark; that Clark then conveyed them to Barber and others; that Barber and others then conveyed them to one Grant; that Grant then mortgaged them to one Ferguson for $2,400, and subsequently mortgaged them to The Citizens Land, Mortgage, Investment, and Loan Society for $700; that Grant then on the 15th February, 1886, conveyed them to the defendant; that on the 23rd June, 1887, Lydia M. Wales and her husband mortgaged the said lands to the defendant for the sum of $1,500, which mortgage was registered on the 24th June, 1887; that on the 23rd June, 1887, Lydia M. Wales and her husband conveyed one undivided half interest in the said lands to one Hawkesworth, which conveyance was registered on the 8th July, 1887; that on the 24th June, 1887, the defendant conveyed the said lands to Lydia M. Wales by deed not registered; that on the 25th June, 1887, proceedings were commenced by Ferguson for the sale of the lands under the power of sale contained in his mortgage; that on the 18th August, 1887, Hawkesworth released his interest in the said lands to Ferguson; that on the 24th August, 1887, the defendant assigned to the plaintiff the mortgage from Lydia M. Wales to her, which assignment purported to be made "in consideration of the assignment of a certain mortgage made by one V. E. Ottaway to one W. J. Ward, and by him assigned to one D. M. McDonald for the sum of $900 and interest," and contained the following printed covenants: "That the said mortgage hereby assigned is a good and valid security, and that the said sum of $1,500 and interest is now owing and unpaid, and that she has not done or permitted any act, matter, or thing whereby the said mortgage has been released or discharged either partly or in entirety."

It appeared that the mortgage, the assignment of which was the consideration for this assignment, was a mortgage made by one Valentine Edward Ottaway to one William Joseph Ward, dated the 18th January, 1882, upon the east half of lot No. 14, in the 10th concession of North Orillia

for securing the sum of $900; that the said William Joseph Ward had assigned the said mortgage to one John Canavan; that the said John Canavan assigned the said mortgage to one Donald Mitchell McDonald, and the said Donald Mitchell McDonald afterwards assigned it to the plaintiff; that on the 25th August, 1887, the plaintiff assigned the said mortgage to the defendant, which assignment purported to be made "in consideration of the assignment by one Elizabeth Joselin of a certain mortgage made by one Lydia M. Wales to her for the sum of $1,500 on certain lots in Peel avenue, Toronto."

Both the assignments were drawn on similar printed blanks by one Creighton, a solicitor, who professed to be acting for the defendant, but the plaintiff in the assignment from him to the defendant erased the words "good and" in the printed covenant therein contained, "that the said mortgage is a good and valid security," &c., and added this clause thereto: "The covenants herein contained on the part of the assignor are not to cover or extend to non-payment or consequence of default in payment of taxes or assessments on said lands and premises, nor is he to be liable for taxes, rates, or assessments on said lands."

The plaintiff swore that McDonald had protected himself by a like clause in the assignment from McDonald to him; that the assignment from McDonald to him was in 1883, and that he knew that there were taxes in arrear on the land at that time, and that he had never paid any since; that the mortgagor was not worth much, and that he did not expect the mortgagor would pay the taxes; that he supposed there were taxes in arrear, but that he did not then know whether the land had been sold for taxes or not, and that he put in this clause to protect himself; that he had also stricken out the words "good and" in the covenant, as he did not want to assume any personal liability. He also swore that he knew before he took the assignment that the mortgage assigned to him by the defendant was a fourth mortgage, and that he had all the particulars of the prior mortgages, and it appeared that he knew that pro-

ceedings were being then taken to sell the mortgaged lands under the mortgage to Ferguson.

Creighton, the solicitor who conducted the negotiation for the defendant and obtained the execution by the defendant of the assignment and delivered it to the plaintiff, swore that he told the plaintiff at the time he delivered the assignment to him that the defendant was not to be liable, that Mr. Joselin would not allow his wife to sign the assignment if it was to be understood she was to be personally liable; that he had no authority to hand over the assignment if it was understood she was to be liable; that he handed it over on the understanding that she was not to be personally liable; that the plaintiff thoroughly understood she was not to be personally liable; that a week after the assignment had been handed over he and the plaintiff had a discussion about the assignment, he contending that it did not make her personally liable, and the plaintiff contending that it did; that the plaintiff was not to have the personal liability of the defendant.

The plaintiff on the other hand swore that when Creighton came to him about the transaction that he, Creighton, stated that the defendant was perfectly good, and that he told Creighton that any negotiations he had at all would be on the basis that she would be personally liable, and that when Creighton handed over the assignment, he Creighton stated positively that it made the defendant personally liable; that Creighton said she guaranteed the mortgage—made herself personally liable for the amount—that Creighton told him she would guarantee payment of $1,500, and on being asked why he did not put in a covenant to that effect, he said he did not draw the assignment, the assignment was brought to him executed; that he did not know the form the assignment was to be in until it was brought to him. His Lordship asked him, Q. Now did you stipulate that they were to guarantee payment of the $1,500 mortgage—become personally liable to you for $1,500 for a $900 mortgage? A. It was matter of contract; I did not suppose more than I have stated; I did not know I could get the money out of

her for certainty; if they choose to make it a certainty now, I will take one-third. Q. You thought at the time she was good? A. Well, I was told so. Q. How could you possibly have understood she was giving you $1,500 for $900 and her own personal liability to pay that amount? A. It was matter of agreement. Q. You thought she was agreeing to give you $1,500 in cash for your $900 mortgage? Is that the case? A. That is the case.

Henry Joselin swore that three or four weeks after this transaction he went out to see about the land in Orillia, and found that it was worth nothing and that it had been sold for taxes, and that the time for redeeming it would expire in thirty days; that as soon as he returned he found a letter from the plaintiff demanding $1,500 and interest; that he went and asked him what he meant by it; that they had not assumed any personal liability; that the plaintiff said it was a fraudulent transaction on their part, giving him a mortgage purporting to be a first mortgage when it was a fourth; that he said he thought the plaintiff had perpetrated a fraud upon them; that he offered the plaintiff to rescind the transaction, and told him that the land had been sold for taxes, and that there were only thirty days in which to redeem it, but the plaintiff would not give him any satisfaction at all; that this was before the sale of the land by Ferguson. It appeared, also, from other evidence, that the Orillia land was valueless, that it never had any value except for the timber on it, and that the timber had all been taken off it. It also appeared that on the 19th September, 1887, Ferguson conveyed the lands, under the power of sale in his mortgage, to one Faircloth.

The learned Judge verbally delivered the following judgment:

STREET, J.—The agreement between the parties was for an exchange of securities, the plaintiff agreeing to transfer to the defendant a mortgage for $900 on a property in North Orillia, county of Simcoe, the defendant agreeing to transfer to the plaintiff a mortgage on property situated

on Peel avenue, in the city of Toronto, for $1,500. It is only with regard to the latter mortgage that any question was reserved. Mr. Clarke in the witness box has stated that it was well understood between him and the defendant that the mortgage the defendant agreed to transfer to him was a fourth mortgage, and tnat it was with a full understanding of that that the negotiation was carried through; that in order to ascertain the value of that fourth mortgage he obtained a statement of the amounts due on the three prior mortgages. If he is entitled to any remedy on the covenants in the assignment from the defendant to him, the damages must be calculated having regard to the value of these covenants at the date of the transaction between the parties; that is to say, the defendant was to transfer to the plaintiff a fourth mortgage; therefore, in deciding as to damages, the basis must be taken to be a fourth mortgage, and the value such a security would have at the time of the assignment. The covenant is that the mortgage was a good and valid security; that is to say, as I understand the meaning of the covenant, that it is a good fourth mortgage in law and in fact. The breach alleged is, that at the time the mortgage was made, the person who made it, Wales, was not entitled to the equity of redemption in the property; it appears that really was the fact; but a few days afterwards, and before the assignment, a conveyance was in fact made to this person, Wales, and the result of that would be that the estate of the mortgagee would be fed by it.

I think that is the result of the case of *Boulter* v. *Hamilton* in our own Courts some time ago. So at the time of the assignment of mortgage the mortgagor was in fact practically entitled to the equity of redemption, and that equity of redemption passed to the mortgagee, subject to the three prior mortgages. Upon that ground I think the action should be dismissed, with costs. Also on the other ground that no damages are proved by the plaintiff to have been sustained by him. The only evidence he gave was that the property had been sold under the power of sale contained in the third mortgage. There is nothing to shew what the amount realized from that sale was. It is possible that the whole amount was realized, and that the plaintiff has received all that was his due. If the property did not sell for

enough to cover the third mortgage, then the plaintiff sustained no damage which he could recover for. I think, therefore, upon these grounds, if upon no others, the action should be dismissed with costs. But the plaintiff will be entitled to the costs of the issue upon which he has succeeded, namely, the defence set up by Mrs. Joselin that he misrepresented the value of the property covered by the mortgage in North Orillia. The action will be dismissed, with costs, and the plaintiff will be entitled to set off the costs of the issue on which he succeeded.

On the 4th June, 1888, *Clarke*, in person, moved to set aside the judgment, and to enter judgment for the plaintiff for the sum of $1,500 and interest, on the ground that the defendant's covenants in the assignment of mortgage guarantee to the plaintiff a first mortgage lien on the lands in the pleadings mentioned for an estate in fee simple, subject only to the mortgagor's right of redemption, and the estate contracted for not passing to the plaintiff, such covenants are broken, and as the evidence shews the lands to be worth more than the mortgage money, and not enough to satisfy all the charges thereon, the plaintiff's damages were the mortgage money and interest.

James Reeve shewed cause.

June 23, 1888. ARMOUR, C. J.—It is difficult to say that any cause of action alleged in the statement of claim has been proved. The sale referred to in the fourth paragraph as having resulted "in the sale and conveyance of the said lands free and clear of any lien or claim under the said mortgage of 23rd June, 1887," forms the only ground work for the submission of the plaintiff in the eighth paragraph "that even if the said mortgage be held to have been at one time a lien upon the said lands, the defendant under the said mortgage and assignment is liable either to pay the $1,500 and interest secured by said mortgage or to make it a first mortgage and a good and valid security existing on said lands;" but the sale referred to had not taken place at the time the assignment was made, and

nothing is alleged to shew that the said mortgage was not at the time of the assignment a good and valid security, nor is anything alleged to shew that its being a first mortgage was necessary to its being a good and valid security within the meaning of the covenant.

At the trial the plaintiff's case was supported by counsel solely on the ground of the allegation in the ninth paragraph that "Lydia M. Wales and William R. Wales never had any estate or interest in the said lands," and because the mortgage given by them was given by them the day before the deed was given to them; but the deed fed the estoppel created by their mortgage, and so the allegation was disproved.

It is unnecessary, however, to decide the case upon this narrow ground, for this Court has the power to rectify the assignment containing the covenant sued upon on the ground of mistake, and I think the evidence amply warrants our taking that course. No doubt, in order to secure the rectification of an instrument, the clearest evidence, "irrefragable evidence," as Lord Thurlow said, is required to be adduced, but it is not meant by that to be laid down that because one of the parties to the instrument chooses to deny that there is any mistake in it, the Court must stay its hand. No doubt the writing must stand as embodying the true agreement between the parties until it is shewn beyond reasonable doubt that it does not embody the true agreement between them.

The Court must in such case, as in the case of any other disputed fact, consider all the circumstances surrounding the making of the instrument, and whether it accords with what would reasonably and probably have been the agreement of the parties, gauge the credibility of the witnesses, pay due regard to their interest in the subject matter, and weigh their testimony; and if, having done all this, the Court is satisfied beyond reasonable doubt that the instrument does not embody the true agreement between the parties, the Court ought to rectify it.

The transaction between the plaintiff and the defendant was an exchange of mortgages. The plaintiff knew all about the defendant's mortgage and the land it covered; that it was a fourth mortgage; he knew the particulars of the prior mortgages, and that proceedings had been taken to sell the lands under one of them; he knew the state of the title, and, in short, everything that the defendant knew about it. The defendant knew nothing about the plaintiff's mortgage or about the land covered by it, except that it purported to be a mortgage upon land in North Orillia for $900. The plaintiff knew all about it, that the mortgagor was worthless and the land valueless. So much so that although he had held the mortgage for four years, and knew that there were arrears of taxes upon the land when he got it, and that the mortgagor would not pay the taxes, he never took the trouble to look after or pay the taxes, and did not know whether the land had been sold for taxes or not. These being the circumstances, the plaintiff swore that the agreement was that he was to assign over his mortgage to the defendant and was to be in no way personally liable to her in respect thereof, and that she was to assign over her mortgage to him and was to be personally liable to him for the $1,500 thereby made payable. Indeed he swore that the understanding was that she would guarantee the payment of the mortgage money; that she was agreeing to give him $1,500 cash for his $900 mortgage. This evidence is incredible, and the plaintiff is, moreover, an interested witness.

On the other hand it is quite clear that the defendant never intended to become personally liable in respect of the mortgage which she assigned to the plaintiff, and we have the evidence of Creighton, who was acting for the defendant, a disinterested witness, who swore that he told the plaintiff when he handed over the assignment from the defendant to him that the defendant was not to be liable; that Mr. Joselin would not allow his wife to sign the assignment if it was to be understood she was to be personally liable; that he had no authority to hand over the

assignment if it was understood she was to be liable; that he handed it over on the understanding that she was not to be personally liable, and that the plaintiff thoroughly understood that she was not to be personally liable.

Taking as my guide what I have said above as to the manner in which and the evidence upon which such a disputed fact as the one in question should be determined, I can draw but one conclusion in this case, and I draw it without any doubt of its correctness, that the true agreement between the plaintiff and the defendant was that neither should be personally liable in respect of the mortgage which each assigned to the other.

The result of this my finding is, that the assignments must be rectified according to the true agreement between the plaintiff and the defendant, and that the motion must be dismissed with costs. See *Caldcot* v. *Hill*, Cases in Chancery 15; *Sugden* on Vendors, 14th ed. 609.

FALCONBRIDGE, J., concurred.

STREET, J., took no part in the judgment.

Motion dismissed.

[COMMON PLEAS DIVISION.]

THE WESTERN CANADA LOAN COMPANY V. GARRISON.

Statute of limitations—Witnessing mortgage covering lands in question—Ignorance of lands so included—Estoppel—R. S. O. ch. 181.

In 1870, the defendant, under agreement therefor with his father, the owner of a farm, went into possession of a certain portion thereof, and remained in possession 16 years. The exact nature of the agreement did not appear, but it pointed to the ownership in defendant of the portion occupied. In 1876, the father executed a mortgage of the whole of the farm to the L. & C. Loan Co., which was witnessed by defendant, who made the affidavit of execution on which the mortgage was registered. The defendant swore that he was not aware of the contents of the mortgage, nor that it included the portion of which he was in possession. In 1882 the father made a mortgage to the plaintiffs also of the whole lot, and on default the plaintiffs brought an action to recover possession of the portion occupied by defendant.

Held, that the evidence shewed that the defendant had been in exclusive possession of the land occupied by him for the statutory period so as to acquire a title thereto by possession; and that the fact of his being a witness to the mortgage to the L. & C. Co., and its subsequent registration, under the circumstances, did not by virtue of sec. 78 of the Registry Act R. S. O. ch. 181, create an estoppel.

THIS was an action brought by the Western Canada Loan and Savings Company against Caleb A. Garrison to recover possession of a portion of the lands included in a mortgage made to them on December 20th, 1882, by H. W. Garrison, father of the defendant.

The defendant claimed title by length of possession as to 48 acres of the mortgaged lands, which 48 acres formed part of the land to recover possession of which this action was brought.

The action was tried before Rose, J., without a jury, at Belleville, at the Spring Assizes of 1887.

It appeared that prior to 1870 the defendant had been working the whole of the lands comprised in the mortgage on shares with his father. In 1870 he became discontented with the existing arrangement, and left the farm, and went to his father-in-law. His father, however, persuaded him to come back, and put him in possession of a log house, known as the "old homestead," which was on the 48 acres in question. The father and another son continued to reside up to the time of this action, which was commenced

in August 21, 1886, in the farm house situated on another part of the land.

The 48 acres in question were, at the time the son was put in possession in 1870, surrounded by a fence; at all events, except at the back, as to which the evidence was not very clear. The defendant set up that his father made a gift to him of the old homestead and the 48 acres; at least he claimed he was to have it by the father's will. The defendant's evidence shewed that from 1870 onwards, for more than ten years, the father never exercised any control or direction over the cultivation of the 48 acres. It appeared, however, there was only one barn for the whole of the lands, in which the produce of the defendant's 48 acres was kept separate from that of the rest of the land.

There was a good piece of pasture land on the 48 acres; and the defendant admitted at times driving his father's cattle on it to pasture there. The father also was at times allowed to gather apples on the 48 acres; and on one occasion, when repairs were required to the fences on the 48 acres, the father assisted the defendant. The defendant was assessed for and paid the taxes on the 48 acres during his occupancy, and paid for necessary repairs to the homestead, his father lending him a little money to buy lumber for the purpose.

In 1876, the father borrowed money on mortgage from the London and Canadian Loan Company, of the whole lot including the forty-eight acres in question; and his son's name appeared as the attesting witness. The son swore that, though he knew he had witnessed a mortgage, and that his father had no other land than that which appeared to be included in it, yet he did not know that the forty-eight acres in question were included.

The learned Judge reserved his decision, and afterwards delivered the following judgment:

ROSE, J.—This case differs from some cases that come before the Court. Where a party comes before the Court as a mere trespasser, or occupying land without any moral claim, in other words as a thief stealing land, every energy is bent to prevent him acquiring title.

The defendant here asserts a right; and I find with him as a matter of fact that he went into possession of the land in 1870, under an agreement with his father which looked towards the ownership of the property in him. Whether that ownership was to become ripe by deed or by will, has not been made, perhaps, very clear; but I think the natural inference from the evidence would be that he expected his father would leave him the property by will, a custom which is not unknown in the country. From that time I think the evidence shews he was treated by the father as owner of the property, left in possession, cultivating, improving, and building, spending his own moneys, reaping the harvest and selling and applying the proceeds to his own use. And thus for sixteen years at least he and his family have occupied that land; and, if he fail in this action, the fruit of his labour for that number of years will be taken away from him. That must not stand in the way, however, if the plaintiffs have a superior claim.

The plaintiffs rely upon two acts: the one is the witnessing of the mortgage to the Loan Company in 1876; and the other the sale, or attempted sale to Hicks, and the lease to Hicks.

As to the first, we have only the evidence of the defendant; and, giving him general credit as I do, finding him corroborated in many important particulars, I find as a fact that he did not know the contents of the mortgage when he witnessed it. I have no reason to find against his oath that he did know. I prefer relying upon his statement, because, as I say, I have given him general credit in his testimony. If, therefore, he witnessed that document without knowing it covered the land in question, it could in no wise operate as an admission of title, and thus the running of the title was not interrupted by that act.

[The learned Judge then considered the evidence on the question of the attempted sale and lease to Hicks, and was of opinion that on the evidence they did not constitute any bar to the defendant's title. The learned Judge then proceeded:]

The fact that the father and the brothers are not here, is a fact that will bear either way. It is not probable that they would take a position against the son in favor of the company, who has taken possession of their property; and, if the father made the declaration which was referred to as to the title, it is likely he found it more comfortable

to be out of the province than in it at the time of this litigation. However that may be, I do not think that can bear against the defendant in attacking his credibility.

I find, therefore, as a fact that the possession had in 1870, had relation to the agreement by which the defendant was to become owner of the property, and had relation to the land in question within the confines of the fence, and that the occupation has been continuous since that time, and independent of the father.

I think the defendant is entitled to judgment in his favour confirming his possessory title.

In Michaelmas Sittings, 1887. *A. H. F. Lefroy* moved on notice to set aside the judgment entered for the defendant, and to enter judgment for the plaintiffs, or for a new trial.

In the same sittings, December 7, 1887, *A. H. F. Lefroy* supported the motion. To hold that the defendant did not know that the mortgage to the London and Canadian Loan Company covered the land he is now claiming is against the weight of evidence and the probabilities. It was registered, and the Registry Act makes it, and all its contents, including the name of the attesting witness, notice to all the world; and having by this act affirmed his father's right to mortgage the land, he should in equity be estopped from now setting up title against plaintiff who for value claims under his father: *Bigelow* on Estoppel, 4th ed., p. 553; *Hale* v. *Skinner*, 117 Mass. 474; *Story's* Equity Jurisprudence, 13th ed., p. 390, sec. 385; *ib.*, p. 395, sec. 390; *Teasdale* v. *Teasdale*, Sel. Cas. Ch. 59; *Forrest & Everard* on Estoppel, p. 304; *Boys* v. *Wood*, 39 U.C.R. 495. No reported case goes so far as to establish title by possession under the circumstances of this case. The possession must be exclusive, and this was not. This case is far more like those collected in *Rob. & Jos.* Digest, vol. 2, p. 2132, under the heading: "Exclusive possession—Possession by or among relatives," than it is like the case where title has been established by possession. See especially *Foley* v. *Foley*, 16 Gr. 463; *Orr* v. *Orr*, 31 U. C. R. 13; *McArthur* v. *McArthur*, 14 U. C. R. 544; *White* v. *Haight*, 11 Gr. 420; *Holmes* v. *Holmes*, 17 Gr. 610. Here, posses-

sion of the whole of the land should be attributed to the father, the head of the family, who certainly exercised some rights of ownership over the land in question, though they may be slight. *Sherboneau* v. *Jeffs*, 15 Gr. 574, shews that the defendant's possession was not itself notice to plaintiffs of any claim by him.

Porter (of Belleville), contra. The defendant's possession was clearly exclusive, and the learned Judge has so found. As to the mortgage to the London and Canadian Loan Company, the defendant, as the evidence shews, did not know his land was included in it.

February 11, 1888. GALT, C. J.—This was an action brought to recover possession of a piece of land.

The learned Judge has given a considered judgment setting out the facts of the case and concludes as follows: "I find, therefore, as a fact that the possession had in 1870, had relation to the agreement by which the defendant was to become owner of the property, and had relation to the land in question within the confines of the fence, and that the occupation has been continuous since that time, and independent of the father; there has been no acknowledgment of the father's title. I think the defendant is entitled to judgment in his favor confirming his possessory title."

In addition to the evidence relied on by the learned Judge, a witness of the name of McCarthy stated he was assessor in 1875 and 1876, and went to the father of the defendant, under whom the plaintiffs claim, and by his directions assessed the defendant for the portion of the lot now in question.

There was, in fact, no doubt that the defendant had been in the exclusive possession of the piece of land now in question, and for upwards of sixteen years; but Mr. Lefroy contended that the defendant was estopped from denying the title of his father, because in 1876 he witnessed a mortgage from him to The London and Canadian Loan Company. The defendant, while admitting he was a witness to this mortgage, denied positively that he knew that the land now

in question was embraced in it; and the learned Judge was of opinion that he spoke the truth, and consequently he was not, as against the plaintiffs, estopped.

This is really the only question.

Mr. Lefroy based his argument on this, that as by sec. 78 of the Registration Act, R.S.O. ch. 181, registration of any instrument is notice, therefore because the defendant was a witness to the mortgage to the Loan Company in 1876, he gave notice that he had no claim to the land covered by the conveyance.

I cannot see anything in the statute which supports this contention. What was intended was, that registration of any instrument should be considered notice to any subsequent purchaser of the existence of the incumbrance, and had nothing to do with the question whether the registered instrument was valid or invalid. We are not now considering the question whether as against The London and Canadian Loan Company the defendant might be barred, but as between him and the present plaintiffs.

The authorities cited by Mr. Lefroy do not expressly say that such an act would preclude the defendant; but it might be so held under the authority of the case of *Teasdale* v. *Teasdale*, cited in W. & T. L. C., vol. 2, p. 685; but that case was very much stronger against the then defendant than the present. There the plaintiff had been induced to contract marriage with the defendant's son on the faith of a marriage settlement by which the father, supposing his son to be tenant in fee, stood by and let his son make a settlement on his intended wife for her jointure. After the son's death the father discovered he was himself the tenant in fee. The bill was filed to establish the settlement. It was insisted on behalf of the father that the case was different from the cases where persons cognizant of their title had concealed them: that the father did not know of his title, and therefore could not be said to conceal it. But Lord King said he should "make no difference, whether he knew of his title or not * * considering the near relation of father and son; it is plain, it was thought the son had

the fee; and had it been known it was in the father, it would have been insisted on that he should have joined, else the marriage would not have been had, as he knew of the settlement, he should not take advantage against it."

At the time when the defendant witnessed the mortgage he had no title, he had then been in possession for only about six years; and he has satisfied the learned Judge that he was ignorant of its contents, otherwise he would not have witnessed it. Had this been the case, the mortgage would have been equally valid being witnessed by any other person, the then mortgagees were in no way that I can see affected by any future claim which he might thereafter have; and it is perfectly manifest that his being a witness has nothing whatever to do with the advance made by the present plaintiffs. The defendant was living on the property, and the plaintiffs ought to have made enquiry as to his right so to do.

The other authority cited is *Bigelow* on Estoppel, 4th ed, 553; but that falls far short of what is now contended for. I quote from the page "Thus (to give for the present a general illustration) the witnessing of a deed to one's own land, done with knowledge of the real state of the title, for a grantee ignorant of the rights of the witness will, at least in equity, estop the witness to set up against the grantee a claim to the land existing in the witness when the deed was executed." In the present case the deed to which the defendant was a witness is not in question, and therefore there is no reason based on the above authority why the defendant should not be permitted to avail himself of the Statute of Limitations under which, according to the authorities cited by Mr. Porter, viz., *Doe d. Perry* v. *Henderson*, 3 U. C. R. 486; *Doe d. Quinsey* v. *Caniffe* 5 U. C. R. 602 he is clearly entitled.

MACMAHON, J., concurred.

Motion dismissed, with costs.

[COMMON PLEAS DIVISION.]

GOWER v. LUSSE.

Verdict of jury—Malicious prosecution—Questions to jury without objection—Answering questions and giving general verdict.—Right to.

By secs. 263-4 of the C. L. P. Act, R. S. O., (1877,) ch. 50, except in certain actions including malicious prosecution, the Judge may require the jury to answer questions; and "in such case the jury shall answer such questions, and shall not give any verdict;" and by sec. 252, the parties in person, or by their attorney or counsel may waive trial by jury.

In an action for malicious prosecution, the trial Judge, without objection, left certain questions to the jury which they answered, but added that their verdict was for the plaintiff. The Judge disregarded the general verdict, and entered judgment, on the answers to the questions, for the defendant.

Held, that the parties must be assumed to have waived their right to a general verdict, and assented to judgment on the specific findings of fact; for if they could waive trial by jury altogether, there was no reason why they could not agree to the course adopted in this case. The jury therefore in finding a general verdict were doing what it was agreed they should not do, and what the parties and the Court dispensed with their doing.

THIS was an action for malicious prosecution, tried before MacMahon, J., and a jury, at Hamilton, at the Winter Assizes of 1888.

The plaintiff was arrested and brought before the Police Magistrate at Hamilton charged, on the information of the defendant, with stealing a part of a line fence. On the hearing of the charge the counsel for the prosecutor stated that there was no case, as the plaintiff had taken his own rails, whereupon the case was dismissed.

The learned Judge left the following questions to the jury without any objection:

1. Who put up the north half of the line fence prior to the fire nine years ago? A. Gower.

2. After the fire referred to in the first question, who was it rebuilt the fence on the north half of line? A. Lusse, under compulsion.

3. Did Gower remove the north half of the fence knowing or believing that that portion of the fence was Lusse's? A. No.

4. Did Lusse believe the statement made by his son that Gower was unlawfully removing the plaintiff's part of the fence? A. Yes.

5. Did Lusse tell to the magistrate all the material facts connected with the case, and did the magistrate act upon his own opinion in charging Gower with felony? A. Lusse did not tell all the material facts. The magistrate formed his opinion on the statements made by Lusse.

6. Was Lusse actuated by any other motive in making the complaint or laying the information than the vindication of the law? A. No.

The jury also on the same paper, after answering the questions, wrote: "Verdict in favor of plaintiff. Damages, $5. Counter-claim to be thrown out."

On motion to enter judgment, the general verdict was disregarded, the plaintiff's counsel objecting; and judgment was entered for the defendant, as the jury in answer to the 6th question said that the defendant was not "actuated by any other motive in making the complaint or laying the information than the vindication of the law."

In Easter Sittings, 1888, *G. Lynch-Staunton* obtained an order *nisi* to set aside the judgment entered for the defendant, and to enter judgment for the plaintiff on the general verdict.

There was also a cross-motion by the defendant to set aside the general verdict.

In the same Sittings, June 7, 1888, *G. Lynch-Staunton* supported the plaintiff's motion, and shewed cause to the defendant's. He referred to *Fitzjohn* v. *Mackinder*, 9 C. B. N. S. 405.

J. W. Nesbitt, contra, referred to R. S. C. ch. 164, p. 1906-8; *Young* v. *Nichol*, 9 O. R. 347; *Star Kidney Pad Co.* v. *Greenwood*, 5 O. R. 28; *Hicks* v. *Faulkner*, 8 Q. B. D. 167, 175; *Johnson* v. *Emerson*, L. R. 6 Ex. 329, 355; *Riddell* v. *Brown*, 24 U. C. R. 90, 97.

June 16, 1888. ROSE, J.—The rules governing modes of trial by jury are found in sub-secs. 263 and 264 of the C. L. P. Act, R. S. O. (1877), ch. 50; *Maclennan's* Judicature Acts, 2nd ed., p. 63, by which, except in certain actions among which are actions for malicious prosecution, the Judge may require the jury to answer questions, and "in such case the jury shall answer such questions, and shall not give any verdict."

By sec. 252, of the C.L.P. Act, *Maclennan*, 2nd ed., p. 61, it appears that the parties in person or by their attorneys or counsel may waive trial by jury; and I am of the opinion that when counsel assented, by not objecting, to the learned Judge leaving questions to the jury it must be taken that they waived their right to a general verdict, and assented to the learned Judge entering the verdict upon specific findings of fact, for if they could waive the trial by jury altogether I cannot see why they might not agree to the jury finding certain facts, and the verdict being entered upon such findings.

In *Broom's* Legal Maxims, 6th ed., p. 134, it is said: "It may appear in some measure superfluous to add that the consent which cures error in legal proceedings, may be implied as well as expressed: for instance—where, at the trial of a cause, a proposal was made by the Judge in the presence of counsel on both sides, who made no objection, that the jury should assess the damages contingently, with leave to the plaintiff to move to enter a verdict for the amount found by the jury, it was held that both parties were bound by the proposal, and that the plaintiff's counsel was not therefore at liberty to move for a new trial on the ground of misdirection, for *qui tacit consentire videtur*; the silence of counsel implied their assent to the course adopted by the Judge," &c., "a man who does not speak when he ought, shall not be heard when he desires to speak."

It seems to me that when the jury made the finding of a verdict for the plaintiff they were doing what it had been agreed they should not do, and what the parties and the Court had dispensed with their doing.

They were directed as to the meaning of malice and when they negatived any motive save a desire to vindicate the law they as it seems to me negatived malice, and so the plaintiff had no cause of action.

I have considered Mr. Staunton's interesting argument as to the distinction between motive and malice, but think it cannot prevail as the finding of the jury leaves no improper motive to be charged against the defendant.

It is not on the facts before us, and the naming of so small a sum as damages, in the interest of justice that a new trial should be granted, which might have been done if on the whole case it seemed that the plaintiff had been very badly used. The verdict was probably a compromise one, the jury evidently being of the opinion that he had not suffered much from the action of the defendant.

The plaintiff's motion will be discharged, with costs, and the defendant's order *nisi*, without costs.

GALT, C. J., concurred.

[MACMAHON, J., was not present at the argument, and took no part in the judgment.]

[COMMON PLEAS DIVISION.]

SWEENEY V. SWEENEY.

Maintenance, sum payable in lieu of—Payable at end of year—Consent judgment.

The plaintiff conveyed his farm to his son, subject to the payment of an annuity of $60 a year; and the plaintiff's "maintenance in board, washing and keep out of the farm," or to "receive in cash an amount sufficient to pay for the same yearly." There was also a bond of same date whereby defendant covenanted to furnish such maintenance, or pay such sum. The defendant sold the farm, and went to reside elsewhere. The plaintiff went and lived with him on the new farm for some years, receiving his maintenance, &c., but becoming dissatisfied left.

Held, that the plaintiff was not bound to reside with defendant wherever he might choose to go; and under the circumstances was entitled to be paid a reasonable sum for his maintenance, payable at the end of each year.

At the trial, the defendant's counsel raised the objection that the amount, if any, was only payable at the end of the year. The trial Judge overruled the objection, and decreed that plaintiff was entitled to receive $2 a week, payable weekly. The defendant's counsel then asked to have the amount payable monthly, to which the Judge acceeded, and gave judgment accordingly.

Held, that the judgment could not be deemed to be by consent, so as to preclude the defendant from afterwards moving against it.

THIS was an action brought by the plaintiff to recover from the defendant the sum of $60 for arrears of annuity, and a sum for the plaintiff's maintenance, &c.

The cause was tried before Falconbridge, J., without a jury, at Peterborough, at the Spring Assizes of 1888.

The plaintiff had been the owner of the east half of lot 31, in the 6th concession of Anstruther, in the county of Peterborough, and in 1876 he conveyed the land to his son, the defendant. The consideration expressed in the deed was natural love and affection. The grant, however, was made subject to an life annuity to the plaintiff of $60 a year, to be paid on the 1st December in each year, and also to the defendant furnishing the plaintiff with "proper maintenance in board, washing, and keep out of the farm;" or to "receive in cash an amount sufficient to pay for the same yearly." There was also a bond executed of even date, and between the same parties, whereby the defendant

bound himself to furnish the plaintiff with the said maintenance, &c., or to pay said amount. The defendant sold the lot, and went to reside on a farm in the township of Haldimand. The plaintiff went with him, and lived with him for a number of years, but becoming dissatisfied, left him, and claimed a reasonable sum for his maintenance, &c.

The learned Judge at the opening of the case endeavoured to get the parties to settle. The defendant said he was not able to pay more than the $60, a further sum of $110 for maintenance, and a small sum, say $10, for costs. The plaintiff declined to accept this, and the trial proceeded.

The defendant contended that the plaintiff was bound to reside with him wherever he might be, and to receive his support, and having voluntarily left him had no claim; and also that in any event the sum for such support was only payable at the end of the year, and that as the year had not elapsed, the action was premature.

The learned Judge was of opinion that the plaintiff was not bound to accept his maintenance at the township of Haldimand, or wherever the defendant might chose to go; but that he was entitled to claim a proper sum in lieu of such maintenance. He was also of opinion that the plaintiff was not bound to wait until the end of the year before he could maintain an action therefor. He therefore decreed that the plaintiff was entitled to recover the $60 for arrears of annuity, and $2 a week, payable weekly, for such maintenance, and a sum of $34 for seventeen weeks arrears.

The defendant's counsel then said: "I ask it be made payable monthly, as it would be very inconvenient to send $2 every week." The learned Judge replied: "I will make it $2 a week, payable monthly;" and directed the judgment to be entered accordingly for the plaintiff.

In Easter Sittings, 1888, notice of motion was given to set aside the judgment entered for the plaintiff, and to enter the judgment for the defendant, or to vary the same.

In the same Sittings, June 5, 1888, *C. J. Holman*, supported the motion and referred to *Coomber* v. *Howard*, 1 C. B. 440; *Woodfall*, L. & T., 13th ed., 395; *Vandewater* v. *Horton*, 9 O. R. 548; *Swainson* v. *Bentley*, 4 O. R. 572.

Leonard (of Peterborough) contra, referred to *Millette* v. *Sabourin*, 12 O. R. 248.

June 21, 1888. ROSE, J.—There are three questions to be considered in this case.

1. Whether the plaintiff is restricted to his "proper maintenance in board, washing, and keep out of the farm" on which the defendant now resides in lieu of out of the farm conveyed by the plaintiff to the defendant, and to which the defendant removed, and on which the plaintiff resided with him for some time; or is entitled to "receive in cash an amount sufficient to pay for the same yearly," and to live wherever he may please.

The defendant contends that he is bound to live with him on the farm where he, the defendant, now resides, and there to receive his support. The plaintiff contends that he is entitled to the cash payment.

2. The second question is, whether the cash is payable at the end of the year, or whether the learned Judge at the trial had the right to make it payable monthly.

3. There is also raised the question that the judgment was one arrived at by consent, and so not appealable.

As to the second question the words of the bond are as appear above in quotation marks.

In the light of *Swainson* v. *Bentley*, 4 O. R. 572, and *Millette* v. *Sabourin*, 12 O. R. 248, I am of the opinion that the plaintiff was not bound to live on the farm to which his son removed. As the son was not in a position to maintain him on the farm conveyed to him by his father, it is not necessary to express any opinion as to the effect of the bond with reference to living on such farm with the defendant.

The fact that the plaintiff removed to the farm where the defendant now resides, and there remained for some

time, makes no difference, if he was not under the agreement bound so to do. In addition to the above cases, the case of *Giraud* v. *Richmond*, 2 C. B. 835, may be referred to, where it was held that as parol evidence was not admissible to vary the terms of a written contract, neither were the subsequent acts of the parties.

I am, therefore, of the opinion that the judgment of the learned Judge on that ground was not open to objection.

As to the second question, it will be observed that the cash is to be paid yearly.

The cases of *Coomber* v. *Howard*, 1 C. B. 440; *Collett* v. *Curling*, 10 Q. B. 785, and *Giraud* v. *Richmond*, 2 C. B. 835, are strong authorities in favor of the defendant's contention, that the payment was to be made at the end of the year in one sum.

The first two cases make it clear that rent payable yearly is payable at the end of the year; and the last case applies the same ruling to a contract for personal services. There the contract was to pay "a salary at the following rates, viz., "for the first year £70; for the second year, £90," &c. Tindal, C. J., said, at p. 840: "Looking at its terms, it appears to me that the salary thereby agreed to be paid, was payable at the end of every year, and not otherwise." See also *Evans* v. *Roe*, L. R. 7 C. P. 138.

In *Grant* v. *McDonald*, 9 C. P. 195, the contract was to do certain work, *i. e.*, build a church; the terms of payment were £3,600, partly in materials, &c., and the balance was in three annual instalments, and according as the work progressed.

Draper, C. J., in giving judgment, assumed that the instalments were payable at the end of the respective years. He said, at p. 200: "I am strongly inclined to the opinion * * that the three years, at the expiration of each of which an instalment is to be paid," &c.

I am of the opinion, therefore, that when the parties contracted, that the plaintiff was to receive in cash an amount sufficient to pay for his board, &c., yearly, they contracted for payment yearly at the end of the year.

The fact that this payment is to be made in lieu of "board, washing, and keep," does not assist the plaintiff's contention, for the "board and keep" would be received daily, every day, but the "washing" probably not oftener than once a week.

It is to be observed that the "immediately preceding clause in the bond provides for payment out of the said land the yearly annuity of $60, to be paid yearly on the 1st day of December, in each and every year." So that the parties use the word "yearly," there to mean what it says.

The learned Judge assumed to fix the payments to be made weekly. Then, at the suggestion of the defendant, he made them monthly. I find nothing in the contract to warrant either time of payment, and know of no power to arbitrarily decide the time of payment where the contract is silent.

Moreover, it would not be in the contemplation of farmers that either weekly or monthly payments would be convenient, for, as we all may be assumed to know, the moneys realized by farmers from their farms come in periodically after harvesting of various crops.

As the parties have agreed to have the payment made yearly, I think they must so be made, and being payable yearly, I think they are by law payable at the end of the year.

I have given some attention to the contention that there was, at the trial, a judgment by consent as it was much pressed upon us, and I was and have been quite unable to see any ground whatever to rest it upon.

The case opened with an earnest effort on the part of my learned brother Falconbridge to induce the parties to effect a settlement; but the defendant felt that he was not financially able to pay more than the $60, a further sum of $110 for maintenance, and a small sum, say $10, for costs. This the plaintiff declined; and then the trial proceeded in the usual way. At the close of the evidence judgment was delivered formally, ordering, amongst other things, that the defendant pay $2 a week, payable weekly, and during that

time the arrears amounted to $34, of which payment was ordered.

The defendant's counsel, Mr. Hall, then said: "I ask that it be made payable monthly, as it would be very inconvenient to send $2 every week." To which the learned Judge replied: "I will make it $2 a week, payable monthly."

Certainly if the learned Judge had power to order payment of $2 a week, weekly, the defendant consented to the order being varied by making the moneys payable monthly; but I am unable to see how this can be a consent to the order, or make the judgment one by consent.

I find in the judgment that the learned Judge overruled the argument that the payment was to be made at the end of the year. The defendant was bound by that expression of opinion, so far as that Court was concerned, and had the right to obtain the best order he could, under the circumstances, and to appeal from that order and obtain a better one, if possible, from the appellate tribunal.

That is a matter of every day occurrence in settling judgments, and it seems to me it would startle the profession to be told that they must not struggle for the best terms possible in the first instance, lest it be said that they were consenting to the judgment. Such a rule would work a hardship that would be to the great detriment of suitors.

But I am glad to find that the point has been expressly decided by the Court of Appeal in *Bell* v. *Macklin*. The decision in appeal is unreported; but my learned brother Osler informs me that the appellant asked the Judge of first instance, Proudfoot, J., for an option, viz., to have the option of having the contract rescinded, instead of having a reference to the Master. Having had the option granted he appealed against the order. It was urged that having asked for and obtained the option, he was precluded from appealing. The Court thought otherwise, and heard and allowed the appeal.

In this case I think the plaintiff was entitled to a declaratory order or decree as to his right to have the annuity payable in cash, and that he was not bound to reside with

the defendant, and that such decree was properly made in this Court, as it was a matter of sufficient consequence involving the payment of an annual sum, for it may be a number of years. But I think my learned brother had no power to order payment of the annuity in weekly or monthly instalments, and that so much of his order must be set aside.

There having been only a partial success, there should be no costs of this motion. The judgment as to costs of the action will not be disturbed.

GALT, C. J., concurred.

[MACMAHON, J., was not present during the argument, and took no part in the judgment.]

[COMMON PLEAS DIVISION.]

TYSON v. ABERCROMBIE.

Evidence—Chattel mortgage—consideration—Parol evidence to vary.

A chattel mortgage of certain timber was expressed to be given in consideration of the payment of $300 to the mortgagor; all the covenants and provisions being applicable to a money payment or default therein. At the trial it was endeavoured by parol evidence to shew that upon the delivery of certain pieces of timber sold by the father of the mortgagor to the mortgagee, the whole of the provisions of the mortgage were to become ineffective and the mortgagee be prevented from claiming payment of the sum stipulated for in the manner and at the time set forth.

Held, that the parol evidence was inadmissible.

THIS was an action on a covenant to pay $300.

The covenant was in a chattel mortgage from the defendant to the plaintiff, and contained a covenant by the mortgagor to "warrant and forever defend by these presents," the goods and chattels conveyed "unto the mortgagee, his executors, administrators and assigns, against him

the mortgagor, his executors and administrators, and against all and every other person or persons whomsoever."

The mortgagor covenanted to pay the $300; and in default of payment, or if he should attempt to sell, dispose of, or part with the possession of the goods and chattels, or to remove them out of the county of Bruce, or suffer or permit them to be seized or taken in execution, without the consent of the mortgagee, then that the mortgagee might take possession, and sell at public auction, or private sale, and out of the proceeds pay expenses, debt, and costs. Provisoes for distress: that mortgagee was not bound to sell, but empowered to hold possession without interference on the part of the mortgagor, or any other person, and in case that the property mortgaged did not on sale realize the debt, then the mortgagor would pay the balance.

The mortgagor by the deed put the mortgagee in possession of the goods and chattels; and the deed further provided that until default the mortgagor should have quiet possession of the property.

The mortgagee's evidence was, that the mortgagor's father owing him a certain sum on general account for goods purchased at his store, and desiring more, he promised to give him goods which, with those already delivered, would amount in value to $300, upon receiving security, and that the mortgage was given as such security.

The defendant was not present at the trial; but his father, who gave evidence, admitted that he was indebted, and desired the additional advance, and that the mortgage was given and goods advanced to the amount of $300. He, however, set up that prior to giving the chattel mortgage he had sold to the plaintiff the certain pieces of timber and fence posts described and conveyed by the mortgage, and which were cut off land belonging to his son, the mortgagor, being in all 9,673 pieces at five cents for every piece from 4 up: that at the time the request was made for the further advance there had been delivered about 800 pieces, and that the plaintiff declined to make the advance

unless the delivery of the balance was secured, and that the mortgage was given, not to secure the payment of the $300, the amount of indebtedness to the plaintiff, but only to secure the repayment of such sum in the event of the non-delivery of the balance of the timber and posts: that the balance of the timber and posts had been delivered, and the mortgage was satisfied.

The case went to the jury, who found for the defendant.

In Easter sittings, June 5, 1888, a motion was made on behalf of the plaintiff to set aside the verdict entered for the defendant and to enter judgment for the plaintiff.

In the same sittings *Creasor*, Q. C., supported the motion, and referred to *Doe d. Levy* v. *Horne*, 3 Q. B. 757, 766; *Edwards* on Bailments, sec. 234.

Masson, Q. C., contra, referred to *Herman* on Chattel Mortgages, p. 509, sec. 214.

June 29, 1888. ROSE, J.—It is manifest that the defence denies the title of the defendant, the mortgagor, in the timber and posts, at the date of the mortgage, and asserts that it was then in the mortgagee, there having been a bargain and sale of the timber and posts, which, according to the evidence, were cut, and eight-tenths of which had been delivered pursuant to the terms of the contract.

It also denies that the mortgage was given to secure the $300 indebtedness as set out and provided for in the mortgage, and asserts that it was given to secure the delivery of the balance of timber and posts.

On the facts, apart from the question of law which I shall in a moment discuss, this contention presents the strange theory that while the plaintiff was indebted to the defendant's father in the sum of about $400 for the logs, that is, say 8,000 pieces at 5c. = $400, he required security for $300 the amount owing to him by the same person.

I think the evidence was not admissible.

But for the case of *General Finance Mortgage and Discount Co.* v. *Liberator Permanent Benefit Building*

Society, 10 Ch. D. 15, and the cases there referred to and discussed, I would have thought that a party giving a mortgage would be estopped from denying that the mortgagee did not take title through the mortgage; and from setting up that at the date of the mortgage he, the mortgagor, had not title in himself. If such were the law the defendant would be here estopped from setting up the prior sale, which would shew title out of himself and in the mortgagee at the date of the mortgage.

But assuming that a chattel mortgage is on the same footing as a real mortgage, there is here no recital of title, and no covenant of seizin.

As to the different views of the law respecting estoppel as to title by deed, whether by recital or covenant, see above case, also *Trust and Loan Co.* v. *Ruttan*, 1 S. C. R. 546 pp. 584-7, where Mr. Justice Strong states the the effect of the decisions in our own Courts, and seems to differ from the Master of the Rolls as to the case of *Bensley* v. *Burdon*, 8 L. J. Ch. 85, being overruled. See also *Casselman* v. *Casselman*, 9 O. R. 442 at 447-8. One cannot dispose of this question upon reason, so far as I can see, but only upon authority.

To quote the language of the Master of the Rolls in the above case of the *General Finance Mortgage and Discount Co.* v. *Liberator Permanent Benefit Building Society*: "Now this question depends upon decision, that is to say, upon authority. The whole doctrine of estoppel of this kind, which is a fictitious statement treated as true, might have been founded in reason, but I am not sure that it was. There is another kind of estoppel—estoppel by representation—which is founded upon reason, and it is founded upon decision also."

I am, however, clear that the mortgagor cannot without reforming the instrument—and there is no evidence here to support an application to reform; no fraud or mutual mistake shewn—be allowed to offer or give parol evidence to shew that the mortgage was to become void, or be satisfied or paid, not by payment of the $300, but by delivery of the balance of the logs.

In *Porteous* v. *Muir*, 8 O. R. 127, we considered the admissibility of parol evidence to extend the time for payment of a promissory note, and held it inadmissible. The late Chief Justice Cameron reviewed the authorities. I refer particularly to *Woodbridge* v. *Spooner*, 3 B. & Al. 233, at pp. 235-6, and to *Abrey* v. *Crux*, L. R. 5 C. P. 37, at p. 42, where Bovill, C. J. said, referring to the facts of that case: "that which the plea attempts to set up is, that the defendant, at the time he signed the bill as drawer entered into a contract under which the payment was to be made at a different time and in a different manner from that which the bill imports—an agreement, in short, which contradicts the written contract, and oral evidence of which is inadmissible, according to the authority of numerous decisions.

In equity it has been allowed to shew that a deed absolute in form was in fact a mortgage. Something which Strong, V. C., in *Morrison* v. *Robinson*, 19 Gr. 480, said he would have had difficulty in doing apart from the decisions.

Parol evidence has also been received in equity, to shew that a mortgage once paid off was agreed to remain as security for a further advance: that it was held as security for the payment of a promissory note; but I have found no case going the length to which it is sought to carry this.

I have examined and refer to *Penn* v. *Lockwood*, 1 Gr. 567; *Gibb* v. *Warren*, 7 Gr. 496; *Inglis* v. *Gilchrist*, 10 Gr. 301; *Teed* v. *Carruthers*, 2 Y. & C. C. C. 31; *Clifford* v. *Turrell*, 1 Y. & C.C.C. 138, at p. 149; *Brownlee* v. *Cunningham*, 13 Gr. 586.

In *Marsh* v. *Hunt*, 9 A. R., 595, at p. 609, Mr. Justice Burton refers to *Clifford* v. *Turrell*. In that case it was laid down that it was not in contradiction of the instrument to prove a larger consideration than that which is stated; but Mr. Justice Burton points out that the consideration in the deed was nominal; and adds: "But if the question for consideration was confined to one point, whether where a substantial money consideration is mentioned in the deed the parties could go out of the deed, and prove that in truth

there was a larger money consideration, and seek to recover the difference, I should require further time for consideration."

In *Clifford* v. *Turrell*, Knight Bruce, V.C., said, at p. 149: "The rule is, that where there is one consideration stated in the deed, you may prove any other which existed, not in contradiction to the instrument," &c.

The language of Proudfoot, J., in *McIntyre* v. *Thompson*, 6 O. R. 710, at p. 713, that "a number of cases has established that a mortgage for a specific sum may be shewn to be for other purposes by parol evidence," must, I think, be confined to the facts of the cases referred to by him, namely, those above cited from *Penn* v. *Lockwood*, 1 Gr. 567; *Inglis* v. *Gilchrist*, 10 Gr. 301; *Brownlee* v. *Cunningham*, 13 Gr. 586; and *Morrison* v. *Robinson*, 19 Gr. 480.

Here the mortgage was given for an expressed consideration of $300, and in fact was given to secure repayment of such sum. The witnessing clause so states; the proviso is for repayment at the expiry of three months; the further provisoes and covenants are applicable only to the money payment or default therein and yet it is endeavored by parol evidence to shew that upon delivery of certain pieces of timber the whole of its provisions were to become ineffective, and the mortgagee be prevented from claiming the payment of the sum stipulated for in the manner and at the time set forth.

To adopt the language of Mr. Justice Burton, in *McNeeley* v. *McWilliams*, 13 A. R., 324 at p. 330: "Where the parties have by a written paper, purporting to be complete on its face, undertaken to define their agreement, parol evidence ought not to be admitted to add a single stipulation, or vary the legal effect of those contained in it." I refer to the various opinions and authorities referred to in that case.

I think, therefore, that the document must be treated as a mortgage to secure repayment of $300 as therein stated, and that the evidence as to the provision for payment or satisfaction by delivery of the timber, must be rejected.

But it is further alleged that the plaintiff, assuming him to have been entitled to recover payment of the $300, took possession and sold, or so dealt with the chattels mortgaged as to ren ler him liable to account for the value.

There is disputed testimony on this point, and the case must go down again for trial to have the facts ascertained. It would, I think, be better that specific questions be left to the jury to have determined the various questions of fact raised, so that on their answers the law governing the dealings by a bailee or mortgagee of chattels may be applied.

The costs of this motion, and of the new trial, will be costs in the cause to the successful party.

GALT, C. J., concurred.

[MACMAHON, J., was not present during the argument, and took no part in the judgment.]

[COMMON PLEAS DIVISION.]

LYDEN v. McGEE AND THE INDUSTRIAL EXHIBITION ASSOCIATION.

Malicious arrest—False imprisonment—Reasonable and probable cause—Misdirection—Damages—Liability of corporation for act of agent.

Action of trespass for false imprisonment. The plaintiff was arrested, as alleged, by direction of the defendants' agent the treasurer of the defendant association. On being brought before the police magistrate, the defendants did not appear to prosecute, when the police magistrate remanded plaintiff, and subsequently dismissed the charge, and discharged the plaintiff. At the trial the Judge charged the jury that it was not necessary to enquire whether or not the plaintiff was guilty of the crime charged against him, for by his acquittal he must be taken to have been not guilty, and the fact that M. believed him guilty, was no excuse. If G. had laid an information, it would have been different, but not having done so, the only question was whether he gave plaintiff into custody.

Held, misdirection; for the defendant M. was justified in ordering the plaintiff's arrest if a felony was committed, and he had reasonable and probable cause to suspect that plaintiff committed the felony.

Held, also, that the defendants could only be liable for the damage proceeding from the arrest, and not for the subsequent proceedings.

A corporation may be liable for false imprisonment under an order of its agent acting within the scope of his authority.

THIS was an action for wrongful dismissal, and for trespass for false imprisonment of the plaintiff, and was tried before Street, J., without a jury, at Toronto, at the Spring Assizes of 1888.

The case went to the jury only on the claim for false imprisonment.

The plaintiff claimed damages because, as he alleged, the defendant McGee, the treasurer of the defendant association, directed a constable to arrest him on the charge of fraudulently appropriating moneys of the association which he had received as gatekeeper.

The plaintiff was arrested and brought before the police magistrate. The defendant did not appear to prosecute when the magistrate remanded the plaintiff, and afterwards on his again being brought before him dismissed the charge and discharged the plaintiff.

The Judge ruled that there was no case made out against the association; but left the case to the jury as against McGee.

The Judge's charge was objected to, the grounds of which appear in the order *nisi*.

The jury answered certain questions in favour of the plaintiff, and assessed the damages at $500, and the Judge directed judgment for the plaintiff for that amount and costs.

In Easter Sittings 1888, the defendant obtained an order *nisi* to set aside the judgment entered for the plaintiff and for a new trial, on the grounds:

1. That the learned Judge erred in directing the jury that "it is not necessary to enquire whether Mr. Lyden had been guilty of the crime he is charged with, or not. He has been acquitted by the Court before which he was tried, and for the purposes of this action we must take it that he was not guilty of the offence with which he was charged. And the mere fact that Mr. McGee believed that he was guilty of the offence, is not a complete answer to this action of trespass which has been brought. That is to say, if Mr. McGee ordered him into custody, then he cannot excuse himself by saying, I believe that he was guilty of a crime. If he laid an information against him, that would have been an excuse, but as he did not lay any information, the only question is, whether he gave him into custody."

2. That the learned Judge should have directed the jury that the defendant McGee was liable only for damages arising from the arrest, and not for the subsequent proceedings.

The plaintiff also obtained an order *nisi* to set aside the judgment in favour of the defendant association, and to enter judgment for the plaintiff against them, on the ground that it was liable for the acts of its officer.

In Easter sittings, June 8, 1888, the orders were argued.

Lount, Q. C., for the defendant McGee, referred to *Addison* on Torts, 5th ed., pp. 128, 132; *Ball* on Torts 94-6; *Roscoe's* N. P. Ev. 13th ed., pp. 889, 892-3; *Lister* v. *Perryman*, L. R. 3 Ex. 197, L. R. 4 H. L. 521; *Patterson* v. *Scott*, 38 U. C. R. 642.

Bigelow, for the plaintiff, referred to *Abrath* v. *North Eastern R. W. Co.*, 11 Q. B. D. 440, 11 App. Cas. 247; *McGill* v. *Walton* 15 O. R. 362.

McWilliams, for the Association, referred to *Addison* on Torts, 6th ed., p. 119.

June 29, 1888. ROSE, J.—I am of the opinion that the defendant must succeed on the first ground taken.

Beckwith v. *Philby*, 6 B. & C. 635-8, decides that a private person is justified in arresting or ordering the arrest of a party when a felony has been actually committed, and there is reasonable and probable cause to suspect that the party committed the felony. See also *Patterson* v. *Scott*, 38 U. C. R. 642, 644, where the law is fully stated.

There must, therefore, be a new trial, so that such question may be submitted to the jury.

As to the second ground, it has been laid down in *Lock* v. *Ashton*, 12 Q. B. 871, that in an action of trespass the defendant is liable only for the trespass in arresting, but not for a remand by the magistrate.

In the 4th ed., of *Mayne* on Damages, at p. 430, it is said: "Where the action is trespass for false imprisonment, damages cannot be given for a remand by the magistrate, which is a distinct judicial act proceeding from himself alone. * * They are altogether different causes of action" referring to actions for false imprisonment and malicious prosecution. "Consequently, in the action for false imprisonment, none of the circumstances connected with the subsequent prosecution can be proved or allowed for in damages," citing *Guest* v. *Warren*, 9 Ex. 379.

During the argument in *Lock* v. *Ashton*, Erle, J., said, at p. 875: "A turning point here may be, whether or not the remand was at the defendant's instance." Lord Denman, C.J.: "Much may depend on that."

It is here alleged that the defendant McGee at the most merely directed the arrest of the plaintiff, and that he was subsequently detained and prosecuted by the voluntary interference of others acting independently of him, and that he in no wise authorized or directed such proceedings.

In the new trial the jury should be called upon to find the facts as to this contention, and if they find for the plaintiff, to confine the damage to the trespass committed by McGee, or under his direction or authority.

As to the motion to set aside the judgment in favour of the defendant association.

In *Re McSorley* v. *Mayor, &c., of St. John*, 6 S. C. R. 531, Sir Wm. Ritchie, C. J., said, at p. 552: "A corporation cannot be made liable for false imprisonment, unless the party complaining gives evidence justifying the jury in finding that the persons actually imprisoning him had authority from the corporation," citing *Eastern Counties R. W. Co.* v. *Broom*, 6 Ex. 314. Reference may also be had to *Goff* v. *Great Northern R. W. Co.*, 3 E. & E. 672; *Poulton* v. *London and South-Western R. W. Co.*, L. R. 2 Q. B. 534.

From these cases it is clear that a corporation may be liable for false imprisonment under an order by its agent acting within the scope of his authority. In the latter case, the company was held not liable for false imprisonment under the order of its station master, who caused the arrest of the plaintiff for not paying the fare for a horse that had been carried by the company. The Act of Parliament authorized the arrest of a person for not paying his own fare, but not for not paying fare for his horse. It was held that there was no authority, because the company having no power to arrest for such cause, it was not within the scope of the agent's authority: that the company having no such power could not have given the agent any power to do the act; and, therefore, the plaintiff's remedy, if at all, was against the station master personally.

If, within the power of the company, then authority would be implied, if the agent was acting in the execution of the duties of his office, although he made a mistake or committed an excess.

The case of the *Eastern Counties R. W. Co.* v. *Broom*, 6 Ex. 314, decided that an action for false imprisonment would lie against a corporation for an act of an agent

authorized to do the act, and that the authority need not be under seal; or for an act which thecompany had power to do and done by the agent without authority but for its benefit, if ratified, citing from 4 Inst. 327: "He that receiveth a trespasser, and agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment."

In *Abrath* v. *North Eastern R. W. Co.*, 11 App. Cas. 247, Lord Bramwell stated that, in his opinion, no such action would lie against a corporation; but others of the Law Lords pointed out that the point was not in question in that case. No reference was made by him to the case of *Edwards* v. *Midland R. W. Co.*, 6 Q. B. D. 287, in which it was held that an action for a malicious prosecution will lie against a company; and that the employment of a policeman by a company to protect its property, was an act within the scope of the incorporation of the company. There the plaintiff had been arrested by a detective policeman in the employ of the company, on a charge of theft, and the charge had been dismissed by the magistrate.

Lord Bramwell had evidently overlooked that case as will be seen by reference to his observations.

In the case before us, it was proved that the defendant McGee was treasurer of the association, and that the plaintiff received his instructions from him: that he was given a card with instructions to employees, on which was printed under the head "Special Notice:" "Breach of trust on the part of any employee will be followed by instant dismissal and prosecution." At the foot, was "Approved by the Board." "H. J. HILL, *Manager and Secretary.*"

After the nonsuit, the defendant McGee was examined, and it appeared that the association was the real defendant here: that he had not paid, and did not expect to pay, anything in defending the action, and that what he did was done in the interest of the asssociation, and for its benefit.

As the case is to go down for a new trial, it will be better to have the facts submitted to the jury to ascertain whether

there is any ground for holding that what McGee did was outside of his authority.

From the case of *Edwards* v. *Midland R. W. Co.*, it will be assumed that to have had the plaintiff arrested for theft was within the scope of the incorporation of the company. From Mr. McGee's position it will be a question whether he was entrusted with the duty of watching over the plaintiff, and seeing that the instructions given to the plaintiff were observed, and to enforce obedience, and whether in directing his arrest he was acting in his office in the execution of his duty, and to promote the interests of the association; and further, if there remain any question as to directions or instructions to McGee, whether there was any ratification by the association.

In my opinion the judgment in favor of the association must be set aside, and the case go down again for a new trial against both defendants.

As each party has succeeded, there will be no costs of the motion. I am treating the association and McGee as in the same interest, and the association as the defendant assuming the cost and risk of defence. The costs of both trials will be in the cause to the successful party.

GALT, C. J., concurred.

[MACMAHON, J., was not present during the argument, and took no part in the judgment.]

[COMMON PLEAS DIVISION.]

LANGMAID v. MICKLE.

Crown Patent—Free Grant lands—Pine timber—Right to—Estoppel.

In 1871, S. under the Free Grant and Homestead Act, located certain land in the Crown Lands Department, but never entered into possession, or performed the settlement duties. The lot was located through B., the crown lands agent for the district. In 1873 S. sold the timber on the lot to B. In 1875 B. wrote the department asking if a cancellation and relocation would affect his title to the pine, and that it be relocated subject to his claim. The department replied that if the purchase was a *bonâ fide* one, and in accordance with the order in council, a relocation would not affect his claim. The order in council was, that the department would recognize the right of all purchasers or locatees of free grant lands who had purchased or located any lot on or before 30th September, 1871, and who on that day were in actual occupation of, or resident on the lots located, to sell and dispose of all pine trees on the said lots. On 10th September, 1875, S.'s location was cancelled for non-performance of the settlement duties; and on the 3rd July, 1876, the lot was relocated to the plaintiff. The plaintiff was informed by B. of his purchase of the timber, and stated that he had a good title to it, which the plaintiff believed, and acted on that belief. On the 9th November, 1886, the patent issued to the plaintiff, and contained no reservation of the pine trees. In 1883 B. sold the timber to the defendant, who in October, 1886, cut same notwithstanding he was notified by the plaintiff to desist. The timber was removed by defendant after the issue of the patent. In an action by plaintiff to recover the value of the timber.

Held, that as the patent contained no reservation of the pine trees standing or being on the land, and as the land was located prior to 43 Vic. ch. 4 (O.) the trees "remaining on the land" at the time of the patent passed to the plaintiff; that prior to the issue of the patent, the locatee under R. S. O. ch. 24, sec. 10 had no right to cut timber except for building, fencing and fuel, and in the actual clearing of the land for cultivation; nor was there any right under 37 Vic. ch. 23 (O.), for the locatee was not on or before 30th September, 1871, "in actual occupation or resident on the lots located;" and, semble, that the words "remaining on the land" applied only to the trees not then cut; but it was not necessary to decide this point, for the plaintiff being in possession with the assent of the crown, he had title to the timber as against the defendant a wrong-doer.

Held, also that the plaintiff having acted on B.'s misrepresentations was not estopped from bringing the action.

Trespass to lot 9 in the 7th concession of the township of McLean, and cutting and removal of a quantity of pine timber.

The defendant claimed that he was the owner of the timber, having purchased it from one Brown, who purchased it from one Schofield, who in 1871 had become the locatee, and was at the time of the sale in actual occupation of the

land: that the plaintiff had due notice of such sale, and after he had obtained his patent, gave Brown permission to have the timber taken off the land in consideration of $100 paid him, and by reason of such consent was aided by Brown in obtaining the patent.

The cause was tried before Robertson, J., and a jury, at Barrie, at the Autumn Assizes of 1887.

It appeared that on the 2nd September, 1871, Schofield had, under "The Free Grant and Homestead Act," located in the Crown Lands Department the lot in question, but never entered into possession or performed the settlement duties. The lot was located through Brown, who was the Crown Lands agent for the district. In 1873, Brown entered into a written agreement, as he alleged, with Schofield, for the purchase of the pine timber off the lot for $125, and paid him $30 on account. The agreement he said had been lost.

In 1875, Brown, wrote to the Crown Lands Department asking if a cancellation and re-location of the lot would affect his title to the pine, and asking that the lot be re-located subject to his claim. The Department replied: "That if the purchase of the timber was at the time it was made a *bonâ fide* one, and in accordance with the Order in Council, the Department would not consider a re-location of the lot in question as affecting his claim to the timber purchased."

The Order in Council referred to was dated 4th October, 1871, and provided that the Department of Crown Lands would recognize the right of all purchasers or locatees of free grant lands "who shall have so purchased or located any lot in the said township on or before the 30th September, 1871, and who shall on that day have been in the actual occupation of and resident on the lots located, to sell or dispose of all pine trees standing or being on the lots located or purchased and occupied by them, subject to the payment of the above duties, which the Department will collect on all timber and saw logs found to have been cut on any sold or located lot."

On 10th December, 1875, Schofield's location was cancelled for non-performance of the settlement duties; and on 3rd July, 1876, it was re-located to the plaintiff. On 9th November, 1886, the patent issued to the plaintiff, and contained no reservation of the pine trees.

The defendant claimed that the plaintiff located subject to Brown's right to the timber; and that, by deed, dated 3rd March, 1882, in consideration of $350, he purchased the timber from Brown, of which the plaintiff had knowledge. In October, 1886, the defendant cut the timber, notwithstanding he was notified by plaintiff to desist. The timber was removed by the defendant after the issue of the patent.

The jury found for the plaintiff with $1200 damages—$1,000 for the value of the timber, and $200 for damages to the rest of the bush.

In Michaelmas Sittings, 1887, *Delamere* obtained an order *nisi* to set aside the judgment entered for the plaintiff, and to enter judgment for the defendant.

In Hilary Sittings, February 18, 1888, *Delamere* supported the order, and referred to *Rae* v. *Trim*, 27 Gr. 374; *Cockburn* v. *Muskoka Mill and Lumber Co.*, 13 O. R. 343.

Mahaffy, contra, referred to *Hutchinson* v. *Beatty*, 40 U. C. R. 135.

June 29, 1888. ROSE, J.—The patent in this case was dated on the 9th November, 1886, and contained no reservation of the pine trees standing and being on the lands, as they had been located prior to the passing of 43 Vic. ch. 4 (O.) See *Dunkin* v. *Cockburn*, 13 O. R. 254.

Under the patent, therefore, all trees remaining on the land at the time the patent issued passed to the plaintiff under his patent by virtue of sub-sec. 2 of sec. 10 of R. S. O. ch. 24.

Under such section there was no right to cut these trees for the purpose of sale and removal, or for any purpose save "building, fencing, and fuel," and "in actual clearing

said land for cultivation." See *Cockburn* v. *Muskoka Mill and Lumber Co.*, 13 O. R. 343. Nor was there the right to cut under 37 Vic. ch. 23 (O.), as has been pointed out, for the locatee was not on or before the 30th September, 1871, "in actual occupation of, and resident on the lots located." See *Hutchinson* v. *Beatty*, 40 U. C. R. 135.

No one, therefore, had a right to cut these trees when they were cut, *i. e.*, in October, 1886, for that was prior to the issue of the patent; and the cutting of them was a trespass in respect to which a right of action at once vested in the Crown.

What then was the effect of the issue of the patent?

We may, I think, take it for granted, that the patent was issued without knowledge on the part of the Crown of the trees having been cut. And as between the Crown and the patentee, the plaintiff, the intention no doubt was that the land should pass with the trees, including these trees, they being understood then to be standing trees.

Did the property in the trees then cut down pass to the plaintiff under the words, "remaining on the land."

Section 10 speaks of trees "growing and being" "cut and disposed of;" and then of trees "remaining on the land."

Section 3 of 43 Vic. ch. 4, (O.) provides that patents issued under that section "shall contain a reservation of all pine trees *standing or being* on said lands." Licensees are empowered to "cut and remove such trees," "cut and use," or "cut and dispose of."

I am inclined to think that such language is applicable only to standing trees; but it is not necessary to decide, for the plaintiff being in possession with the assent of the Crown, he has title as against a wrong-doer who cannot set up the *jus tertii*. See *Nicholson* v. *Paye*, 27 U. C. R. 505; *McDougall* v. *Smith*, 30 U. C. R. 607.

It is, however, claimed that the plaintiff has estopped himself from bringing this action.

It appears that the lot was located to Schofield on the 2nd September, 1871. It would appear as if the parties had

assumed to act upon the order in council of 4th October, 1871; but it did not apply, as Schofield was not "in the actual occupation of or resident on the lots located."

On the first of April, 1875, Brown wrote to the department asking if a cancellation and relocation would affect his title to the pine, and asking that the lot be relocated subject to his claim. In reply, he was informed "that if the purchase of the timber was at the time it was made a *bonâ fide* one, and in accordance with the order in Council, the department would not consider a relocation of the lot in question as affecting "his claim to the timber purchased."

On the 15th of December, 1875, Schofield's location was cancelled for nonperformance of duties.

On the 3rd of February, 1876, it was relocated to the plaintiff.

It was alleged, and probably was the fact, that the plaintiff was informed by Brown, who acted as a Crown land agent, that he had purchased the timber, and that it was his. Brown was the plaintiff's then employer. The plaintiff no doubt believed this statement, and probably took the steps he did in locating and patenting the lot on such belief.

It is also probably the case that Brown induced him to take out the patent in order to enable him or the defendant to take off the timber without payment of the crown dues which, assuming the right to take it off under the order in council, would have become payable.

I think it also appears that the plaintiff knew of the sale by Brown to Mickle, although it is not said that he was informed of it until after it had been made.

This is urged as an estoppel; but I think not successfully, as the whole of the plaintiff's action was determined by the statement of Brown that he had a good title to the timber, which, in fact, he had not, and which he knew he could not have, if he was not very stupid or ignorant. The plaintiff had a right to suppose that a man who acted as Crown land agent would understand the law regulating licenses, location, patents, and the sale of timber, suffici-

ently to know whether Schofield had complied with the terms of the order in Council; and relying, as he says he did, upon the statement by Brown, that the pine was his, he can not, in my opinion, be estopped by a course of action consistent with such statement and belief, although it works to the detriment of Brown, or of the defendant.

I cannot see how the defendant can set up an estoppel, as he never had any conversation with the plaintiff before purchasing from Brown; and although Brown says that the plaintiff was told by him of the contract and sale to the defendant, and in effect assented thereto; and even though it be assumed that the defendant purchased upon the representation by Brown that the plaintiff did so assent, which was not proved, still the plaintiff could not be bound for all that he said or did was upon the assumption of the truth of the statement by Brown, that the title to the timber was in him.

The jury were charged that, "If the plaintiff through fraud or carelessness, or negligence, did any thing to induce the defendant to make this purchase from Brown then that, I think is an estoppel and he is bound by it."

On this evidence, such a direction was sufficiently favorable to the defendant, and the jury have by their verdict negatived any such charge of fraud, carelessness, or negligence.

As to the damages, the jury awarded $1,000 "for the value of the timber, and $200 for the damage to the rest of the bush."

There is no evidence of damage to the bush other than such as would be consequent to the taking out of any timber; and there is no witness who makes any estimate of the amount of such damage. Indeed, except incidentally the question was not raised at the trial.

The outside estimate of value of timber taken, was by a witness, Henderson, who measured the logs as skidded, and found 461,532 feet, and 18,060 feet of square timber.

The learned Judge at the trial directed the jury without objection, as follows: "We will take it at 479,500 feet, that

would be $959; if you agree that $2 is a fair sum to allow this man."

For the defence it was testified that $1 per m. was all that was being paid.

I think the jury in allowing $1,000 instead of $959, and $200 for damage to the bush, without evidence, have shewn an excess of liberality; and that, unless the plaintiff will consent to reduce the verdict to $959, this motion must be allowed with costs to the defendant, the Court setting aside the verdict and judgment, and granting a new trial without costs. If he consent to such reduction then the motion will be dismissed, without costs.

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

[COMMON PLEAS DIVISION.]

NORTH BRITISH MERCANTILE INSURANCE COMPANY V. KEAN ET AL.

Principal and surety—Notice terminating liability—Bond applicable to present not future appointment.

The defendants executed a bond as sureties for one K., which recited his appointment as agent of the plaintiffs. The bond was sent, executed, to the head office of the plaintiffs, but no appointment was, in fact, made by them for a year and a half afterwards, when K. was notified of his appointment, but of this the defendants were not informed. About three months after the execution of the bond, the defendants, or one of them, wrote to plaintiff's head office repudiating the suretyship, but received no reply.

Held, that whether the plaintiffs were notified by one or both defendants, the latter were discharged.

Per ROSE, J., also. No appointment having been made in fact when the bond was executed, the defendants could not be held liable for defaults occurring months afterwards, for their contract was in respect of a present, not a future engagement.

THIS was an action brought against the defendants as sureties for one Kean, to recover a balance due by him as agent at Orillia for the plaintiffs.

The defence was, that at the time when the bond was executed, viz., 18th June, 1884, it was represented to them that the said Kean had been appointed agent for plaintiffs at Orillia, whereas the said Kean had not then been appointed agent, and was not so appointed until December, 1885, and that before he was so appointed they had notified the plaintiffs that they were no longer willing to be held as sureties for the said Kean; and that the defendants had never notified them of the acceptance of said bond.

The case was tried before Falconbridge, J., without a jury, at Barrie, at the Spring Assizes of 1888.

The learned Judge gave judgment in favor of the defendants, on the ground that the defendants were never notified by the plaintiffs of their acceptance of the bond.

In Easter Sittings, 1888, the plaintiffs moved to set aside this judgment.

In the same sittings, June 4th, 1888, *Pepler* supported the motion, and referred to *Mozley* v. *Tinkler*, 1 C. M. & R. 692; *Pollock* on Contracts, 4th ed., 46-8, 386; *Xenos* v. *Wickham*, L. R. 2 H. L. 296; *Leake* on Contracts, (ed. 1878), 134, 140-2; *Davis Sewing Machine Co.* v. *Richards*, 115 U. S. 524; *Exchange Bank* v. *Springer*, 13 O. R. 390, 404; *Regina* v. *Leeming*, 7 U. C. R. 306; *Cosgrave Brewing and Malting Co.* v. *Starrs*, 11 A. R. 156; *De Colyar* on Guarantees, 2nd ed., 345; *Corporation of Essex* v. *Strong*, 21 U. C. R. 149; *Baylies* on Sureties, 205, 255; *Byrne* v. *Muzio*, L. R. 8 Ir. Ex. 396; *Mactaggart* v. *Watson*, 3 Cl. & F. 525; *Albany Dutch Church* v. *Vedder*, 14 Wend. 165; *Trent Navigation Co.* v. *Harley*, 10 East 34; *Taylor's* Equity Jurisprudence, sec. 247; *Brandt* on Suretyship, p. 494, sec. 368; *Municipal Corporation of East Zorra* v. *Douglas*, 17 Gr. 462; *Carter* v. *White*, 25 Ch. D. 666.

Kean, contra, referred to *Addison* on Contracts, 11th ed., 854; *Brandt* on Suretyship, p. 194, sec. 138; *De Colyar* on Guarantees, 2nd ed, 225-6; *The Mayor &c. of Cambridge* v. *Dennis*, E. B. & E. 660; *Corporation of Adjala* v. *McElroy*, 9 O. R. 580, 587; *Phillips* v. *Foxall*, L. R. 7 Q.

B. 666; *Taylor's* Equity Jurisprudence, sec. 245; *Pollock* on Contracts, 3rd ed., 259, 261.

June 29, 1888. GAIT, C. J.—Whatever question might be raised as to the point decided in *Mozley* v. *Tinkler*, 1 C. M. & R. 692, being inapplicable to the present, on the ground that in this case it is positively stated that the plaintiffs had accepted Kean as their agent, and had appointed him, there can be no question that the reasoning of the learned Judge, Mr. Justice Gray, who delivered the opinion of the Supreme Court in *Davis Sewing Machine Co.* v. *Richards*, 115 U. S. 524, is in accordance with the judgment of the learned Judge who tried this case; but, apart from that, I am of opinion that months before the appointment was made the defendants had notified the plaintiffs that they would not continue as sureties for the agent.

The facts may be briefly stated as follows: Kean had applied to the plaintiffs to be appointed as their agent in Orillia. He was told it would be necessary for him to obtain sureties; he applied to the defendants to become his sureties. They agreed to do so; and executed the bond in question. This bond was sent to the head office in Montreal, and was put to one side, and the whole matter appears to have been forgotten by Mr. Davidson, and nothing was done until December, 1885, when Kean again applied, and Mr. Davidson, apologizing for his oversight, sent him "supplies," and he became their agent. In the meantime, however, viz., September, 1884, in consequence of some disagreement between Kean and the defendants, the defendants wrote to Montreal repudiating their suretyship. They received no answer, and thought the matter was at an end. The officers of the company stated they never received these letters, and that they can find no trace of them; but when we bear in mind that beyond question they had forgotten the application of Kean, and had made no appointment, it appears to me that the weight of evidence tends to shew these letters were written. The learned Judge has

said: "Giving credence, as I do, to Mr. Evans's testimony, I find that Murray did not give the notice in question, and that Black did." I think, however, it is a matter of indifference whether one or both letters were written, for after having received notice from one of the sureties, the other surety had a right to be informed that his co-surety had withdrawn, more especially as no appointment had then been made.

This motion must be discharged, with costs.

ROSE, J.—I agree to the conclusions arrived at by the learned Chief Justice, that the sureties are discharged.

In addition to the facts set out in his judgment, it appears that the bond recited an appointment at its date as follows: "Whereas the above bounden B. Kean has been appointed the agent of the said company at Orillia."

I am of the opinion that no appointment in fact having been made, the sureties could not be made liable for default made months after, even if they had been given notice of such appointment, for they contracted in respect to a present appointment, and not in respect to an appointment to be made at some indefinite time in the future at the will of the company.

And, even if they could have been made liable upon notice, it would seem contrary to natural justice that they might be made responsible in respect to a future appointment without notice that the company looked to them, for on the facts of this case they might well assume that they were not to be looked to.

There is also much force in the objection that the conduct of the company after the default by the agent, during the said six months of the agency, discharged the sureties.

I agree that the motion must be dismissed, with costs.

[MACMAHON, J., was not present at the argument, and took no part in the judgment.]

[COMMON PLEAS DIVISION.]

ROBINSON V. THE CORPORATION OF THE TOWN OF OWEN SOUND.

Work and labour—Building contract—Final certificate of engineer of completion of work—Necessity for—Condition precedent.

The plaintiff entered into a contract with defendants for the construction of certain main sewers. The contract provided that the work and material should in all things be performed and provided according to the plans and specifications, by a named date, and to the entire satisfaction of the engineer in charge of the work. The specifications provided that the contractor should, on the 1st day of each month, hand in to the engineer his account for work during the preceding month, and be paid on the certificate of the engineer at the rate of 85 per cent. of work done during the previous month; an additional 10 per cent. when the work was finished, and the balance of 5 per cent. at the expiration of three months from the date of the completion of the contract, &c. No final certificate was obtained from the engineer of the completion of the work; nor was the work completed to his satisfaction. In an action to recover the balance alleged to be due under the contract.

Held, that the certificate of the engineer as to the completion of the work was a condition precedent to the right to recover, and therefore the plaintiff must fail.

THIS was an action tried before Falconbridge, J., at Owen Sound, without a jury at the Spring Assizes of 1888.

It was brought to recover a balance alleged to be due on certain works contracted to be performed by the plaintiff, namely, the construction of certain main sewers for the defendants.

The principal defence relied on at the trial was that the plaintiff had not obtained a final certificate from Kennedy, the chief engineer of the defendants, of the said works.

The plaintiff, after setting out the description of the works to be done by him, covenanted as follows:

"And the said works shall in all things be performed, and the materials therefor in all things provided, according to the said plans and specifications after the manner therein set forth and explained; and shall be fully completed and finished on the 1st August, 1887; and shall be performed, and the materials therefor provided, in all things to the entire satisfaction of the said engineer in charge of the said works, or to the satisfaction of such other person as may succeed the said William Kennedy as engineer of the said works."

The specifications were embodied into the contract. Paragraph 14, was as follows:

"The contractor shall, previous to the first day of each month, hand in to the engineer his account for work during the preceding month, on the printed form which will be furnished to him on application, and subject to the condition contained in this specification. The contractor shall be paid upon the certificate of the engineer at the rate of 85 per cent. of work done during previous months; an additional 10 per cent. when the work is finished, and the balance 5 per cent. at the expiration of three months from the date of completion of contract, at which time the contractor shall be fully released from responsibility connected with the maintenance of sewers."

During the progress of the trial, two letters from the engineer, Mr. Kennedy, to the plaintiff, were produced, one was dated 27th July, 1887. The first paragraph of that was:

"I visited the sewers yesterday, and found part of the work in good condition; part is barely acceptable, and part is defective. I cannot accept it in the present condition."

Then followed a statement of what was required In his evidence plaintiff asserted that what was required by this letter was done.

In answer to the question.

Q. "The whole letter has been read to you, and, after referring to the work, he points out certain things that is to be done, the removing of the stage and things of that kind? A. Yes. Q. That was all done? A. Yes. Q. And everything required in that letter, was done? A. As defined. Q. That is as defined in the letter of 27th July? A. Yes."

On the 20th December, 1887, Kennedy wrote the following:

"Your final estimate sewer account has this day been handed to me by Mr. Lloyd, chairman of the Board of Works, also your letter of the 19th, pressing for settlement. I cannot furnish a final estimate to the Board of Works, nor recommend payment until the defective work referred to in my letter of the 27th July last, and pointed out to your representative a day or two later, has been made good. After this is done I will immediately make an inspection, and if the entire work is complete according to contract, will hand in the Board of Works my final estimate."

No work was afterwards done by the plaintiff.

The learned Judge gave judgment as follows:

"In this case I am of opinion that the evidence does not show that the work has been performed, and the materials provided, to the satisfaction of the engineer in charge of

the works, and that the certificate of the engineer is a condition precedent to the payment of the money. This certificate does not, in my opinion, refer only to the 85 per cent. I do not think there has been any such taking possession of the property as will work a waiver of the condition precedent. I am, therefore, obliged to dismiss the action, with costs."

In Easter sittings, June 6, 1888, the plaintiff moved on notice to set aside the judgment entered for the defendants, and to enter judgment for the plaintiff.

In the same sittings, *McCarthy*, Q.C., and *Masson*, Q.C., supported the motion, and referred to *Pashby* v. *Mayor, &c. of Birmingham*, 18 C. B. 2: *Ardagh* v. *Corporation of Toronto*, 12 O. R. 236; *Oldershaw* v. *Garner*, 38 U. C. R. 37; *Munro* v. *Butt*, 8 E. & B. 738; *Jones* v. *The Queen*, 7 S. C. R. 570; *Roberts* v. *Watkins*, 14 C. B. N. S. 592; *Burn* v. *Millar*, 4 Taunt. 745.

Lash, Q.C., and *Creasor*, Q. C., contra, in addition to the cases cited, referred to *Jarvis* v. *Dalrymple*, 11 U. C. R. 393.

June 29, 1888. GALT, C. J.—There was a good deal of evidence given at the trial to which it is unnecessary to refer, because, as was stated by Mr. McCarthy, "the defence is, the plaintiff has not obtained a certificate from Kennedy, the chief engineer."

If this is entitled to prevail, the judgment is right; if not, there must be a reference.

It is plain from the evidence that no final certificate was given; and therefore, if such is required, the plaintiff cannot recover until it is obtained. Mr. McCarthy contends that no certificate was required for final completion under the fourteenth paragraph of the specifications; but, admitting this to be so, there is a positive engagement in the contract itself that the works shall be fully completed and finished to the entire satisfaction of the engineer, and we have here positive evidence in the letter of 20th December, 1887, that the work has not been completed to his satisfaction.

The case of *Pashby* v. *Mayor, &c., of Birmingham*, 18 C. B. p. 2, appears to me to be very different from that now before us as respects this point, for in that case the architect had certified to the completion of the works; and the question was as respects extras, whether it was necessary to enable the plaintiff to recover, that the architect's certificate as to the amount was necessary; and it was held it was not; but it was never disputed by the plaintiff that he must shew the work had been completed to his satisfaction. It was admitted by the plaintiff's counsel, that "The plaintiffs are bound to shew that the architect has certified the completion of the building and works; but it is submitted that such certificate need not contain a statement of the final balance."

The case is, in its circumstances, very similar to the one now before us.

There were conditions the same as those in the 14th paragraph, relied on by Mr. McCarthy respecting what may be called progress estimates. There was also a reference to arbitration.

Jervis, C. J., in referring to the progress estimates, says, at p. 32: "The true construction of the covenant and conditions appears to me to be this,—the fourteen days' certificates are to contain an approximate estimate of the value of the work done (including, it may be, the extra work, which is to be entered in a book), to the extent of 90 per cent.; and then no further payments are to be made to the contractor until a certificate of final completion to the satisfaction of the architect is obtained, when the balance is to be paid according to the terms mentioned in the contract. It seems to me that it is not a condition precedent to the plaintiffs' rights to recover what may be due to them for the balance, that such balance should be ascertained and mentioned in the certificate of the final completion given by the architect."

Cresswell, J., "I am of the same opinion. The certificate of final completion is clearly sufficient without reference to the amount that may be due to the contractors, whether in respect of work done under the contract or of alterations or additions."

The other Judges expressed the same opinion.

The case establishes that upon a final certificate of completion being given, the plaintiff has a right to enforce his claim without producing a final certificate of the amount due, which, as was held, he might do by a reference to arbitration. But it is manifest that the decision of the Court was based on a certificate of completion being given without which the plaintiff would have no claim.

The case of *Ardagh* v. *Corporation of Toronto*, 12 O. R. 236 is in point. Mr. McCarthy contended the circumstances were different. I have read the judgment given by my brother Rose, and can see no difference in principle between that case and the present.

The case of *Monro* v. *Butt*, 8 E. & B., p. 738, appears to be clearly against the plaintiff, both as respects the taking possession of the works, and the want of a certificate.

Mr. Masson stated that the only case similar to the present which he could find, was that already referred to, viz., *Pashby* v. *Mayor, &c., of Birmingham*; but as I have already shewn that case decides only that after a certificate of *completion* has been given, a final certificate of *amount* is not required. See also the case of *Jones* v. *The Queen*, 7 S. C. R. 570, at the conclusion of which a number of cases are set out by Richards, C.J., in *all* of which it was held that where, by the terms of the contract, a certificate is required, such certificate must be produced.

The result is, that, in my opinion, it is necessary that the plaintiff should procure a certificate from the engineer of the completion of the work, and on that being done, if there is any dispute as regards extras, it can be referred to arbitration.

The order must be dismissed, with costs.

ROSE, J.—It was urged on the part of the plaintiff that the work having been done under the inspection of the engineer, or a man appointed in his stead, and proper certificates having been given from time to time, furnished complete evidence of the work having been performed to the satisfaction of the engineer.

I do not feel able to accede to this contention, especially in the face of the fact that the engineer expressed his dissatisfaction with the work, and pointed out what he complained of.

It was further urged that the necessity for a final certificate existed only with reference to the contract price, and not with reference to the extras. I am also unable to yield to this argument.

Reading in paragraph 14 of the specifications with the contract, it seems clear that all payments, either for the contract work or extras, were provided to be made upon the certificate of the engineer. The obtaining of such certificate I agree to be a condition precedent, and it has not been obtained.

I also think *Oldershaw* v. *Garner*, 38 U. C. R. 37, and *Munro* v. *Butt*, 8 E. & B. 738, applicable in answer to the argument, that the defendant corporation had, by taking possession of the work, rendered itself liable to pay on a *quantum meruit*.

I agree that the motion fails, and must be dismissed, with costs.

[MACMAHON, J., was not present during the argument, and took no part in the judgment.]

[COMMON PLEAS DIVISION.]

REGINA V. TUCKER.

Canada Temperance Act—Hard labour—Payment of inspectors' attendance and mileage.

Under the Canada Temperance Act there is no power to order imprisonment at hard labour.

Quære, whether there was power to order defendant to pay a sum for two days attendance of the inspector and his mileage.

THIS was a motion to make absolute an order *nisi* to quash a conviction by James Deacon, Police Magistrate for the County of Victoria, on 26th April, 1888, under the second part of the Canada Temperance Act, on the grounds:

1. That the magistrate had no power to order imprisonment at hard labour.

2. Or to order payment of a sum for two days attendance of the inspector, and his mileage.

There were other grounds taken which are not necessary to be considered.

The conviction appeared as for a first offence imposing a fine of $50; in default of payment, distress, and in default imprisonment for thirty days with hard labour, unless the fine and costs should be sooner paid.

In Easter sittings, 1888, *A. C. Boulton* supported the motion, and referred to R. S. C. ch 178. secs. 62, 66, and 67; *Regina* v. *Walsh*, 2 O. R. 206; R. S. O. ch. 78 (1887); *Regina* v. *Elliott*, 12 O. R. 530.

Aylesworth, contra, referred to R. S. C. ch. 106, secs. 100, 107; *Regina* v. *Doyle*, 12 O. R. 347; *Ex p. Pourier*, 23 N. B. S. C. 544; R. S. O. (1887) ch. 194, sec. 117.

June 29th, 1888. ROSE, J.—The form of conviction was considered in *Regina* v. *Walker*, 7 O .R. 186, apart from the question here raised.

Section 100 of the Canada Temperance Act, R. S. C. ch. 106 provides for a penalty of $50, but says nothing as to imprisonment or mode of collecting penalty.

Section 107 incorporates the provisions of the Summary Convictions Act, R. S. C. ch. 178.

Section 62 of ch. 178, provides for issuing a warrant of distress to recover the penalty where "by the Act or law in in that behalf, no mode of raising or levying the penalty, compensation or sum of money, or of enforcing payment of the same, is stated or provided."

Section 66 provides that in default of sufficient distress the magistrate may commit the defendant to prison either with or without hard labour, "in the manner and for the time directed by the Act or law on which the conviction or order mentioned in the warrant of distress is founded."

Chapter 106 does not direct any manner or time; and even if sections 62 and 67 are read into chapter 106, and the language of section 66, above quoted, is varied so as to read "in the manner and for the time directed by this Act," we are not assisted, for sec. 100 of ch. 106, is the only section referring to the matter, and as I have said, it does not give the necessary direction,

I think Mr. Boulton's argument that the provisions of sec. 67 must govern, is valid, and must prevail.

That section provides that "whenever by the Act or law on which the conviction or order is founded, the justice is authorized to issue a warrant of distress to levy penalties or other sums recovered before him by distress and sale of the defendant's goods, but no further remedy is thereby provided in case no sufficient distress is found whereon to levy such penalties or other sums—and wherever the Act or law on which the conviction or order is founded provides no other remedy, in case it shall be returned to a warrant of distress thereon, that no sufficient goods can be found, the justice * * may, if he thinks fit, by his warrant commit the defendant to the common gaol * * for any term not exceeding three months."

This section does not authorize the imposition of hard labour, and therefore the conviction is bad on its face.

This decision is in accordance with the view of Cameron, J., in *Regina* v. *Walsh*. 2 O. R. 206.

We do not consider the second ground. As to it reference may be had to R. S. O. (1887) ch. 194, sec. 117; R. S. O. ch. 178. secs. 58-61, and R. S. O. ch. 78.

The order must be made absolute, quashing the conviction, without costs, and with the usual order protecting the magistrate.

GALT, C. J., concurred.

[MACMAHON, J., was not present during the argument, and took no part in the judgment.]

[CHANCERY DIVISION.]

JOHNSON V. CLINE ET AL.

Fraudulent conveyance—To defeat, delay, and hinder creditors—48 Vict. ch. 26, sec. 2 (O.)

The defendant E. C. having entered into a business partnership, at the instigation of his wife conveyed certain land to her to prevent its becoming liable to creditors of the new firm. He, then, as agent of his wife, placed the property in the hands of the plaintiff, a land agent, to sell or exchange, and through him an agreement for exchange was arranged. The plaintiff sued the wife for his commission, and recovered a verdict against her, but while the action was pending she reconveyed the land to her husband. There was no consideration for any of these conveyances.

In an action to set aside the reconveyance as fraudulent and void against the creditors of the wife. It was

Held, (reversing the judgment of Galt, C. J. C. P. at the trial) that the conveyance by the husband to the wife having been made to defraud creditors (following *Mundell* v. *Tinkis*, 6 O. R. 625) the Court would not assist a person who has placed his property in the name of another in order to defraud his creditors; that the wife had an interest in the property which could be made available to her creditors for the payment of her debts, and that the conveyance from her was made with intent to defeat, delay, and prejudice her creditors, and that as the evidence shewed she was unable to pay her debts in full, it fell within the provisions of 48 Vict. ch. 26, sec. 2 (O.), and was void.

THIS was an action brought by R. G. Johnson as judgment creditor on behalf of himself and all other creditors of Mary E. Cline, against Mary E. Cline, Elmore Cline, her husband, and Jonas Steele, to set aside three conveyances

of certain lands, viz., a conveyance dated on or about 7th May, 1886, Mary E. Cline to Jonas Steele; a conveyance dated 13th April, 1886, Mary E. Cline to Elmore Cline, and a conveyance dated 10th May, 1886, Jonas Steele to Elmore Cline, as fraudulent and void against creditors.

The action was tried at the Autumn Assizes, 1887, held in Toronto before Galt, C. J. C. P.

Ritchie, Q.C., and *A. B. McBride*, for the plaintiff.
Foster, Q.C., and *Meek*, for the defendants.

The evidence shewed that Elmore Cline was the owner of the land in question, and having entered into a new partnership in business he, at the instigation of his wife and family, conveyed it to the former on September 3rd, 1883, for the purpose of preventing it becoming liable for any debts of the new firm: that in January, 1886, the husband as agent of the wife employed the plaintiff and his partner, one Grundy, as land agents, to effect an exchange for other land, and a bargain was made with one Edmonds, and an agreement of exchange was executed but not carried out: and it was for services in affecting this agreement that the plaintiff's judgment was recovered: that while Johnson's action to recover said commission was pending, and on the 13th day of April, 1886, the defendant Mary E. Cline conveyed the property firstly direct to her husband by conveyance, which was never registered, and afterwards to Jonas Steele, who subsequently conveyed it to Elmore Cline, all said deeds being without consideration.

The further facts are set out in the judgments.

The learned Chief Justice gave the following judgment:

February 1, 1888. GALT, C.J. C. P.—This action, which is brought to set aside a conveyance made by Mrs. Cline to her husband, Elmore Cline, was tried before me. The suit is by a judgment creditor of Mrs. Cline. The claim on which the judgment was based was for commission on a proposed exchange of the land now in question with a person named Edmonds.

The land now in question was purchased by the husband in May, 1883, and was by him conveyed to his wife on 3rd September, 1883. I find that at the time the last deed was executed it was for the purpose of preventing any claim being made against it by any creditors of a person of the name of James Johnson, with whom Elmore Cline had then entered into partnership, and it was understood and agreed that it should be reconveyed to the husband at any time he might desire. I find that the wife paid nothing on account of the property.

I find that the proposed exchange on which the plaintiff's claim was based was negotiated by the husband, and that in truth he was the person who should have been found liable to the plaintiff.

I find that the conveyance made by the wife to her husband was made in accordance with the original understanding, and that the husband is the owner of the land in question. I therefore dismiss this action so far as it claims to set aside the deed.

I find that the husband was the person under whose retainer the plaintiff was engaged, and that at the time he procured the reconveyance he knew of the plaintiff's claim, and I therefore declare that the said lands in the hands of the defendant Elmore Cline are liable for payment of the plaintiff's claim. I dismiss the action against the defendant Jonas Steele.

I give judgment in favour of the plaintiff for the sum of $352.00,* and costs, and declare the same to be a charge on the lands in the hands of the defendant Elmore Cline. I give no judgment against the defendant Elmore Cline personally, but only that the lands in his hands be subject to the plaintiff's claim.

From this judgment the defendant appealed, on the grounds (1) that the action was brought to set aside certain conveyances and declare the land liable for the debts of Mary E. Cline, but the judgment declared that the land was never owned by her, that she was a mere trustee for Elmore Cline, and as no judgment was given against Elmore Cline the land was not liable; (2) that there was no evidence to shew any liability of Elmore Cline for the plaintiff's claim, and that fact was not in issue in this

* $152.00 of this was the costs of the County Court suit.—REP.

action: (3) that the fact that Elmore Cline knew of the plaintiff's claim against Mary E. Cline at the time of the conveyance to him did not render the land liable for the plaintiff's claim, as she was never more than a bare trustee of the said land, and the said land would not have been liable if it had remained in her hands: (4) that Elmore Cline was not a party to and had no opportunity of defending the action in which the plaintiff recovered his claim.

The plaintiff also gave notice of a cross-appeal and motion for an order setting aside the findings of the learned Chief Justice at the trial other than the one wherein it was found that the land was liable for the plaintiff's claim, and for an order declaring the deeds to Jonas Steele and Elmore Cline fraudulent and void as against the plaintiff and the other creditors of Mary E. Cline, and that the land was liable for the plaintiff's claim.

The appeal and cross appeal came on before the Divisional Court, and was argued on February 17th, 1888, before Ferguson and Robertson, JJ.

Foster, Q.C., and *Meek*, for the defendants. The trial Judge has found that the deeds were not fraudulent. When the husband conveyed to the wife he did so on the distinct understanding that she would reconvey whenever requested. The plaintiff's claim and judgment are against Mrs. Cline individually, but the land sought to be affected by the judgment is not and never was hers. We are not seeking here to enforce a parol trust. The trust was at an end when the reconveyance was made. [ROBERTSON, J.—But if a creditor comes in, alleging that the deed is fraudulent you must use the same evidence as if you were seeking to establish the trust.] I refer to *Haigh* v. *Kaye*, L. R. 7 Ch. 469. There is no estoppel as regards Elmore Cline. The plaintiff contends that he represented his wife to be the owner, but the evidence does not establish that fact. Even if the representation was made the plaintiff did not do any-

thing he would not have done if it had not been made. A representation that the wife owned the property is not inconsistent with the fact that she is not the owner now for she had the legal estate then. [FERGUSON, J.—But "owner" means more than the holder of the legal estate.] Yes, it may, but that representation made no difference, and so raised no estoppel, and the evidence does not show that the word "owner" was used, or that the plaintiff earned his commission relying on any such representation.

Moss, Q.C., and *Ritchie*, Q.C., for the plaintiff. The deeds should be set aside, as they were made to defeat creditors, The evidence shews that the wife always claimed the land as her own. The Court will not allow the husband to tell the plaintiff that the land belonged to the wife, and when the plaintiff had performed the service take a transfer of the land and say that the plaintiff cannot get paid: *Keel* v. *Larkin*, 20 Central L. J. 140 (No. 141 in Dig.), cited as of 3 Southern Reporter 296. The Court will not relieve lands from an execution against the holder, to whom they had been conveyed, to qualify him as bondsman: *Langlois* v. *Baby*, 10 Gr. 358, aff. 11 Gr. 1. If the husband had come into Court to compel the wife to reconvey to him the Court would not aid him when the motive of his conveyance to her was disclosed. The conveyances are binding between the parties, and creditors or subsequent purchasers only could attack them: *May* on Fraudulent Conveyances, 2nd ed., pp. 316 & 317. The evidence shews that the husband represented that "the place belonged to the wife." See also *Walker* v. *Hyman*, 1 A. R. 345; *Mundell* v. *Tinkis*, 6 O. R. 625.

Foster, in reply.

June 18, 1888. FERGUSON, J.—The action was brought to have certain conveyances of an equity of redemption in lands in the city of Toronto set aside as being fraudulent and void as against the plaintiff and other creditors of the defendant Mary E. Cline, the wife of the defendant Elmore Cline, or to have the said equity of redemption declared

liable in the hands of the defendant Elmore Cline for the payment of the plaintiff's claim against the defendant Mary E. Cline, and for general relief.

The plaintiff is a creditor of the defendant Mary E. Cline, and has obtained against her a judgment in the County Court of the county of York for the sum of $200, and costs of suit, the claim being for the amount of certain commission on an exchange, or attempted exchange of the lands in question for other lands. The recovery by the plaintiff in the County Court was upon an agreement signed by the defendant Mary E. Cline on the 23rd day of January, 1886, and as was stated without contradiction at the bar, a few days after this time her liability became complete by the plaintiff having performed what he was to do, as the consideration for the money to be paid him.

The defendant Elmore Cline was the owner of this equity of redemption, and on the 3rd day of September, 1883, made a conveyance of it to his wife Mary E. Cline. The defendant Elmore Cline had about that time, or shortly before, entered into a partnership with one James Johnson, and the learned Judge before whom the action was tried has found that this conveyance was executed for the purpose of preventing any claim being made against the lands by any creditors of this James Johnson, with whom Cline had entered into partnership; and that it was understood that the land should be reconveyed to Cline at any time he might desire. Nothing was paid by the defendant Mary E. Cline for the land or as a consideration for the conveyance, and the learned Judge has so found.

There is evidence shewing that there were persuasions by the wife and other relatives, and also by a solicitor employed to induce Cline to make this conveyance, some of which were to the effect that if he did not do so this James Johnson would cheat him out of the property. Cline himself says that he was not afraid of this or of Johnson in any way, and that he thought he was able to take care of himself. The conveyance was, however, in fact made soon after, or about the time the partnership with this

James Johnson was entered into by Cline. The solicitor in his evidence says: "Mr. Cline was, I think, a partner in the firm of James Johnson & Co., and I believe it was thought that Johnson had put his property out of his hands, and that there were liabilities of the firm, and Mrs. Cline thought that Mr. Cline was not managing the business well, and if they did not look out they might lose the property, and she wanted the property conveyed to her, and it was in pursuance of that that the deed was drawn." This solicitor was in a position to know and understand the facts. He says there was no agreement outside of this that he heard of. He says they wanted to know if that was valid, and he told them it was providing there were no existing creditors: that there was at the time a contingent liability of the firm, Johnson & Co., a claim by the Hudson Bay Company, but afterwards this was settled so that no person could set aside the deed, and that he told her (Mrs. Cline) that the deed would be good as against claims of future creditors. The solicitor is asked, Were these liabilities of the firm of Johnson & Co. discussed at that time? He answers: "Well, it was in connection with that, that this deed was proposed."

The evidence shews that there were persuasions by others, of Cline, to execute the deed; but I do not see that these can make any difference in the character of the transaction. Counsel for the defence did not finally contend that they could.

The defence set up a parol trust on the part of the grantee Mary E. Cline to the effect that she was to hold the land for the benefit of herself and the family until such time as Cline should request her to re-convey the land to him, and that upon such request she would make the reconveyance.

In many, if not most, conveyances made to hinder, defeat, and delay creditors there is a secret trust for the reconveyance of the property or some equivalent at a future time, and I fail to perceive that anything more is established here.

After a perusal of the evidence, the conclusion at which I arrive is, that the conveyance from Cline to his wife was made for the purpose of saving the property from the claims of any creditors there might thereafter be of the firm Johnson & Co., of which he was about to become, or had recently become, a member—that is to say, Cline was embarking in a partnership business with Johnson; there is evidence shewing that this business was considered a hazardous one for Cline, and the conveyance was made for the purpose of saving the property from any creditors there might be in that business; and I think the conveyance falls within the category of conveyances made for the purpose of hindering, defeating, and delaying creditors. To put it shortly, it was a conveyance made to defraud creditors. See the language of the Vice-Chancellor in the case *McKay* v. *Douglas*, L. R. 14 Eq. at p. 122, the language of the late Chief Justice Spragge in *Buckland* v. *Rose*, 7 Gr. at p. 447, and *May* on Fraudulent Conveyances, 2nd ed., pp. 520 and 521.

In the case *Mundell* v. *Tinkis*, 6 O. R. 625, the Chancellor says, at p. 627: "I have always understood the rule of equity to be as expressed by Esten, V.C., in *Phelan* v. *Fraser*, 6 Gr. 336, that the Court never assists a person who has placed his property in the name of another in order to defraud his creditors." This proposition is supported by many other authorities, and is, I think, doubtless, a correct one. The conveyance to Mary E. Cline from her husband was, as was said, duly registered. The transaction was a completed one, and she was in a position to hold the property conveyed to her (which was an equity of redemption only) as against her husband had she chosen so to do, unless, at all events, some question not raised by the parties or mentioned in the argument might by possibility arise under sec. 3 of ch. 125 R. S. O., (1877), which provides that the section shall not extend to any property received by a married woman from her husband during coverture. I do not at present see how any such question could arise, and if it did the evidence does not afford the means of determining it.

I think, as I have already said, that it cannot be successfully contended that there was in this case a trust such as in the case *Blackburn* v. *Gummerson*, 8 Gr. 321, referred to by counsel on the argument, where it was held that the lands could not be properly sold on an execution against the trustee, and I am of the opinion that at the time of the conveyance from the defendant Mary E. Cline, which is impeached, or sought to be impeached, she was possessed of or entitled to an interest in the lands professed to be transferred by that conveyance, which could be made available to her creditors for the payment of debts owing to them, and it is beyond question that the plaintiff was at the time her creditor for a debt which has not hitherto been paid or satisfied.

If it were necessary to decide, or rather find, on the question I should be of the opinion that it has been shewn and sufficiently appears that this conveyance from the defendant Mary E. Cline was made with intent to defeat, delay, and prejudice creditors. It certainly had the effect of so doing so far as the plaintiff is concerned, and it is clear on the evidence that she, the defendant Mary E. Cline, was at the time in insolvent circumstances, and unable to pay her debts in full. It is shewn to be beyond all doubt that, apart from this land, she was possessed of only a few dollars worth of property—a very trifling amount indeed; and I think the case falls within the provisions of 48 Vic. ch. 26, sec. 2, (O.), and that the conveyances impeached by the plaintiff are as against him "utterly void."

We were referred by counsel to the case *Keel* v. *Larkin*, 3 Southern Reporter 296, noted in the Central Law Journal, vol. 20, as No. 141 at p. 140. The report of the case has, however, not yet reached the library. The note in the Cent. L. J. is as follows: "A. bought land, and to avoid his creditors, the deed was made to B. Subsequently B. became indebted, and, to avoid his creditors, conveyed it to A.:—*Held*, that the latter deed was void as to B.'s creditors."

I am, for the reasons I have endeavoured to give, of the opinion that the plaintiff should succeed in the action, and

that the conveyances impeached by the pleadings should be set aside. The plaintiff asks to have the lands in the hands of Elmore Cline declared liable to satisfy his claim, and he asked for general relief.

It was said that the action is on behalf of the plaintiff and all other creditors of the defendant Mary E. Cline.

There is, I think, a recognized form of judgment in use in such cases in this Division of the Court which may be consulted, and as regards the mode of reaching the property of a married woman by an execution, the remarks of Mr. Justice Patterson in *Laidlaw* v. *Lawson*, 3 A. R., and in the case, *Douglas* v. *Hutchison*, 12 A. R. at p. 118, may be looked at.

On account of the defendant Mary E. Cline having first made a conveyance directly to her husband which was not registered, and afterwards the conveyance that was registered, there appears to be some confusion in the pleadings as to the one that is attacked. I think both should be set aside. The plaintiff was a creditor for his present debt at the time the first one was made. Any amendment of the pleadings that may be considered necessary should, I think, be allowed.

In the view I have taken of the case, it does not seem necessary to decide the question of estoppel that was argued.

There should be costs to the the plaintiff, I think.

ROBERTSON, J., concurred.

G. A. B.

[CHANCERY DIVISION.]

STEVENSON V. MCHENRY.

Specific performance—Misrepresentation—House described as "solid brick" —Insufficient description of lands in agreement.

Two houses were built with extensions in rear in a terrace or row, the outside walls of the terrace and the extensions being brick, but the inside walls between the houses themselves and the adjoining houses, and also between the extensions and the main houses to the height of the roofs of the extensions being of wood, and the outside rear walls of the houses above the roofs of the extensions were brick resting upon timbers at the top of the wooden wall below.

In an action for specific performance,

Held, not to be "solid brick" houses.

Semble, they were not "brick houses."

The property in an agreement for exchange was described as "135 feet on G. Avenue, the same being 337 feet west from R. Avenue, Parkdale, on the north side of said Avenue. It was shown that R. Avenue was the west boundary of Parkdale and G. Avenue, a street in it which, as such street, would have its termination at R. Avenue, but it extended across R. Avenue as a road or way outside of Parkdale, and no further description was given, such as the depth or by reference to a plan or otherwise.

Held, that the property was not sufficiently described.

THIS was an action brought by Paul Stevenson against John McHenry for the specific performance of an alleged agreement for the exchange of lands.

The two principal defences set up by the defendant were misrepresentation, in that the houses on the plaintiff's land were represented as being "solid brick houses;" and that the defendant's land was not sufficiently described in the agreement.

The action was tried at the Spring Sittings at Toronto, on May 7th, 9th, and 10th, 1888, before Ferguson, J.

Moss, Q.C., and *Geo. Macdonald*, for the plaintiff.

Laidlaw, Q.C., and *W. J. Nelson*, for the defendant.

June 21, 1888. FERGUSON, J.—[The learned Judge in his judgment set out the agreement, which was an offer in writing by the defendant accepted by the plaintiff, in which the defendant's land was described as "one hun-

dred and thirty-five feet on Garden avenue, the same being three hundred and thirty-seven feet west from Roncevalles avenue, Parkdale, on the north side of said Garden avenue," and a letter which had been previously written to the defendant by the plaintiff's agents in these words: "The houses referred to are two solid brick houses, numbered sixty-two and sixty-four—62 and 64—Dundas street; size of lot, 33 ft. x 118 ft., mortgage on each house two thousand dollars, with interest at 8 per cent. per annum," and found on the evidence that there had been no waiver of title by the defendant, and then proceeded as follows:]

Then as to the alleged misrepresentation, I mean the representation made by the letter of the 31st August from plaintiff's agent to defendant. I may here say that it was not disputed that the plaintiff is responsible for this letter sent by his agent. I think he is responsible for it as much as if it had been written by himself. The offer made by the defendant, which, with the acceptance of it, constitutes the alleged contract, was no doubt made relying upon the letter of the 31st of August. It was apparently sought to be shewn that the defendant, in making this offer, relied rather upon his own knowledge of the houses than upon this letter; but I think the effort failed, and without referring to the particulars of the evidence further than I have already done, I find not only that the defendant did rely upon the representation contained in this letter, but also that it was intended by Bunting* that he should rely upon it in making the offer that he made; and I am of the opinion and I find that the defendant did not then know that the houses were of the kind that they are, by the evidence, shewn to be. And although the defendant had been in the houses, or one of them, for the purpose of inspecting them, looking at the evidence of the architects and builders in regard to the appearance of the houses, he was not negligent in not having discovered what the actual facts were in regard to the construction of the houses, and was entitled to rely upon the representation made in this

* NOTE.—Bunting was plaintiff's agent.—REP.

respect, which he did. I am not, however, to be understood as deciding that any such negligence would disentitle him to rely upon the representation when in fact he did rely upon it.

The representation was, no doubt, a material one, and was, in my opinion, properly relied on by the defendant.

This representation, it will be remembered, was, that the houses in question were "solid brick" houses, and the question now to be considered is, whether that statement was true or not.

The evidence shews that the houses are two of a long row or terrace of, I think, eleven houses; that the outside walls of this terrace are of brick; that there are what are called "extensions" at the rear of these two houses for, one would suppose, kitchen purposes (amongst others); that the outside walls of these are of brick, but that the inside walls between these extensions and the houses proper are of wood to the height of the roof of the extensions, and the outside rear walls of the houses, above the roofs of the extensions, are of brick supported and resting upon timbers at the top of the wooden wall below. It also shews that the wall between these two houses and the wall between each of them and the houses adjoining them, respectively, are of wood; that is to say, putting it shortly; all the inside walls of each of the houses, including the wall between them and the wall between each of them and the next adjoining house in the terrace, are of wood, and lathed and plastered, though looking at the houses from the outside they appear to be all of brick. I may here say, however, that the dividing walls in the cellar are of brick. These facts I have no difficulty in determining and finding on the evidence. It is also in evidence that some of the cross walls of the terrace are of brick, but not any of the cross walls appertaining to either of the houses in question.

The question arose as to what is a solid brick house, or rather, whether or not under this description of structure these houses are "solid brick" houses, and evidence on

each side of architects and builders was given on the subject. This was in the nature of opinion evidence, and was to some extent conflicting. I do not know that there is really any distinction between a "brick house" and a "solid brick house," or that the use of the word "solid" makes the statement really different from what it would have been if this adjective had not been used. It does, however, appear to me that the use of the word as it was used, would probably convey to the mind of the reader or hearer the idea that the houses were of brick throughout.

However this may be, it will not, owing to the opinion I have formed on the subject, make any difference in the conclusion, for after considering the evidence given as well as I have been able, and employing the sort of common sense that I have, and such portion of the common knowledge on the subject as I possess, I am of the opinion that it has been shown that these houses are not "brick houses," and that if there is any difference between the expressions, that they are not "solid brick houses," and that the representation made was in fact untrue. This representation being, as I have no doubt it was, a material one, being in fact untrue, and if my view is correct, largely untrue, and having been relied upon by the defendant in making his offer, he having the right to rely upon it in so doing, and it being intended by the plaintiff's agent that he (the defendant) should rely upon it, I think it sufficient ground to avoid the contract, and to relieve the defendant from his supposed obligation to perform it, even if as a matter of law a contract has been shewn which is good in the face of a pleading setting up the Statute, commonly known as "the Statute of Frauds." I am expected, however, to decide as to whether such a contract has been shewn.

As I understand, Roncevalles avenue constitutes the westerly boundary of Parkdale, lying between Parkdale and land to the west thereof, that at the time of the making of the alleged contract was part of the township of York, but which has since been included and embraced within the

limits of the city of Toronto. Garden avenue, as I understand, is a street in Parkdale which, as such, would have its westerly end at Roncesvalles avenue, which it meets at right angles, or nearly so, but as a road or way it extends in fact across and in a westerly direction from Roncesvalles avenue. On the north side of this (if I may so speak) extension, in fact of the way or road called in Parkdale, Garden avenue, and at the distance westerly mentioned in the alleged agreement, from Roncesvalles avenue, are the lands of the defendant which were one of the subjects of the alleged exchange.

For some of these statements I am depending on recollection alone, for the kindness has, as I find, been bestowed upon me of not leaving any of the plans or any copy of any of them. I do not see how the description of the land of the defendant contained in the offer made by him can be held sufficient. Even if the description be read in the most liberal way and leaving out of the question the fact that it does not state in what city, town, village, township, or place the land is, and assuming the words in this respect employed to mean on the north side of Garden avenue in Parkdale extended westward, and commencing at the distance of 337 feet westerly from Roncesvalles avenue, which appears to me to be a liberal, if not much more than a liberal, reading of the description so far, there yet remain two important parts or elements of a description of land that are nowhere found so far as I can see, namely; the depth of the lands northward from Garden avenue extended, and the bearing of the boundary lines on the easterly and westerly sides. There were at the time no lots partitioned off, and no lots are mentioned.

It is laid down, that every valid contract must contain a description of the subject matter, but that it is not necessary that it should be so described as to admit of no doubt what it is; for the identity of the actual thing, and the thing described may be shewn by extrinsic evidence: *Stevenson* v. *O'Donohoe*, 8 A. R. at 166, the learned Judge quoting from *Fry* on Specific Performance with

approval; but I cannot see my way to the application of this rule here, for I do not see that any land is described, and after looking at all the cases referred to on the argument of this branch of the case, I am unable to arrive at the conclusion that the description is sufficient. The subject is a troublesome one, and others may think differently in regard to this description. All I can say is, that in my opinion it is not sufficient, and that the alleged contract is not good in the face of the pleading of the defendant setting up the statute.

In the argument it was stated that the contract was not good because it professed to be for an exchange of lands and was not by deed; but the case of *Findley* v. *Pedan*, 26 C. P. 483, indicates the contrary of this contention, and is binding upon me.

Action dismissed, with costs.

G. A. B.

[COMMON PLEAS DIVISION.]

STILLMAN V. THE AGRICULTURAL INSURANCE COMPANY.

Fire insurance—Title—Fraud and false statement—1st and 15th statutory conditions—Partnership interest—Damages—Threshing machine covered while in any outbuildings insured—Outbuildings insured in another Co.—Liability.

In an action on a fire insurance policy, application was made at the trial to set up the first statutory condition as a defence, in that a threshing machine insured as plaintiff's own property, was partnership property; and also to set up the 15th condition, in that there was fraud and false statement, for the like reason, in the proofs of loss. *Held*, that the application must be refused, the 1st condition having no reference to title; and as to the 15th, the statement was not proved to be wilfully false and fraudulent, and the fact that the threshing machine was partnership property, was not material, no question as to title having been in the application for insurance asked. As the terms of the policy limited the right of the plaintiff to recover to the extent of that interest. interest only, the damage was reduced to the extent of his own The plaintiff had two barns, Nos. 1 and 2. The threshing machine was insured as "in No. 1 Barn." The machine was in No. 2 barn, though the horse power was outside. The plaintiff applied to the company, and an endorsement was made on the policy stating that the machine should be covered "while in any one of the outbuildings insured." Barn No. 2 was insured, though not by the defendants' company. *Held*, that the machine was covered by the policy, and that the plaintiff was entitled to recover in respect of it.

An objection was also made that a reaper, destroyed by the fire, was not covered by the policy. *Held*, on the evidence, that the objection was not tenable.

THIS was an action on a fire insurance policy, tried at Belleville before Armour, C. J., without a jury, at the Spring Assizes of 1888.

It was begun before a jury, but as it turned out that there was no dispute as to the facts, the jury were discharged.

The learned Chief Justice reserved his decision, and afterwards, on 11th May, 1888, gave the following judgment in favour of the plaintiff.

ARMOUR, C. J.—It came out on the examination of the plaintiff at the trial, that the threshing machine, for the damage to which this action was brought, was partnership property, being the joint property of the plaintiff and his brother-in-law, and thereupon application was made to me

by the defendants' counsel to set up the first statutory condition as a defence to this action This I declined to allow, because the first statutory condition has no reference to title.

Application was also made to me by defendant's counsel to set up the fifteenth statutory condition; but that condition only avoids the claim in case of fraud or false statement in the particulars therein before referred to, and there was no fraud or false statement with regard to such partnership in the statutory declaration made by the plaintiff.

I declined to allow the amendments asked for also, because I was satisfied that there was no fraudulent or wilfully false statement in the statutory declaration, and because from the terms of the application I was of opinion that the fact that the threshing machine was partnership property was not a fact material to be made known to the company, no question having been asked therein as to the title to it.

The plaintiff had an insurable interest in the whole of this threshing machine, and was entitled under the terms of the policy to have made good "all such immediate loss or damage as should happen by fire or lightning to the said threshing machine:" *Waters* v. *Monarch Ins. Co.*, 5 E. & B. 870; *London and North Western R. W. Co.* v. *Glyn*, 1 E. & E. 652; *Manhattan Ins. Co.* v. *Webster*, 59 Penn. St. R. 227.

The insurance, by the terms of the policy, is "$200 on the threshing machine in No. 1 barn." Is the reference to No. 1 barn merely a matter of description of the place where the threshing machine was at the time of effecting the insurance, for the purpose of identification, or does it mean that the threshing machine is only insured while in No. 1 barn? The answer to this question must depend upon the construction to be placed upon the words in the policy, having regard to the nature of the machine and its user. In my view, the statement of the place in which the machine was at the time of effecting the policy was a matter of description merely, and this is apparent from the fact that all the other chattel property insured by the policy is only insured *while* in some building; and as to this insurance the words are, "$200 on threshing machine in No 1 barn," and not *while* in No. 1 barn; a clear distinction being thus made between this machine and the other chattel property insured.

This machine could not be used without a part of it, the horse power, being outside the barn; and, if burned while being thus used, could it be said that it was not covered by the policy?

The plaintiff thought that it would not be covered if removed from this barn; but what he thought cannot affect the proper construction of the policy. So thinking, he went to the agent of the defendants, for the purpose of having the policy rectified; and as to what took place between the agent and him I regard the plaintiff's evidence as true. The letter enclosing the policy sent by the agent to the Toronto office, is unfortunately not produced by the defendants, and we do not know what it contained, but the policy was returned with these words written across the face: "It is hereby agreed that the threshing machine herein insured shall be covered while in any one of the outbuildings insured." At first I thought that "insured" meant insured by the defendant company; but on examining the policy I find that the only outbuilding insured by the company is No. 1 barn; and to hold this meaning to be insured by the defendant company, would give no force or effect to this writing. Force and effect, however, can be given to it by holding that insured meant insured, whether by the defendant or another company; and force and effect must be given to it rather than that it should perish. No. 2 barn, in which it was destroyed by fire, was insured in another company; and so the threshing machine was covered by the policy while therein; and the plaintiff is entitled to recover for the loss of it.

The plaintiff is also clearly entitled to recover for the loss of the reaper. A binder is not a reaper. It is a reaping machine; a sickle and a cradle are reaping machines, but neither of them is a reaper. A reaper is a well-known implement, and so is a binder. They are both reaping machines, but the binder is not a reaper, nor is it ever known as such, nor is the reaper a binder, nor known as such; they are distinct machines, always dealt with by their distinctive names.

In my opinion, therefore, judgment should be entered for the plaintiff for $260, and interest from the 22nd August, 1887, to date, $11.20, with full costs of suit.

See *May* on Insurance, 2nd ed., 275; *Gorman* v. *Hand-in-Hand Ins. Co.*, 11 Ir. C. L. (1878), 224; *Pearson* v. *Commercial Union Assurance Co.*, 1 App. Cas. 498; *Grant* v. *Ætna Ins. Co.*, 15 Moo. P. C. 516.

In the Easter sittings, 1888, *Britton*, Q. C., moved to set aside the judgment entered for the plaintiff and to enter it for the defendants, or to reduce the amount to $160.

In the same sittings, June, 1888, *Britton*, Q.C., supported the motion, and referred to *Pearson* v. *Commercial Union Assurance Co.*, 1 App. Cas. 498; *Bunyon* on Fire Insurance, 2nd ed., 82; *Porter* on Insurance, 2nd ed., 105-6; *Grant* v. *Ætna Ins. Co.*, 15 Moo. P. C. 516; *Klein* v. *Union Fire Ins. Co.*, 3 O. R. 234; *Reddick* v. *Saugeen Mutual Fire Ins. Co.*, 14 O. R. 506; *Goring* v. *London Mutual Fire Ins. Co.*, 10 O. R. 236.

Clute, contra, referred to *Manhattan Ins. Co.* v *Webster*, 59 Penn. St. R. 227; *Hooper* v. *Lusby*, 4 Camp. 66; *Armitage* v. *Winterbottom*, 1 M. & G. 130; *Hunt* v. *Royal Exchange Assurance Co.*, 5 M. & S. 47; *Clement* v. *British American Ins. Co.*, 141 Mass. 298; *Porter* on Insurance, 2nd ed., 48, 62; *Inglis* v. *Stock*, 10 App. Cas. 263, 274.

June 29, 1888. GALT, C. J.—At the trial the principal contest was that the defendants were not liable for the threshing machine because it was insured in the policy "in No. 1 Barn," and was not in that barn when the fire took place, but was in Barn No. 2.

It appeared from the evidence that the plaintiff had two barns Nos. 1 and 2. This is also apparent from the policy itself, because there is an insurance to the extent of $1,000 on barn No. 1 and attachments and contents, and $350 on ordinary contents of barn No. 2, but no insurance on the building.

It was proved that the plaintiff, having become dissatisfied with the description of the insurance on the threshing machine as being in barn No. 1, applied to the agent of the defendants, and represented to him that the machine was not kept in barn No. 1, and requested him to have an alteration made.

The agent sent the policy to the principal agent with a letter, which unfortunately was not produced, and some time afterwards the policy was returned with the follow-

ing endorsement: "It is hereby agreed that the threshing machine herein insured shall be covered while in any one of the outbuildings insured."

It was shewn that barn No. 2 was insured, although not by the defendants; and the view expressed by the Chief Justice is: "At first I thought that 'insured' meant insured by the defendant company; but on examining the policy I find that the only outbuilding insured by the company is No, 1 barn; and to hold this as meaning, to be insured by the defendant company, would give no force or effect to this writing. Force and effect, however, can be given to it by holding that insured meant, insured whether by defendant or another company; and force and effect must be given to it rather than that it should perish. No. 2 barn in which it was destroyed by fire was insured in another company; and so the threshing machine was covered by the policy while therein; and the plaintiff is entitled to recover for the loss of it."

The view taken by the learned Chief Justice is strongly supported by the evidence at the trial of the agent Young. After stating he was the agent through whom the policy was effected, the following conversation took place:

Q. After the insurance was effected do you remember the plaintiff coming to your place? A. I am not sure whether he came to the office, or whether I saw him upon the street. He said the insurance on his threshing machine was in "1," and were it burned where it was he would not get anything.

Q. Where did he say he wanted it? A. I don't know.

Q. In barn "2." A. I don't remember.

Q. He said the policy was not right? A. He said he did not keep his threshing machine in the barn in which it was insured, and were it burned where he kept it, he would not get the insurance? I told him to bring it down.

Q. You remember the fact that it was to be insured; he made the application? A. No doubt about that.

Q. He complained it was not rightly entered in the policy? A. He may have kept it then in "1," when he got the insurance. I made out the application according to the instructions he gave me.

Q. At all events you promised to have it corrected, did not you? A. I told him I would send the policy away, and ask Flynn to make the change he desired?

Q. You wrote a letter to that effect to the company? A. Yes.

Q. And sent the policy? A. Yes.

Q. Have you got a copy of that letter? A. I don't keep copies of letters.

MR. CLUTE.—I ask that the application and the letter be produced.

MR. BRITTON—We have not got them.

Q. You wrote a letter according to instructions from the plaintiff? A. I tried to. If I did not, it was not my fault, I intended to.

Q. It was to have the policy so changed that the threshing machine would be insured in "2"? A. I don't know what his instructions were. He wanted it changed. I am not sure where he told me it was kept at the time.

Q. He says in "2." Can you contradict that? A. No.

Q. You have no doubt it is so? A. I don't know I am sure. I never knew him to tell an untruth. I have no recollection about it.

Q. You don't know what object he could have except to have the policy changed? A. No.

Q. The premium he paid was to cover the threshing machine. He paid premium upon the threshing machine? A. It was insured. It was in the application, or it would not have appeared in the policy at all.

Q. Now, as a matter of recollection, do you remember anything? A. No.

I concur in the opinion of the Chief Justice on this point; and therefore this objection fails.

As regards the reaper, the evidence proved that the plaintiff had only one reaper, which was covered by his insurance; therefore the third objection fails.

The remaining objection is, that the learned Chief Justice refused to allow an amendment at the trial allowing the defendants to set up as a defence the wrongful statement of ownership, and the false statement in the proofs of loss. In my opinion the learned Judge was right, for the reasons given in his considered judgment.

The question of amendment was one within the discretion of the learned Chief Justice, as was held by the Court in *Oates* v. *Supreme Court of Forresters*, 4 O. R. 535, and was, in my opinion, properly exercised; there was no merit in the defence whatever.

Then as to the amount of damages. It was held in *Waters* v. *Monarch Ins. Co.*, 5 E. & B. 870, and *London and North-Western R. W. Co.* v. *Glyn*, 1 E. & E. 652, that parties in possession of goods might insure them to their full value although they might not be the actual owners.

Lord Campbell, in *Waters* v. *Monarch Ins. Co.*, says,

at p. 881: "And I think that a person intrusted with goods can insure them without orders from the owner, and even without informing him that there was such a policy. * * The last point that arises is, to what extent does the policy protect those goods. The defendants say that it was only the plaintiffs' personal interest. But the policies are in terms contracts to make good 'all such damage and loss as may happen by fire to the property hereinbefore mentioned;'" and the Court held the plaintiffs entitled to recover the full amount.

The present case is different; the company "promises and agrees to make good unto the assured all such immediate loss or damage, not exceeding in amount the sum or sums hereby insured—nor the actual cash value of the personal property." It appears to me that this latter clause limits the right of the plaintiff to recover to the extent of his own interest only; and therefore that this motion must be allowed so far as to reduce the damages by $100, and interest $4.50 = $104.50.

It must be borne in mind that after the several issues have been found for the plaintiff the question is one of damages only, and therefore as by the terms of the policy the loss was to be confined to the interest of the plaintiff alone, the reductions must necessarily follow without any amendment of the pleadings.

As the defendants have been successful only in part of their motion, there will be no costs of this motion. As the plaintiff's claim is thus reduced to an amount within the jurisdiction of the County Court, he should recover only such costs as he would have recovered in that Court.

The costs of the action will therefore be according to such scale.

ROSE, J., concurred.

[MACMAHON, J., was not present at the argument, and took no part in the judgment.]

[COMMON PLEAS DIVISION.]

POTTS v. BOVINE.

Will—Cujus est solum ejus est usque ad cœlum—Rebuttable presumption.

The maxim *cujus est solum ejus est usque ad cœlum*, is not a presumption of law applicable in all cases and under all circumstances, but the presumption may be rebutted by circumstances existing at the date of a will shewing it was not to apply.

Where therefore in a devise of land the boundaries according to the above maxim would have included an edifice built over a gangway or right of way, but the circumstances existing at the date of the devise shewed that it was not intended to pass, but was to be part of an adjoining edifice to which it was attached, and with which it was intended to be used, and was used, it was held to pass under the devise of such adjoining edifice.

THIS was an action brought to recover possession of a portion of a house built over a gangway.

The cause was tried before Armour, C. J., without a jury, at Belleville, at the Spring Assizes of 1888.

There was no dispute as to the facts of the case, and the whole question turned on the construction of the will and codicil of the testatrix under whom both parties claimed.

As there was no evidence, and as the property was in the city of Belleville, the learned Chief Justice took the trouble with the approval of both parties of personally inspecting the premises.

The learned Judge reserved his decision, and afterwards on May 10th, 1888, delivered the following judgment, which contains full extracts from the will and codicil, and also a description of the premises.

ARMOUR, C.J.—The testatrix was the owner in her lifetime, and at the time of her death, of a block of buildings situate on Front street in the city of Belleville, and the land upon which the same was erected, and the land adjacent thereto.

The three southerly buildings of the said block were built for and used as stores, and the northerly building as and for an hotel. Between the hotel and the most northerly of the three stores there was a lane or gangway for the use of the tenants of the several buildings in the said block. At the top of the first story of the said last mentioned store a floor was carried across the gangway from the store to the

hotel, and a wall was carried up in front and rear to the height of the block with windows in front and rear. The front wall above this gangway was carried up with the front wall of the said block to the height of and with the front wall of the block. The block is built of brick, and the southerly wall of the hotel is an entire brick wall from cellar to garret without any windows, doors or other openings therein; and there is consequently no mode of access from the hotel to the edifice above the gangway. The northerly wall of the last mentioned store is of brick, and is an entire brick wall without any windows, doors, or other openings therein as far up as the top of the first story of the said store from whence upwards to the roof there is merely a lath and plaster partition serving as a division wall between the rooms above the said store and the said edifice above the gangway, with doors through this partition from the rooms above the store to the rooms in the edifice above the gangway.

I find that the edifice above the gangway was originally built as and intended to form a part of the said most northerly of the said three most southerly of the said buildings, and has always since been used, and now is used, as a part thereof.

This action is brought by the plaintiff to recover possession of this edifice, claiming that the same passed to the devisee of the hotel under the will and codicil of the said testatrix; and the defendant, Bovine, claiming that it passed to her under the said will.

The devise contained in the said will under which the defendant Bovine claims, is as follows:

"I will, devise, and bequeath to Caroline Bovine, of St. Hyacinthe, widow, and to her heirs and assigns forever, subject to the reservations and charges herein charged and made in this my will, that certain messuage, land and premises situate on the west side of Front street, in the city of Belleville, lying next above or north of the property hereinbefore devised to Elizabeth L'Esperance, and which is now occupied by one Thomas Lockerty, measuring from the north east corner of said lot devised to said Elizabeth L'Esperance, 19 feet more or less frontage on said Front street; thence westerly in a straight line to the river Moira; also the land lying in rear of the said store to the river Moira; together with all the buildings and erections thereon; together with right of way and free use of gangway leading to or from Front street, as now used in common with the owners or tenants of the property formerly owned by the late James Whiteford, which gangway is between the premises devised to said Caroline Bovine, and the property devised by me in this will to William A. J.

Whiteford, reserving thereout and therefrom a right of way across said land to the lands and premises hereinbefore devised by me to Elizabeth L'Esperance and James William Whiteford, and now used and enjoyed by me and the tenants of said premises."

The devise contained in the said codicil under which the plaintiff claims, is as follows:

"I will and devise unto James William Whiteford of the city of Winnipeg, in the Province of Manitoba, formerly of the city of Ottawa, in the Province of Ontario, physician, and to his heirs and assigns forever, all that certain messuage, land and premises situate on the west side of Front street, in the city of Belleville, lying next above north of the property devised in said will to Caroline Bovine, and which said property is now occupied by one Daniel Coyle, as an hotel, measuring thirty-three feet and six inches, more or less, frontage on said Front street, measuring from the south side of the gangway, leading from Front street to the rear of said land, between land devised in my said will to Caroline Bovine, and this property devised to said James William Whiteford, and the south east corner of land owned and occupied by S. B. Smith, Esquire, to include all the land between these two points on Front street and the river Moira; also the land lying north of said lot, and south and west of land owned by Samuel B. Smith to the river Moira, together with all the buildings thereon. This bequest is intended to convey all the land owned by me or the late James Whiteford, lying north of the north side line of land in my said will devised to Caroline Bovine, and north of the straight line produced to the river Moira, running westerly along the north side of said land devised to said Caroline Bovine, from west side of Front street to said river Moira, which said lands are those devised to William Whiteford in the twentieth paragraph of my said last will, which said paragraph is by this codicil revoked, subject to the following reservations and and charges: reserving free use of gangway and right of way as now enjoyed by me and my tenants for ingress and egress to lands and premises in my said will devised to Caroline Bovine, Elizabeth L'Esperance and James William Whiteford, and each of their heirs, executors and assigns, charged with the payment of $1,000 to William A. J. Whiteford of the city of Montreal, and Province of Quebec, and with the payment of $150 to Mary Ester Holden, as more particularly set forth in the devise to each of them."

The edifice above the gangway was at the time of the making of the said will and codicil, and at the death of the said testatrix, occupied by the said Thomas Lockerty the tenant of the most northerly of the said three stores, and by him used as a part and parcel thereof, and has ever since continued to be so occupied and used by the said Thomas Lockerty.

This edifice would be included in the words used in the devise to Caroline Bovine, "that certain messuage land

and premises;" and, in my opinion, passed to her under the said devise as being then "occupied by Thomas Lockerty;" and I do not think that the statement of the frontage of the store on the ground upon Front street detracts from the effect of the devise of what was then occupied by him; nor is there anything in the devise under which the plaintiff claims, in my opinion, which detracts from that effect.

The property devised to James William Whiteford is described as that then occupied "by one Daniel Coyle as an hotel," and although by the terms of the devise it is to include all the land between "those two points on Front street, (the south side of the gangway and the south east corner of land owned and occupied by S.B. Smith,) and the river Moira," yet these words do not necessarily pass this edifice, and do not do so if the circumstances existing at the time of the devise show that it was not the intention of the testatrix that it should pass.

It is said that it passed under these words by force of the maxim "*cujus est solum ejus est usque ad cœlum*;" but this maxim is not of universal application. "A man may have an inheritance in an upper chamber though the lower buildings and soil be in another": *Co.*Litt., 48 *b.*; *Doe d. Freeland* v. *Burt*, 1 T. R. 701.

The maxim *cujus est solum ejus est usque ad cœlum* is not a presumption of law applicable in all cases and under all circumstances; for example it does not apply to Chambers in the Inns of Court: per Maule, J., *Fay* v. *Prentice*, 1 C. B. 828.

In the *Duke of Devonshire* v. *Pattinson*, 20 Q. B. D. 263, Fry, L. J., says: "The conclusion that you may regard the circumstance under which a deed is executed as rebutting the presumption" (of land conveyed to a river being *ad medium filum aquæ*) "is only an illustration of a wider principle."

"In deeds, as well as in wills," said Lord Wensleydale in *Lord Waterpark* v. *Fennell*, 7 H. L. Cas. 650, at p. 684, "the state of the subject at the time of execution, may be inquired into. So again there is a presumption that a demise of land described by superficial metes and bounds carries with it the land to the centre of the earth: but this presumption has been rebutted by considering the state of circumstances at the date of the grant, and finding that the lessor has previously demised a cellar to a third person who was in occupation under that lease at the date of the lease of the surface: *Doe d. Freeland*

v. *Burt*, 1 T. R. 701. There is, in our opinion, no doubt that in the grant of a set of chambers in our Inns of Court a flat in a house constructed in flats, or of a seam of coal in the earth, the presumption that the grant extended indefinitely upward and downwards would be repelled by the nature of the subject matter of the grant, and without any express words in the conveyance."

In my opinion the nature of this edifice, its construction, the intention of its builder that it should be part of the building to which it was attached, and with which it was intended to be used, and was used, and the nature of its use, all tend to show conclusively that the testatrix intended it should pass to Caroline Bovine, under the description of its occupation, "occupied by Thomas Lockerty," and that it was not intended to pass to James William Whiteford.

An argument might also be drawn in support of this view from the provisions of the will as to party walls, from which it might be concluded that it was not the intention of the testatrix that this lath and plaster partition should be the party wall and not the southerly wall of the hotel.

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

In Easter Sittings, 1888, the plaintiff moved to set aside the judgment for the defendant and enter judgment for the plaintiff.

In the same Sittings, June 7, 1888, *Dickson*, Q. C., and *Burdett*, supported the motion.

Northrop, contra.

June 29, 1888. GALT, C. J.—There is no doubt that the words of the will describing the boundaries of the land devised to the plaintiff, or rather the party through whom he claims, covers the strip of land now in question; but that does not decide the right of the parties, for it has been held in many cases, not only those cited by the Chief Justice but in others, particularly the case cited by Mr. Northrop of *Press* v. *Parker*, 2 Bing. 456, that in a devise very similar to the present, evidence might be given to ascertain the intention of the testator.

That was an action of trespass for breaking into a closet and coal cellar, which the plaintiff and the defendant both claimed under the will of the plaintiff's father. The several devises are set out in the report; and it appears "that from the year 1791, till within five years previous to the trial, the plaintiff's house had been occupied by the devisor and from that time to the present by the plaintiff; during the whole period the devisor and the plaintiff had occupied the coal cellar in question, to which, though it was within the *boundary of the defendant's house*, there was no approach but on the plaintiff's side."

In the case now before us, the house devised to the defendant had been owned by the devisor, and had been leased by her to one Lockerty, and devised to the defendant as the premises "now occupied by Thomas Lockerty;" there was no, what may be called, party wall beyond the first story.

The premises are described by the learned Chief Justice as follows: "The three southerly buildings of the said block, were built for and used as stores, and the northerly building as and for an hotel. Between the hotel and the most northerly of the three stores there was a lane or gangway for the use of the tenants of the several buildings in the said block. At the top of the first story of the said last mentioned store, a floor was carried across the gangway from the store to the hotel, and a wall was carried up in front and rear to the height of the block, with windows in front and rear; the front wall above the gangway was carried up with the front wall of the block. The block is built of brick, and the southerly wall of the hotel is an entire brick wall from cellar to garret, without any windows, doors or other openings therein, and there is consequently no mode of access from the hotel to the edifice above the gangway."

The learned Chief Justice then says: "I find that the edifice above the gangway was originally built as and intended to form a part of the said most northerly of the said three most southerly of the said buildings, and has always since been used, and now is used, as a part thereof."

In the case to which I am now referring, the defendant was about to call witnesses after the close of the plaintiff's case to shew that the coal cellar was within the ambit of his house; but the Chief Baron said such testimony would be useless, because, admitting the fact, he thought the will would pass to the plaintiff whatever was in his occupation at the time of publishing the will.

This direction was moved against, but was upheld by the full Court. In my opinion it is decisive of the present case; and this motion must be discharged, with costs.

ROSE, J.—It would seem manifest from the language of the will, read in the light of the facts as to the use and occupation of the property, that the testatrix did not intend to disturb the possession of those in occupation, or to divide up the land in a manner different to that in which it was used and occupied.

It would also seem clear that there was no intention to to pass the title of the land, used as a lane, free from burdens, or in such a way that it might be built upon, but merely to pass it as a lane, for the devise is made subject to the "free use of gangway and right of way as now enjoyed by me and my tenants for ingress and egress to lands and premises in my said will devised to Caroline Bovine, Elizabeth L'Esperance, and James William Whiteford, and each of their heirs, executors and assigns."

Such user of the gangway precludes any intention to give the plaintiff the right to build; and the room in question over the gangway in no wise interferes with the right to enjoy the devise of the land as above set out.

The law is collected in *Broom's* Legal Maxims, 6th ed., at pp. 371, under the caption of the maxim *cujus est solum, ejus est usque ad coelum.*

The plaintiff is asserting his claim with a very strict regard to his own rights, and not, as seems to me, with regard to the intention of the testatrix.

I am not sorry to find that the claim is without legal foundation, and fails.

[MACMAHON, J., was not present during the argument, and took no part in the judgment.]

[COMMON PLEAS DIVISION.]

CLARK V. HARVEY ET AL.

Mortgage—Short Form Act—"Express exception from"—Power of sale without notice—Validity under Act—Entry prior to sale.

The power of sale contained in a mortgage, purporting to be under the Short Form Act, was: "Provided that the mortgagee on default for one day may, without any notice, enter on and lease or sell said lands." *Held*, per GALT, C. J., at the trial, that this case was distinguishable from *Gilchrist and Island*, 11 O. R. 537, as the sale there was by an assignee of the mortgagee, and not as here by the mortgagee himself: and that under the power entry on the land was not necessary prior to sale. On appeal to the Divisional Court,

Per ROSE, J. The power was operative under the Short Form Act; and therefore the point as to entry was immaterial. *Gilchrist and Island*, dissented from.

Per STREET, J. The form was not operative; and the words therefore must be confined to their actual meaning apart from the statute; and that under its terms the power did not arise, or at all events could not be exercised until entry made on the land.

THIS was an action brought by the plaintiff as mortgagee, claiming a right to redeem under the following circumstances: One Edward Johnston, claiming to be the owner of the land in question, subject to certain mortgages which are not in question, on 2nd January, 1886, executed a mortgage to the defendant Fisken for $350. Afterwards, on 19th February, 1886, he executed a mortgage to the plaintiff for $450, subject to the prior encumbrances amounting to about $1,100, which included the Fisken mortgage. The statement of claim then charged that on or about the 26th March, 1887, without any notice to the plaintiff, the said Fisken pretended to convey the said lands to the defendant Harvey in pursuance of a power of sale alleged to be contained in the mortgage to Fisken; averred that the mortgage to Fisken did not contain any power of sale enabling him to convey the said lands, and that the defendant Harvey was a trustee for defendant Barwick, and purchased the land for him: that the said sale was pretended and colourable only, and was collusively and improperly conducted to defeat the plaintiff's claim. The plaintiff claimed that the conveyance from said Fisken

to Harvey be set aside, and that the plaintiff be allowed to redeem, and that accounts be taken.

The defendant Harvey denied all charges against him; and contended that the sale was a valid sale. The defendant Barwick denied all charges of improper conduct. The defendant Fisken denied all charges of improper conduct, and contended that he had the right to sell the lands.

The cause was tried before Galt, C. J., without a jury, at Toronto, at the Fall assizes of 1887.

The learned Chief Justice reserved his decision and afterwards delivered the following judgment.

GALT, C. J.—I find as a fact that the defendant Barwick was not guilty of any improper conduct, and dismiss the action against him with costs.

I find that the defendant Harvey was not guilty of any improper conduct, and that he purchased the land in good faith; and, so far as the allegations against him are concerned, I find they are entirely without foundation.

I find that defendant Fisken, acting under the power of sale (as he believed) contained in his mortgage, sold the land in good faith to Harvey on 28th March, 1887. I find that on the 28th April, 1886, Fisken served a notice of sale on Johnston and on the plaintiff.

The question now resolves itself into this, whether or not Fisken had a right to sell the lands under his mortgage.

The mortgage purports to be made in pursuance of the Act respecting short forms of mortgages. At the close of the evidence, the case was adjourned for argument before me. It was argued about the beginning of the present month of March.

Mr. Osler's first contention was, that the power of sale could not be read in its extended form, not being in accordance with the Statute R. S. O. (1877) ch. 104. And for this position he cited the case of *Re Gilchrist and Island*, 11 O.R. 537.

There is no doubt that had the sale in this case been made by an assignee of Fisken, it would, under the authority of that decision, have been void; but it is not so. The sale was made by the original mortgagee, and not by an assignee.

He then contended that as no entry had been made before the sale, the sale was void: for which he cited *Jones* on Mortgages, 3rd ed., vol. ii., sec. 1782, and a case of *Roarty* v. *Mitchell*, 7 Gray (Mass.) 243. Sec. 1782, lays down the proposition as broadly as possible. It is thus stated. "'Under a power in default of payment to enter and take possession of said premises immediately, and sell and dispose of the same,' a sale cannot be made without a previous entry and taking possession, or at least a demand for possession and a refusal;" but, on referring to the authority, *Roarty* v. *Mitchell*, 7 Gray 243, it by no means bears out the statement.

The learned Judge, by whom the judgment was given, states the case as follows, at p. 244: "The deed of mortgage provides that, in default of payment, 'the said Read & Co., or assigns, may enter into and take possession of said premises immediately, and may sell and dispose of the same on giving two weeks notice thereof publicly.' Now upon the agreed facts it appears that no possession was taken of, nor any entry made upon the premises. Nor was any demand for entry or possession made. We think such entry and possession, or, what perhaps would be equivalent, a demand for possession, and refusal, were conditions precedent, without which no valid sale could be made under the power of sale in the deed."

It is manifest that the decision turned on the terms of the deed, and is no authority for the broad proposition of the learned author.

Assuming, then, that the condition should be read in its extended form, we find that upon default being made "It shall and may be lawful to and for the said mortgagee, his heirs or assigns, after giving written notice to the said mortgagor, his heirs or assigns," (this was done on the 16th April, 1886) "of his intention in that behalf, without any further consent or concurrence of the said mortgagor, his heirs or assigns, to enter into possession, and when either in or out of possession of the same to make any lease or leases thereof, or of any part thereof as he shall think fit, and also to sell and absolutely to dispose of the said lands."

In my opinion under these provisions the mortgagee had a right to sell without prior entry; and this contention is not entitled to prevail.

He then urged that the note of 4th February, 1887, which was the note in existence when the sale was made to Harvey was not secured by the mortgage because it is

not to Fisken but to Fisken & Co. The proviso in the mortgage is, "this mortgage to be void on payment of three hundred and fifty dollars of lawful money of Canada, being the amount of a promissory note bearing even date herewith, made by the mortgagor, payable three months after date, to the order of J. C., and by him endorsed, and all renewals thereof and substitutions therefor, and in default of payment of the said renewal or substitution, then interest at the rate of three per cent. a month shall be payable upon the amount in arrear monthly until paid."

It was proved that the last note was in substitution of the first; and from the statement put in at the trial the interest charged was less than than provided for by the agreement.

This objection is therefore overruled.

He then contended that the sale was made for the purpose of cutting out the mortgage of the plaintiff, and cannot be sustained, no attempt having been made to get the best price.

If we were unacquainted with the circumstances under which the present defendant Harvey became the purchaser, it might be thought that a sale based only on the amount due to defendant Fisken was a singular transaction; but on considering the evidence it is not so. It is plain from the evidence of Jacob Paul Clark (the plaintiff E. J. Clark was not examined as a witness) that he is in reality the owner of the mortgage now in question.

It is also manifest that Fisken was anxious and willing to do anything in his power to sell the said land and to obtain payment of his debt.

I confess that the evidence of Jacob Paul Clark impresses me very unfavorably to the present claim. He was an assignee of a prior mortgage, and in March, 1887, before the sale by Fisken to Harvey, had taken proceedings in the Court of Chancery against Johnston and Barwick to foreclose this very land, and had served notice on Fisken and E. J. Clark (in reality on himself) as subsequent mortgagee. Barwick then (who had for the accommodation of Canavan, the real owner of the land, become an endorser on the note for the security of which the mortgage had been given) applied to Harvey to become the purchaser so that he Barwick might be discharged, and Harvey acting in good faith, and for the purpose of assisting his friends, became the purchaser.

I therefore dismiss this action, with costs as against each of the defendants.

In Michaelmas sittings, 1887, the plaintiff moved on notice to set aside the judgment entered for the defendants, and to enter judgment for the plaintiff.

In Easter sittings, June 6, 1888, the motion was argued.

Osler, Q. C., and *Shepley*, for the plaintiff, referred to *Jones* on Mortgages 3rd ed., vol. ii., sec. 1782; *Roarty* v. *Mitchell*, 7 Gray 243; *Cranston* v. *Crane*, 97 Mass. 459; *Emmett* v. *Quinn*, 27 Gr. 420, 7 A. R. 307, 325.

Bain, Q. C., for the defendant Fisken, referred to *Mason* v. *Bickle*, 2 A. R. 291; *Cameron* v. *Kerr*, 3 A. R. 30; *Crozier* v. *Tabb*, 38 U. C. R. 54.

Moss, Q. C., and *A. C. Galt*, for the defendant Harvey, referred to *Davey* v. *Durrant*, 25 L. J. N. S. Ch. 830; *Shaw* v. *Crawford*, 4 A. R. 371; *Kelly* v. *Imperial Loan &c. Co.*, 11 A. R. 326, 11 S. C. R. 516; *Metters* v. *Brown*, 33 L. J. N. S. Ch. 97.

T. P. Galt, for defendant Barwick.

June, 29, 1888. ROSE, J.—The questions for decision are, whether the form of power of sale contained in the mortgage is operative under the Act respecting Short Forms of Mortgages, R. S. O. (1887), ch. 107, and:

2. If not, was entry upon the mortgaged premises necessary prior to making sale thereof?

The form in the mortgage was: "Provided that the said mortgagee, on default of payment for one day, may, without giving any notice, enter on, and lease or sell the said land."

The short form in the Act is: "Provided that the said mortgagee, on default of payment for —— months, may, on —— notice, enter on and lease or sell the said lands."

It is urged that the words used in the mortgage are not within the powers conferred by the Act as found in sec. 3, schedule B., which is as follows: "Such parties may introduce into, or annex to any of the forms in the first column, any express exceptions from, or other express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column."

It is clear that the long form in column two of the schedule is quite intelligible if read with the changes indicated by the language used in the mortgage; and there is no difficulty in reading into the long form the exceptions or qualifications, if such they be.

Re Gilchrist and Island, 11 O. R. 537, a decision of the learned Chancellor, is cited as expressly in point and in the plaintiff's favour; and so it is.

That learned Judge says, at p. 539, that the use of the words, "without giving any notice," prevents the proviso for sale being operative under the Act; and that the power "must derive virtue solely from its force as a contract or covenant which is to be construed according to the ordinary rules."

He further says: "This deviation from the statute is neither an exception from nor a qualification of the form there given, but an abolition of one of its most important terms."

I have the misfortune to differ from such view.

Giving the matter my best attention, I am unable to distinguish the effect of excepting anything from the proviso and abolishing the thing excepted. If excepted from the clause, it of course is no longer there, and therefore is abolished so far as that clause is concerned.

But without desiring to enter into any verbal criticisms, I am wholly unable to give effect to the language of the Act above quoted, if one is not at liberty to except from the proviso any requirement therein contained.

To except is to exclude; and, it seems to me, that if the parties agree so to do, they are empowered by the Act to exclude or except from the power the provision requiring any notice, just as they might "annex to" the form any such exception.

If the exact form in column one had been used, filling up the blank so as to provide for one month's default and thirty days notice; and the parties then added: "Provided, and it is hereby agreed that notwithstanding anything hereinbefore in the above proviso contained, the said mortgagee

shall not be required to give any notice of default previous to exercising the power of sale contained in said proviso," would not such words be in exact compliance with the power to "annex to any of the forms in the said column, any express exception from" the same? If so there is the like power to "introduce into any of the forms the like exception."

I arrive at the conclusion, therefore, that the form used in the mortgage is operative under the Act; and therefore the second question becomes, in my view, immaterial.

I need not say that, with the unfeigned respect I have for the opinion of the learned Chancellor, I venture to differ with extreme diffidence, and only because compelled by a very strong opinion which I am unable to change.

Upon the facts, the evidence of Mr. J. P. Clark places it beyond doubt that the sale was an honest one, the object being to free Mr. Barwick from his unpleasant position as an accommodation endorser, and that although the effect was to cut the plaintiff out, that was only a result and not the object of the defendants' action.

Mr. Clark said that he went to Fisken's solicitor and offered to pay Fisken's debt, taking an assignment with the collaterals, which was refused, that is, the giving of the collaterals was refused. He said: "I wanted assignment of the mortgage and the collaterals, because I felt that the claim was a claim that could not be recovered on the mortgage, so I wanted the collaterals."

Mr. Barwick had testified that his object was merely to get free from his liability; and it appeared that there had been two abortive attempts at making sale of the property.

I think the learned Chief Justice was quite right in disposing of the questions of fact as he did; and I agree in the result at which he arrived.

The motion must, in my opinion, be dismissed, with costs.

STREET, J.—I regret to find myself unable to agree with the conclusion at which my brother Rose has arrived, viz.,

that the power of sale in the mortgage in question here is to be interpreted under the Act respecting Short Forms of Mortgages.

The second section of that Act, R. S O. ch. 107, provides that where a mortgage, expressed to be made in pursuance of the Act, contains *any of the forms of words* contained in column one of Schedule B, such mortgage shall be taken to have the same effect, and be construed, as if it contained the form of words contained in column two of that schedule

The third clause of the directions as to the forms provides that parties *who use any of the forms* in the first column may introduce into or annex to any of such forms any express exceptions from or other express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or on the corresponding forms in the second column.

The intention of the Legislature that the forms should be strictly adhered to, is shewn by their having thought it necessary to provide in the first and second clauses of the directions, that a name or names might be substituted for the words mortgagor or mortgagee, and the feminine for the masculine gender in the form of words in the first column.

The meaning attached by the forms in the second column to those given in the first column, goes in many of the instances so far beyond the natural meaning of the words used in the first column that I think the latter should be treated more as symbols to which a particular and extended meaning is given by the Act, than as forms of words with which the persons using them are to be at liberty to tamper at will; in short, that if the Legislature had chosen to say that "*x, y,*" should, when used in a mortgage purporting to be made under this Act, have attached to them the meaning of the first and second clauses in the second column, the parties to a mortgage would not be at liberty to leave out the "*y,*" and then attribute to "*x*" the meaning of the first clause: and that as no word in the first column has attributed to it, apart

from its fellows, any particular meaning, we are not at liberty to leave out any word from the first column, and say that the form in the second column is still applicable.

What the Legislature intended by the third clause of the directions seems to me to have been this: that so long as the parties to a mortgage left untouched the form of words in the first column so that the Act might operate upon them, so long in fact as the symbol remained, it might be made subject to express exceptions, or qualifications, either inserted between some of the words forming the symbol or added to them at the end: for example in form 2 of the first column after the word "Canada," it appears to me that the words "or in current gold coin," might be added and that the effect would be to add the same words after the word "Canada" in the second column; or in form 8, the words "created by the mortgagor" might be added to the words in the first column with the effect of limiting the operation of the covenant to the acts of the mortgagor. But what authority is to be found in the statute for saying that the omission from form 14 of the words, "enter on and lease or," would still leave the mortgagee at liberty to treat the remainder of the form in column one as entitled to the meaning of any portion of column two? The answer to such a claim would I think be that not having used the form of words given in the first column, he is not entitled to any part of the extended meaning set out in column two, because the Act does not confer any such right. The legislature has in effect said "if you use the prescribed words you may claim the prescribed meaning, and you may add qualifications or exceptions; but if you use a portion only of the prescribed words, you cannot appeal to the Act for the purpose of giving to that portion a meaning which the Act does not give them apart from the remainder of the words of the form."

The words of this power must, therefore, in my opinion be confined in their meaning to their actual meaning, apart altogether from the statute. The words used are these: "Provided that the said mortgagee on default of payment

for one day may, without giving any notice, enter on and lease or sell the said lands."

The person giving a power of sale, is entitled to impose upon the execution of it such conditions and restrictions as he may deem proper, and any such conditions and restrictions when imposed, must be performed or the power to sell will not arise: *Sugden* on Powers, 8th ed., pp. 206-7.

The fact that the power to sell is here to be exercised without notice, giving as it does to the mortgagee, "the right to terminate the mortgagor's equity of redemption immediately upon default, although such a power has been called an oppressive one in *Miller* v. *Cook*, L. R. 10 Eq. 641, should not weigh in construing this power, which is to be taken according to the natural meaning of the words used.

The authority given is to "enter on and lease or sell the said lands," which I take to be equivalent to "enter on the said lands and lease or sell them;" and, again, as being equivalent to "enter on the said lands, and having entered to lease or sell them."

I do not see any other construction which would give to each word in the power its meaning. There was, excepting as a preliminary condition to the exercising the power, no need to authorize the mortgagee to enter upon the land. By the grant contained in the mortgage, he was entitled to the possession of the land, subject to the right of the mortgagor to hold possession only until default. He was, therefore, entitled to enter immediately on default. The terms of the power are that after one day's default he may enter on and lease or sell. Why should this additional authority be given to him in the power unless it were given for some purpose? and for what other purpose can it have been given than as a form imposed on the execution of the power?

"Where forms are imposed on the execution of a power, it is either to protect the remainderman from a charge in any other mode, or to preserve the person to whom it is given from a hasty and unadvised execution of the power:" *Sugden* on Powers, 8th ed., p. 206.

In *Jones* on Mortgages, 3rd ed., vol. ii., sec. 1782, it is laid down upon the authority of two American cases of *Roarty* v. *Mitchell*, 7 Gray (Mass.) 243, and *Cranston* v. *Crane*, 97 Mass. 459, that "under a power in default of payment 'to enter and take possession of said premises immediately, and sell and dispose of the same,' a sale cannot be made without a previous entry and taking possession, or at least a demand for possession, and a refusal."

I am of opinion that under the terms of the power of sale here in question the power did not arise, or at all events could not be exercised until entry had been made upon the land by the mortgagee.

There being no evidence that any entry of any kind whatever had been made before the sale which is impeached took place, I think the sale cannot stand.

The plaintiff sets up that the conveyance by the mortgagee, Fisken, to the defendant, Harvey, was made collusively: that the defendant Harvey holds merely as a trustee for the defendant Barwick, and that the transaction was in effect a fraudulent one. He further sets up that the note, which the mortgage is given to secure, had been paid off, and that the note which was given in renewal of or substitution for it, is not within the description of the debts which are intended to be secured by the mortgage.

I think that all these issues must be found against him; and that as he has not unconditionally offered to redeem, he should pay to the defendant Harvey, who stands in the position of assignee of the mortgage, his costs of this action.

The defendant Barwick having succeeded upon the issues raised by him, should also have his costs against the plaintiff.

The action should, I think, be dismissed as against the defendant Fisken, without costs.

[QUEEN'S BENCH DIVISION.]

HONSINGER v. LOVE.

Partnership — Judgment against partners—Payment by one—Enforcing against the other—R. S. O. (1887), ch. 122, secs. 2, 3, 4.—Partnership accounts—Statute of Limitations.

The plaintiff and defendant were partners, and judgment was recovered against them in 1876 by a bank upon certain promissory notes, of which they were respectively maker and indorser. The plaintiff paid the judgment immediately after its recovery, took an assignment of it, and in 1886 proceeded to enforce it against the defendant. The partnership accounts were taken by a referee, whose finding, approved by the Court, was, that the defendant should have paid one-half of the judgment.

Held, that the plaintiff was entitled to that extent to stand in the place of the original judgment creditor, and enforce the judgment against the defendant.

Per ARMOUR, C. J.—The Mercantile Amendment Act, R. S. O., 1887, ch. 122, secs. 2, 3, 4, applies to the case of partners.

Small v. *Riddel*, 31 C. P. 373; *Potts* v. *Leask*, 36 U. C. R. 476; and *Scripture* v. *Gordon*, 7 P. R. 164, not followed, in view of the opinions expressed in *London and Canadian L. & A. Co.* v. *Morphy*, 14 A. R. 577.

AN appeal by the plaintiff from the judgment of Galt, C.J., in favour of the defendant upon an issue tried between the parties, the facts as to which are fully set out in the judgment of Street, J.

The appeal was argued before the Divisional Court on the 30th May, 1888.

G. C. Campbell, for the plaintiff.

Aylesworth, for the defendant.

June 23, 1888. STREET, J.—This is an issue directed by the local Judge at St. Thomas, under the following circumstances:

The plaintiff applied to him in March, 1886, under Rule 356, for an order for leave to issue execution upon a judgment of the Court of Queen's Bench recovered on 15th July, 1876, by the Molsons Bank against the defendant and the plaintiff for $405.83 debt, and $25.93 costs.

Affidavits were filed by the defendant Love disputing the plaintiff's right to issue execution against him, and an issue was finally directed by the local Judge on 20th

March, 1886, in this Division, as to whether the plaintiff, Honsinger, was entitled to issue execution upon the said judgment against the goods and lands of the defendant, and if so, for what amount.

The issue was entered for trial at the St. Thomas Spring Assizes, 1887, before the present learned Chief Justice of the Common Pleas Division, by whom a reference was directed in the following words: "I refer it to D. McLaws, local Registrar, St. Thomas, to take account; and I reserve further directions and costs till after the said McLaws shall have made his report, and direct judgment accordingly."

The extended minutes of this judgment were drawn up, and signed by counsel as follows:

"It is adjudged that it be referred to David McLaws, local Registrar of the High Court of Justice at St. Thomas, to take the partnership accounts of the partnership existing in 1875 and 1876 between the plaintiff and defendant, and find what, if anything, is due from either of the parties hereto to the other; the said David McLaws to make his report to this Court, and the same to be subject to appeal and confirmation in the same manner, and the proceedings on either of those courses to be the same as in case of appeals from and confirmation of reports of Masters under the proceedings and practice of the late Court of Chancery and Chancery Division of this Court. And it is further adjudged that further directions and costs be reserved until the said David McLaws shall have made his report;" and the formal judgment follows these minutes.

On the 31st October, 1887, the local Registrar reported in substance as follows:

That the plaintiff and defendant entered into partnership as produce dealers in the spring of 1875, and continued in business until June, 1876, when the partnership was dissolved without any settlement being made of their partnership affairs: that defendant kept the partnership books, and did all the banking business of the firm, and that he was unable in the proceedings before the local Registrar to produce any books, or to give any satisfactory account

of what became of the moneys in the business, nor that the losses exceeded the profits: that the capital used in the business was borrowed in the first instance from the Merchants Bank on notes made by the plaintiff and indorsed by the defendant: that subsequently the partnership account was changed to the Molsons Bank, and that the debt to the Merchants Bank was paid off by moneys raised in the Molsons Bank on notes made by the defendant and indorsed by the plaintiff: that at the close of the partnership the debt of the firm to the Molsons Bank amounted to $800 on four promissory notes of $200 each, upon which the bank obtained two judgments against the plaintiff and defendant: that the plaintiff on the 15th July, 1876, paid one of these judgments, amounting to $431.76, and took an assignment of it from the bank: that he has paid the other, but has not taken an assignment of it, and that the defendant has not repaid any part of this $431.76 to the plaintiff, nor has he promised to pay it, nor has he given any acknowledgment in respect of it, nor did the plaintiff demand payment of it until the application to the Judge in March, 1886, above mentioned: and that the defendant is now indebted to the plaintiff in the sum of $822.41, without computing interest, unless the debt is barred by the statute.

From this report the defendant appealed, and the appeal came on to be heard before the learned Chief Justice of the Common Pleas Division, in March, 1888, who gave judgment for the defendant upon the issue, being of opinion that upon the facts found by the local Registrar, and relied upon by the plaintiff, the case was brought within the authority of *Small* v. *Riddel*, 31 C. P. 373; that the plaintiff could not therefore recover even if the report were upheld, and that it was therefore unnecessary to consider the defendant's objections to it.

Against this judgment the plaintiff moved before the Divisional Court at its Easter sittings, in 1888, upon the grounds that the learned Chief Justice should have dismissed the appeal from the report of the local Registrar, and should

have found that the amount claimed by the plaintiff was not barred by the Statute of Limitations. Upon the argument of the motion the matters of fact involved were argued upon the evidence taken and used before the local Registrar as if no report had been made by him, and as if the evidence had been taken by him as referee merely, and had been returned to the Court without any report. I have stated such of his findings, however, as seem to be material; because a perusal of the evidence leads me to the belief that they are substantially correct, and they state in a concise form the result of the evidence. The plaintiff's story was that the notes which were discounted at first in the Merchants Bank and afterwards in the Molsons Bank, were so discounted for the pupose of obtaining the only capital used by the firm in its transactions. The defendant says, on the other hand, that he contributed a stock of goods worth some $800 to the firm assets, and that the notes discounted in the banks represented the plaintiff's contribution to the firm assets, and were in fact a debt of the plaintiff's own for which he, the defendant, was a surety only. Each party swears to the truth of his own story. The defendant was the book-keeper and accountant of the firm, managed all its financial matters, and retained in his possession when the partnership was dissolved all the assets and accounts of the business: but he can produce nothing in support of the truth of his statements beyond his bare oath. Under these circumstances I think the undisputed facts weigh heavily in the plaintiff's favor. If the defendant put his stock of goods into the business to the amount he alleges, we should expect to find the plaintiff in some way making up an equal amount at the inception of the partnership, as he was to share equally with the defendant in the profits. But it is not disputed that for the first nine months, at least, the amount borrowed from the bank (that being, as the defendant alleges, the only capital brought into the business by the plaintiff) never exceeded $200, and was at the end of that time increased to $400

only. It is improbable that the defendant should have put in a stock of goods worth $800 as against $200 contributed by the plaintiff, and should have gone on for nine months sharing and dividing daily and weekly profits equally with the plaintiff: but this is what he did, if his account is the correct one. It is much more consistent with probability that the stock of goods, if any, which the defendant had when the partnership began should have been disposed of by him for his own purposes, and that the partnership business should have been conducted upon the money raised upon the joint names of the partners, in the bank. The business does not appear to have been one in which much capital was needed. The produce bought upon the market one day was sold immediately for cash, and the profits upon each transaction were at once divided between the partners. The circumstance that the notes upon which the money was borrowed were at one time made by the plaintiff and indorsed by the defendant, and at another time made by the defendant and indorsed by the plaintiff, seems to shew that the debt which they represented was not one for which the defendant was a surety merely for the plaintiff, but was really, as the plaintiff contends, a joint liability, and that is the conclusion at which I have arrived upon the evidence.

The plaintiff was then a person who, being liable with another, viz., the defendant, for the payment of a debt, has paid the debt, and he had a right, under the words of the statute, to have assigned to him the judgment which the creditor, the Molsons Bank, held in respect of such debt. In *Batchellor* v. *Lawrence*, 9 C. B. N. S. 543, it was held that one of several joint judgment debtors, against whom a judgment had been recovered, had a right to insist, under the statute, to have the judgment assigned to him in order that he might seek contribution from his co-debtors.

The ground upon which the learned Chief Justice proceeded in his judgment was that the transaction in question was a partnership one, and that the opinion

expressed by Sir Adam Wilson, when Chief Justice of the Court of Common Pleas, in *Small* v. *Riddel*, 31 C. P. at p. 382, precluded the plaintiff from any right to recover under the provisions of R. S. O. (1877) ch. 116, secs. 2, 3, and 4. That opinion is thus expressed: "But, in my opinion, that Act does in no way relate to partnership transactions. It does not authorize one partner, upon paying a debt of the partnership, to assign that debt to another for the purpose of suing the other co-partners for their several contributions to the partner who has paid that debt. The effect of such a construction of the statute would necessitate the taking of the partnership accounts in every case, even in the pettiest transactions, a proceeding which no partnership could stand, and which would break up or ruin the wealthiest and most prosperous association." This case was decided in 1880, and the point referred to does not appear to have been argued nor to have been necessary for the decision of the case, because the Chief Justice had already expressed his opinion that, even if the Act did apply, the form of the plaintiff's proceedings would preclude him from recovering. It is, however, in accordance with the decision of Chief Justice Galt, in *Scripture* v. *Gordon*, 7 P. R. 164, decided in 1877, which is almost precisely in point here.

If the question had arisen here for the first time, I should, I think, have found it difficult to come to the conclusion that words so wide as those used in the 2nd section of the Act in question, ch. 122 R. S. O., (1887) were not intended to apply to partnership matters, and that all such matters were to be taken as excepted from it.

The section is as follows: "Every person who, being surety for the debt or duty of another, *or being liable with another for any debt or duty*, pays the debt or performs the duty, shall be entitled to have assigned to him every judgment," &c.

No exceptions are here made; persons who, being partners enter jointly or otherwise into a promise to pay a partnership debt are clearly liable with each other for the

payment of it, and therefore appear to come within the words of the statute.

I should have thought that, in using words so large, the Legislature must be taken to have used them in their ordinary meaning, unless their ordinary meaning involved a palpable absurdity, and that no sufficient reason existed for excluding partnership matters from the scope of the Act.

In view, however, of the opinions expressed in the cases to which I have referred, I should feel strongly pressed by the weight and authority due to them, if it were necessary for the determination of this case to inquire whether the Act in question relates to partnership dealings and transactions. Apart, however, from the statute, and before it became law, a surety paying the debt of his principal was entitled to stand in the place of the creditor with regard to all securities held by the creditor for his debt. This rule was subject to the qualification stated by Lord Eldon in *Copis* v. *Middleton*, 1 Turn. & R. 224, that it is to be taken to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal creditor. Accordingly in that case it was held that where a bond had been given by A. and B. to C., B. being surety for A., and B. had paid the bond and taken an assignment of it, he could not in a suit in equity for the administration of A.'s estate claim as a specialty creditor of A. The reason for this appears to have been that it was considered to be one of the cases in which equity must follow the law; and inasmuch as an action at law upon the bond could at that time only have been brought in the name of C., the original creditor, it would appear upon oyer of the bond that the debt was extinguished, and C. would have no answer to a plea of payment. The general rule giving to a surety all the rights of the creditor under such circumstances is admitted, and the exception seems to have proceeded upon a technical rule of pleading and practice, having no longer any force. The exception has not been extended, so far as I can find, to any case in which an

obstacle of this nature does not interfere. Subject to this exception the question seems to have been treated as a matter of intention. Thus in *McIntyre* v. *Miller*, 13 M. & W. 725, a firm being unable to pay a debt, one of the partners paid it out of his own moneys, but took an assignment of the debt to a trustee for himself, and it was held that the debt was not extinguished by the payment. See also *Lindley* on Partnership, 5th Eng. ed., pp. 224 and 225. In the United States the authorities upon the question as to the effect of payment by one of several joint judgment debtors of the judgment debt seem to be divided. The cases upon the subject are collected in paragraphs 470 and 472 of *Freeman* on Judgments, 3rd ed., pp. 495 to 498.

The objections to the right of a surety or joint debtor to have the debt which he pays kept alive for his benefit as against the principal, a co-debtor, seem in the first place to have arisen, and so far as they are still of force, to rest upon technical difficulties in the way of the subsequent enforcement of the security, and to leave untouched in every other case the well settled principle which entitles him to the benefit of the security where he has shewn that the payment has been made with the intention of keeping the debt alive, and not of extinguishing it.

The absence of any ready means of taking the necessary accounts between partners at the time of the decisions in *Small* v. *Riddel* and *Scripture* v. *Gordon*, above referred to upon a summary application for leave to issue execution, may, perhaps, have not been without weight in inducing the learned Judges before whom those cases were heard to come to the conclusion that the Act can not have been intended to apply to cases between partners. Both of those cases, however, were decided before the passing of the Judicature Act. Since that time, under Rule 356, the powers of the tribunal to which application is made for leave to issue execution have been extended so as to enable it to order "that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried."

This Rule follows out the prevailing intention of the Judicature Act and Rules, and makes it obligatory upon the Court which first becomes seized of any dispute between parties who come or are brought before it to determine the dispute, if within its jurisdiction and powers, and not to refuse relief on the ground that some other Court or some other proceeding would afford a more appropriate remedy.

In *Lindley* on Partnership, 5th Eng. ed., at pp. 458 and 561, the changes made by the Judicature Act in the law as to actions between partners is pointed out.

The intention of the plaintiff here to keep the debt alive and not to extinguish it by the payment which he made was evidenced by his taking an assignment of it at the time he paid it. It is true that the assignment was taken to himself, and not to a third person as trustee for him; but I take it that under our present system, the intention being once well established, the mere fact that a trustee was not introduced into the transaction would not be treated as material. The remarks of the Court during the argument of *McIntyre* v. *Miller*, 13 M. & W. 725, shew how strongly, even then, their inclination was to give effect to the intention of the partner who paid the debt of the firm. I am of opinion, therefore, that, entirely apart from the statute, the transfer of the judgment in question to the plaintiff entitled him to stand in the position of the judgment creditor in order that he might recover a due proportion of the debt from the other judgment debtor.

It is, however, objected by the defendant that to enable the plaintiff to proceed upon the judgment is to enable him to evade the statute, which has been held to limit the right of a partner to open up partnership transactions after the lapse of six years. The position of the parties is, however, to be considered. The plaintiff is the holder of a judgment for a debt, which in its original creation was to be paid in equal shares by the plaintiff and the defendant. The plaintiff has paid the whole, and asks nothing more than that the defendant should pay his half to him. If the defendant assented to this position, it would have been

unnecessary that the partnership accounts should be taken at all: it was for the defendant's benefit that these accounts were gone into, in order that he might shew a state of things which would relieve him from this *primâ facie* obligation. See *Knox* v. *Gye*, L. R. 5 H. L. pp. 681, 682, and 687.

It appears to me, further, that the defendant has raised his objections to these proceedings at too late a stage to make it proper that effect should be given to them in any event. If the assignment to the plaintiff of the judgment was a mere nullity, as the defendant now contends, that objection should have been raised when the application was made to the local Judge for leave to issue execution If the fact that the judgment was tainted with partnership transactions, and therefore incapable of force in the hands of the plaintiff, or if the right to enter into the taking of the partnership transactions was barred by the Statute of Limitations, it was plainly the duty of the defendant to point this out when the issue directed by the local Master came on for trial, if he desired to raise the questions at all. But instead of doing this, his counsel signs on his behalf the minutes of the judgment by which it was referred to the local Registrar to take "the accounts of the partnership existing in 1875 and 1876 between the parties." It is not until after these accounts have been taken and the result has proved adverse, that the objection is made for the first time that the plaintiff is not the holder of the judgment because the assignment to him is void, and that the partnership accounts should not have been taken because the right to take them is barred by the statute.

My conclusion upon the issue directed is that the assignment of the judgment to the plaintiff was not a nullity; and that the partnership account having been taken without objection, and having shewn that the defendant should have paid one-half of the judgment in question, the plaintiff is entitled to that extent to stand in the place of the original judgment creditor, whom he has paid, and to issue execution under Rule 356 against the defendant for half

the amount of the judgment debt with interest; and that the issue directed by the local Judge should be so found. See *Duff* v. *Barrett*, 15 Gr. at p. 634; *Dewar* v. *Sparling*, 18 Gr. at p. 637.

ARMOUR, C.J.—I agree with the result arrived at by my brother Street.

Objection was taken by counsel for defendant, when this case first came before us for argument, that under the course that had been pursued at the trial, the judgment of the learned Chief Justice was a judgment upon further directions, and that there was no appeal from it to this Court. The case thereupon stood over until we could confer with the learned Chief Justice on the subject; and upon consulting him, he informed us that his intention was that the local Registrar at St. Thomas should take the evidence and report to him, and that he should then deal with the case as if the evidence had been taken before himself. Having stated this to counsel, the argument was proceeded with.

I agree with my brother Street in his finding of fact, and think it clear that the proceeds of the notes referred to were the only money put into the partnership, and that neither of the partners contributed anything else to the partnership capital. The defendant ought, therefore, in justice, to pay one-half of the amount of these notes, and the question is, can he be made to do what he ought to do by law?

If the Mercantile Amendment Act (R. S. O., 1887, ch. 122, secs. 2, 3, and 4) applies to this case, there is no obstacle in the plaintiff's way, and I think it clearly does. *Small* v. *Riddel*, 31 C. P. 373; *Potts* v. *Leask*, 36 U. C. R. 476; and *Scripture* v. *Gordon*, 7 P. R. 164, are against it; but in *London and Canadian L. & A. Co.* v. *Morphy*, 14 A. R. 577, the Chief Justice of Ontario said, (p. 579): "I have no doubt but that the fact of Morphy being co-defendant at the plaintiffs' suit entitled him to take the assignment of the judgment, and he had the right to claim contribution

from his co-defendant" (also his co-partner). "But the statute provides that he shall only recover the just proportion as between themselves." Burton, J. A., said (p. 580): "But I think that the moment it was stated to us that the judgment had been satisfied by one of the defendants, it was our duty to have dismissed this appeal without prejudice to any right the defendant might have to apply to have himself substituted for the plaintiffs, on proper materials shewing that he filled the position of surety only as to the original debt, or so much of it as he is now seeking to enforce by this peculiar process." In this Patterson, J. A., concurred, and Osler, J. A., said (p. 581): "The judgment was recovered against the defendants as partners, and I doubt if, under the Mercantile Law Amendment Act, R. S. O. ch. 116, secs. 2, 3, 4 one partner paying a judgment against the firm is entitled as a matter of right to enforce it for his own benefit; except it may be to the extent that anything may be proved due to him upon the taking of the accounts between them, and (as regards a judgment for such a cause of action as this judgment was recovered for) ascertaining whether the claim was one which should as between the partners themselves be borne equally or by one of them alone."

I think these opinions of the Court of Appeal warrant us in disregarding the decisions of the Court of Common Pleas and of my brother Galt, to which I have referred, and following the plain words of the statute.

In this case, the fact being found that, having regard to the partnership accounts, the claim of the plaintiff in respect of the notes referred to is one which, as between the partners themselves, should be borne equally, the conclusion reached by my brother Street is correct.

FALCONBRIDGE, J., having been engaged at the Toronto Assizes, took no part in the judgment.

Judgment for plaintiff.

[CHANCERY DIVISION.]

WRIGHT v. COLLINGS ET AL.

Will—Construction—Wrong description—Falsa demonstratio.

A testatrix by her will devised as follows: "I give, devise, and bequeath to my husband all my real estate, comprised of the north-west quarter of lot number ten in the sixth concession of the township of Mersea;" and it appeared that she had never owned the said lands, but had owned and lived upon the north-west quarter of lot ten in the fifth concession of the said township. There was no residuary devise.

Held, that as the will, taken apart from the erroneous description, contained a gift or devise of all the real estate of the testatrix, which would, if taken alone, be a sufficient description for the purpose of passing the lands really owned by her, the part of the description referring to lot ten in concession six, might be rejected as *falsa demonstratio*, and that the lands really owned by the testatrix, passed to the devisee.

Hickey v. *Stover*, 11 O. R. 106; *Re Shaver*, 6 O. R. 312; *Summers* v. *Summers*, 5 O. R. 110, distinguished.

THIS was an action brought upon a mortgage, and giving rise, by reason of the circumstances mentioned in the judgment, to a claim to have a certain devise of lands wrongly described in a will, so construed as to pass the lands really intended to be devised to the mortgagor.

The action came on for trial on May 16th, 1888, before Ferguson, J., at Toronto.

J. B. Clarke for the plaintiff. As to the execution of the will; the fair conclusion from the evidence is that it was properly executed. As to the question arising on the construction of the will, I refer to *Hickey* v. *Stover*, 11 O. R. 106; *Summers* v. *Summers*, 5 O. R. 110; *Re Shaver*, 6 O. R. 312.

S. H. Blake, Q.C., for the infant defendant. As to the execution of the will, see *Re Goods of Mary Gunstan*, 7 P. D. 102. As to the construction of the will, the rule is that if there is a distinct description, without the erroneous particular description, the latter may be rejected. There is, here, however, the single description only. We rely on *Hickey* v. *Stover*, *supra*. If, however, both points are decided in favour of the plaintiff, yet he cannot charge the

costs against the infant on the estate. The infants' position is, that the plaintiff, for his convenience, wanted a construction of the will, and the will proved, and should pay the costs. The infants could not have consented to what is asked.

Clarke in reply. The description is double. The intention appears to be to devise *all* the estate of the testator. If the description is to be treated as single as contended, then this intention is defeated. There is no residuary devise. The case of *Re Goods of Mary Gunstan*, 7 P. D. 102, is widely different. The plaintiff should have his costs.

June 29th, 1888. FERGUSON, J.—The action is upon a mortgage bearing date the 6th day of January, 1880, made by the late Thomas Emerson Collings and the defendant Sarah Collings, his wife (to bar dower), in favor of the plaintiff, for securing the sum of $1,300 and interest upon the north-west quarter of lot No. 10 in the 5th concession of the township of Mersea. The infant defendant is the only surviving child, and is sole heiress-at-law of the said late Thomas Emerson Collings. Her rights are simply submitted to the consideration of the Court. It is admitted that the late Isabella Collings, apparently a former wife of Thomas Emerson Collings, had a good title to this land, she taking the same by a deed of conveyance from one Joseph McCrackan, which was produced at the trial. The plaintiff seeks to shew title by her last will in favor of her husband, and the mortgage from the husband to him. The plaintiff himself points out an error in the will, and asks that it be construed to have the effect that he contends for, namely, to pass a good title to the mortgaged lands to the mortgagor. On behalf of the infant defendant it is contended that the will was not properly executed, or that it has not been shewn to have been properly executed so as to pass the estate; and besides, even if it were properly executed, it cannot be so construed as to be a will of these lands. The mortgagor left a will whereby he directed a sale of his property and an equal division of

the proceeds thereof between the defendants, his widow and child.

The will of Isabella Collings is as follows:

"This is the last will and testament of me, Isabella Collings, of the township of Mersea, in the county of Essex and province of Ontario, wife, made this sixth day of May, in the year of our Lord one thousand eight hundred and seventy-nine, as follows:

"I give, devise, and bequeath to my beloved husband, Thomas Emerson Collings, all my real estate, composed of the north-west quarter of lot number ten, in the sixth concession of the township of Mersea, in the county and province aforesaid, containing by admeasurement fifty acres be the same more or less, to him, his heirs and assigns for ever, subject, however, to the payment of two hundred dollars to my daughter Isabella, and two hundred dollars to my son John Franklin, when they become to the age of twenty-one years of age; and in the event of my daughter or son's death, my husband, Thomas Emerson Collings, shall be freed from the payment of the one deceased, or both, as the case may be."

Then follows the appointment of executors, the signature of the testatrix (which is by a mark), the testamentary clause, and the signatures of two witnesses.

Both the subscribing witnesses were called as witnesses at the trial, and after having heard their evidence and again perused my notes of it, I am of the opinion that this will of the late Isabella Collings was shewn to have been executed by her in the manner required by law to pass real property, and as to this objection or contention I think the plaintiff should succeed.

As to the other matter of dispute, the alleged error in the description of the land, the testatrix was the owner of the land mentioned and described in the mortgage, the north-west quarter of lot number ten in the fifth concession, and she and her husband were living upon it, and after her death her husband, the mortgagor, lived upon it. There was evidence shewing that she had not lived upon

or occupied any part of lot No. 10 in the 6th concession. There was not the proper formal evidence by documents shewing who did own the north-west quarter of this lot No. 10 in the 6th concession, and thereby shewing that the testatrix did not own it. There was, however, some general evidence, or rather evidence of a general character, tending to shew that she did not own it, which evidence was eventually objected to, but there was really no pretence that she did own it, or had ever owned it.

A number of cases were cited and relied on by counsel, amongst which were *Hickey* v. *Stover*, 11 O. R. 106; *Re Shaver*, 6 O. R. 312; *Summers* v. *Summers*, 5 O. R. 110; *Doe Lowry* v. *Grant*, 7 U. C. R. 125.

The will in question, taken apart from what is alleged to be an erroneous description, contains a gift or devise of all the real estate of the testatrix, which, taken alone, would, I think, be a sufficient description for the purpose of passing the lands mortgaged to the plaintiff, because these lands were the property of the testatrix at the time of the making of the will and at the time of her death. There are then two descriptions—this one, and the one that mentions the part of the lot 10 in the 6th concession of Mersea. This distinguishes the case from *Hickey* v. *Stover*, *Re Shaver*, and *Summers* v. *Summers*, and I think the principle of the case *Doe Lowry* v. *Grant* is applicable, and that the part of the description that refers to part of lot No. 10 in the 6th concession may be rejected as *falsa demonstratio*, and a sufficient description left. There is no residuary devise, and my conclusion is, that this will of the late Isabella Collings was well executed, and did take effect as a devise to her husband, the mortgagor of the lands in question, he, however, taking these lands subject to the payments to the children mentioned in the will. The son, John Franklin Collings, has long since died (as was stated at the trial). The daughter is the infant defendant. I do not recollect that there was any discussion respecting the gift to her of the $200 when she attains twenty-one years, which appears to be charged upon the

lands; and excepting whatever may be the the rights in regard to this the plaintiff is, I think, entitled to such a declaration as he asks, though I hope it may be expressed in fewer words than in the prayer in the statement of claim.

The plaintiff is entitled to the usual remedies of a mortgagee that are appropriate under the circumstances. He asks for a foreclosure, but the infant defendant requests that there should be a sale. The infant defendant is entitled to have this, and a sale will be ordered. The reference will be to the Master.

As to the costs, my present impression is, that notwithstanding what was suggested by counsel for the infant defendant, the plaintiff should have his costs added to his claim on the mortgage, and that he should pay the costs of the infant defendant and add these to his costs.

I am, however, willing, if it is desired, to hear any argument or suggestion as to costs upon the settling of the judgment.

A. H. F. L.

[CHANCERY DIVISION.]

REGINA V. WEBSTER.

Municipal corporations—By-law—Farouvitism—Delegations of functions—Regulation of manufactories dangerous in causing or promoting fire—R. S. O. (1887) ch. 184, sec. 406, sub-sec. 14.

The corporation of the town of P. passed a by-law to "Regulate or Prevent the Carrying on of Manufactures or Trades Dangerous in Causing or Promoting Fire," whereby it was provided that no such manufacture or trade should be allowed to be carried on within 300 feet of any other building, and a fine of from $5 to $20 was imposed for each day that a violation of the law continued, with distress on default of payment, and imprisonment in default of sufficient distress.

Afterwards they passed another amending by-law, providing that the restriction should not exist if the owners of such buildings within 300 feet consented in writing, the said consent, however, to be submitted for approval by the chairman of the board of works.

Held, that the by-law as amended was invalid within the principles laid down in *re Kiely*, 13 O. R., at p. 457, and in *re Nash and McCraken*, 33 U. C. R. 181, viz., because by requiring the consent of the owners of the adjoining buildings to be obtained it constituted these persons the judges of the right asked for, and divested the council of the power they should personally exercise, and by requiring the approval of the Chairman of the Board of Works it permitted favoritism, and all persons who desired to follow the same trade were not placed on the same footing. It was also bad because it delegated in part the exercise of the judgment and discretion that should be exercised by the enacting body alone under R. S. O. 187, ch. 184, sec. 496, sub-sec. 14.

The council also passed another by-law making it unlawful to erect a steam-engine, etc., within the village limits without the leave of the council.

Held, that this by-law was also bad, and unauthorized by R. S. O. 1887, sec. 496, sub-sec. 14, since it applied to all cases whether there was danger in causing or promoting fire or not.

THIS was a motion to quash a conviction which had been removed into this Court by a writ of *certiorari*, under the circumstances which are fully set out in the judgment of Ferguson, J.

The motion came on for argument on June 22nd, 1888 before Ferguson and Robertson, JJ.

G. W. Holmes, for the defendant. A by-law must be consistent with the general laws: *Lumley* on By-laws, p. 57; *Everett* v. *Grapes*, 3 L. T. N. S. 668. The fact of the nuisance must be proved in each case: *Regina* v. *Martin*, 12 O. R. 800; *Regina* v. *Nunn*, 10 P. R. 395. It was not

shewn that what was done was dangerous, and it is not so found: *Johnson* v. *Mayor, &c., of Croydon*, 16 Q. B. D. 708; *Munro* v. *Watson*, 57 L. T. N. S. 366. According to English authority it has to be proved in each case that the subject matter is a nuisance at common law. There is no authority for such a by-law as this. It is illegal. Moreover, it is unreasonable: *Re Nash & McCracken*, 33 U. C. R., 181. The penalty in the conviction, also is greater than the by-law allows.

Shepley, for the prosecutor and magistrate. The by-law is within the jurisdiction given by R. S. O. ch. 184, sec. 496, sub-sec. 14. The danger here is found by implication. The construction to be applied to the conviction must be fair and liberal: R. S. C. c. 178, secs. 87, 88, 94; *Regina* v. *Richard Lake*, 7 P. R. 215; *Re Kiely*, 13 O. R. 451. I also refer to the Municipal Act R. S. O. ch. 184, sec. 489, sub-sec. 41, sec. 496, sub-sec. 13. We can support this conviction under by-law 132.

Holmes, in reply. By-law 132 is bad for the same reason as the other one; and it would be necessary to prove that the matter in question was a nuisance, which has not been done. The conviction should be quashed with costs, to be paid by the town of Parkdale: *Regina* v. *Jamieson*, 7 O. R. 149.

June 30th, 1888. FERGUSON, J.—The motion is to quash a conviction of the defendant by James M. Wingfield, Esq., one of Her Majesty's Justices of the Peace for the county of York.

The offence as stated in the conviction is: "For that he the said George Webster, on the 5th day of May, 1888, at the town of Parkdale, in the county of York, did unlawfully use, or caused to be used, a steam engine and boiler requiring fire to be used for the creation of steam, within a distance of three hundred feet of another building, without the authority to authorize the same contained in by-law No. 87, of the town of Parkdale, contrary to a certain by-law of the municipality of the council of the said

town of Parkdale, passed on the 7th day of January, 1880, entituled a by-law to regulate or prevent the carrying on of manufactures or trades dangerous in causing or promoting fire, No. 43; and the said by-law No. 87, entituled a by-law to amend by-law No. 43. Edward Kingzinger, inspector for the said town, being the prosecutor."

The defendant was adjudged to forfeit and pay the sum of five dollars, to be paid and applied according to law; and also to pay to the prosecutor the sum of —— for his costs; and if the said several sums should not be paid forthwith, or on or before the 8th day of June then next, it was ordered that the sum should be levied by distress and sale of the goods and chattels of the defendant; and in default of sufficient distress, it was adjudged that the defendant should be imprisoned in the common jail of the said county, at Toronto, for the space of five days, and be kept at hard labor, unless the said several sums and all costs and charges of the distress and of the commitment and conveying of the defendant to the said jail, should be sooner paid."

The conviction bears date the 8th day of May, 1888, and was made at Parkdale aforesaid. The grounds on which the defendant contended that the conviction should be quashed, were:

1. That the by-laws under the professed authority of which it was made or took place, are contrary to law.

2. That the same by-laws are unreasonable.

3. That the penalty or punishment in the conviction is greater than the by-laws allow or provide for.

The parts of by-law No. 43, that are here material, are as follows:

1. "That it shall not be lawful for any person or persons to carry on or cause to be carried on any manufactory, planing mill, or other trade or business dangerous in causing or promoting fire; or use or cause to be used any steam engine, boiler, or other motor requiring fire to be used for the creation of steam, except as hereinafter provided."

2. "That no such manufactory, planing mill, or other trade or business, or any such steam engine or boiler of the character described in section 1 of this Act, shall be allowed within a distance of three hundred feet of any other building, dwelling-house, or other tenement."

The penalty or punishment which this by-law provides, is a fine of not less than $5, and not more than $20 for each and every day that a violation of it is continued, and in default of payment, distress and sale of the chattels of the offending person, and in default of sufficient distress, imprisonment in the common jail for a period not exceeding twenty-one days, but it does not say anything as to hard labor.

By-law No. 87 enacts as follows: "That by-law No. 43, be hereby amended by adding, after the word 'tenement,' in the second clause thereof, the words 'except by the consent in writing of the owner or owners of such other building, dwelling-house, or other tenement, which consent shall be submitted to and approved by the chairman of the board of works of the village of Parkdale.'"

During the argument, counsel appearing for the prosecutor and the town of Parkdale, called to his aid by-law No. 132, the second clause of which is as follows:

II. "That from and after the passing of this by-law, it shall not be lawful for any person or persons to erect a steam engine, boiler or other motor requiring fire to be used for the creation of steam, within the limits of the village of Parkdale, without the leave of the council of the corporation of the said village of Parkdale, being first had and obtained."

This by-law imposes or provides for a penalty of $50 for each offence, and in default of payment, distress; and in default of sufficient distress, imprisonment; but is also silent as to "hard labor."

The defendant had not obtained the consent mentioned in by-law No. 87, nor had he the leave mentioned in by-law No. 132.

There was not a finding by the magistrate that what

was done by the defendant, of which complaint was made, was "dangerous" in causing or promoting fire.

The evidence does not show that it was, but rather shows the contrary; and before us it was contended that it was not and could not be considered as dangerous in this sense.

The Legislative authority, under which by-law No. 43 was passed, is now found as sub-section 14 of section 496 of ch. 184, of the R. S. O. 1887. (The words have not been changed in the late revision.) The enactment is, that the council of every city, town and incorporated village, may pass by-laws.

14. "For preventing or regulating the carrying on of manufactories or trades dangerous in causing or promoting fire."

The part of by-law No. 132, to which I have referred, was passed as was said, under the same Legislative authority or supposed authority.

By-law No. 87 appears to have been passed on the 20th of September, 1881. It, and by-law No. 43, which is amended by it, must, I think, be read together. One of the conclusions of Sir Adam Wilson, in the case of *Re Kiely*, 13 O. R. at p. 457, is thus expressed: "The by-law if not *ultra vires*, is objectionable, because it requires, as a condition precedent to the granting of the license, that the applicant shall procure the consent of a number of persons in the neighborhood, thus constituting these persons the judges of the right he asks, and divesting the commissioners of the power which they are required personally to exercise." The principle of the conclusion thus stated by the learned Chief Justice, seems to apply to the provision contained in by-law 87, respecting the obtaining the consent of the owner or owners therein referred to. The same provision, however, contains a further requirement, that the consent shall be submitted to and approved of by the chairman of the board of works, which as well as the clause of by-law No. 132 respecting the obtaining of the leave of the corporation of the village, would seem to fall under the principle of *Re Nash and McCracken*, 33

U. C. R. 181, the head note of which is: "A by-law that no person shall keep a slaughter-house within the city without the special resolution of the council. *Held*, not within the power given to the corporation by the Municipal Act of 1866, sec. 296, sub-sec. 23, to prevent or regulate the erection or continuance of slaughter-houses, &c., which may prove to be a nuisance; because it permitted favoritism by the council, and might be exercised in restraint of of trade or used to grant a monopoly; and all persons therefore were not placed, or might not be placed, or were able to be not placed, on the same footing who followed or desired to follow the said trade."

By-laws 43 and 87 read together as one by-law, require that the approval of the chairman of the board of works of the village, of the consent in writing of the owner or owners referred to, shall be obtained by a person desiring to do any of the kinds of business mentioned in the by-law. The second clause of by-law 132, requires that the leave of the council should be first had and obtained; and I think it plain that each contains the vice that in *Nash* v. *McCracken* was held to be fatal. I also think that by-laws 43 and 87 read as one by-law is unjustifiable on the ground that it delegates in part the exercise of the judgment and discretion that should be exercised by the enacting body alone, and does not place all the inhabitants in the same position in regard to the matters affected by the enactment. The second clause of by-law 132, prohibits the erection of a steam engine, boiler, or other motor requiring fire to be used in the creation of steam without the leave of the council, whether the same may or may not be "dangerous in causing or promoting fire," which seems to be unauthorized by the statute under the authority of which the by-law was professedly passed.

My conclusion is, that neither the by-law composed of by-laws 43 and 87, nor the second clause of by-law 132, can be justified. I think they are invalid, and that a conviction founded upon them, or either of them, cannot stand.

Another objection to the conviction is, that it does not show that it was found by the convicting magistrate as a fact that the defendant had done an act in his manufacture or trade that was "dangerous in causing or promoting fire" within the meaning of the statute or the first clause of by-law 43; and the evidence shows that what he did was not dangerous in this respect. And still another that it imposes imprisonment with hard labor, which is unauthorized by the by-laws, or any of them.

Mr. Shepley in his argument, referred to sections 87, 88 and 94 of the Summary Convictions Act, as supporting his contention under by-law 132; and also to sections 489, sub-sec. 41, 496, sub-sec. 13, and section 421 of the Municipal Act, but I cannot see that these or any of them help him out.

I am of the opinion that the conviction should be quashed. I think it is clearly void. The practice seems to be not to give costs in such cases. See *Archbold's* Crown Practice, p. 190. This appears to be a hardship upon the defendant, but seems to be the rule.

ROBERTSON, J., concurred.

Conviction quashed.

A. H. F. L.

[CHANCERY DIVISION.]

RE INGERSOLL, GRAY V. INGERSOLL.

Registrar—Fees—Salary—Apportionment—R. S. O., ch. 111, secs. 98-104.

Held, that on the proper construction of sec. 98 of R. S. O. (1877). ch. 111, each registrar is bound to account to the county as therein mentioned only after he has first received the sum of $2,500 and not before, and this whether there be successive holders of the position in any one year or not.

The Act being in derogation of the rights of registrars as they previously existed under the common law, must be construed strictly.

THIS was an appeal from a special report of H. B. Beard, Master at Woodstock, made pursuant to an order for the administration of the estate of the late James Ingersoll, on February 16th, 1888, with reference to a claim against the estate brought in by the municipal corporation of the county of Oxford, as to the proportion of fees received by the deceased as Registrar of the county under R. S. O. ch. 111 from January 1st, 1886, until his decease, and amounting to $982.55. The Master, however, only allowed $317, in respect to the claim, arriving at that result by a method which is fully explained in the judgment.

The Master accompanied his report with a separate certificate, dated January 23rd, 1888, setting out in detail the nature of the claim, and the various methods of computing the amount due, which are mentioned in the judgment, and giving his reasons for preferring that which lead to a result of only $317 being due, as follows:

"I think the last named amount is the one that ought to be allowed. The first named mode would result in the county getting the whole amount that would be payable in case one officer held the office for the whole year, but it would lead to this, as I think, injustice as far as Mr. Ingersoll is concerned, that his share would be taxed in respect of money he had never received, and Mr. Whitehead and Mr. Pattullo be taxed a part of their receipts to the county, though neither had received the full sum of $2,500 named in the Act. This case seems to be one not provided for in the Act. I allow this item at only $317."

The grounds of appeal as set out in the notice of motion, were as follows :

1. Because the Master did not make the total receipts of the office of Registrar for the County of Oxford for the year 1886, amounting to the sum of $6,760.25, the basis upon which the deduction of $2,500 to be first retained out of such proceeds should be made.

2. Because the said Master did not make the aforesaid sum of $6,760.25 the basis upon which the said Corporation of the County of Oxford were to be paid the portion of said fees to which under the Registry Act they were entitled.

3. Because the said Master did not estimate the said yearly deduction of $2,500 for the proportion of time only during which the said James Ingersoll continued to be Registrar, namely, from January 1st, 1886, up to August 9th, 1886, being the day upon which the said James Ingersoll died.

4. Also because the said Master deducted the full amount of $2,500 from the amount received by the said James Ingersoll from January 1st, 1886, to August 9th, 1886, being the day of his death, the same being the amount he would have been entitled to deduct if he had continued to be registrar for the whole year.

5. Because the said Master deducted from the said sum of $4,042.75, being the amount received by the said James Ingersoll for fees from January 1st, 1886, up to the date of his death on August 9th, 1886, the said sum of $2,500, and estimated and allowed to the Corporation of the County of Oxford only such a sum out of the remainder of the said sum of $4,042.75 as they would have been entitled to if that sum were the whole fees of the office for the year 1886, whereas the fees received for said office for the year 1886, were as follows : [as set out in the judgment], making the total receipts of the office for 1886, $6,760.25.

6. And because the said Master should have deducted only such a portion of the sum of $2500 from the amount of fees received by the said James Ingersoll, $4042.75, as the period he continued in office bears to the whole year.

7. Because the said Master should have allowed the corporation of the county of Oxford such sum as under the Registry Act they would have been entitled to receive from the total fees of the office for the year, namely from the sum of $6760.25, or else such proportion as they would have been entitled to receive if only such a proportion of the sum of $2500 had been deducted as the time the said James Ingersoll continued such registrar bears to the whole year, and such a proportion of said fees should have been allowed to the said corporation of the county of Oxford out of the said sum of $4042.75 as the said period up to August 9th, 1886, bears to the whole year.

The matter came on for argument on March 26th, 1888, before Robertson, J.

Ball, Q.C., for the appellants.
W. Nesbitt, contra.

July 6th, 1888. ROBERTSON, J.—This is an appeal from the report of the local Master at Woodstock, made specially at the request of all parties, as to the claim of the appellants against the estate of the late registrar for the county of Oxford, who died on the 9th August, 1886, and whose deputy filled the vacant position from that date until August 25th, 1886, when the present registrar, Mr. Pattullo, was appointed. The claim is as follows:

1. Proportion of fees received by the said James Ingersoll, as registrar, from January 1st, 1886, until his decease and not paid over by him, $982.55.

2. The county also claims that there is a large quantity of work left undone by said James Ingersoll, for which he was paid, and for which the county will have to pay a large sum, probably $600.

The first claim, which is the one in question, is based on sections 98 to 104 inclusive, of R. S. O. 1877, ch. 111, and the fees received by the late registrar for 1886, up to his death, amounted to $4042.75; his deputy received from August 9th, to August 25th, 1886, $272.65; and the present registrar received up to December 31st, 1886, $2444.85, making a total of $6760.25. The Master allowed the county on the amounts received by each of the several persons who were registrars and acting registrar for the year separately, which has the effect of letting the two last named out, and Mr. Ingersoll's contribution stand thus: Amount received by Mr. Ingersoll, $4042.75; amount allowable under the statute, $3725.75; leaving amount due the county, $317.00. The county objects to this, and urges that the account should be taken by allowing one salary to all these officers, based on the sum of $6760.25, making the deductions on such amount, apportioning such deductions *pro rata* among each incumbent, and charging each with the amount so ascertained, which would produce the following result: total fees received for the year, $6760.25;

salaries allowable, $5130; to be paid to the county, $1630.25; which would make Mr. Ingersoll's estate contribute, $1074; Mr. Whitehead, $65; Mr. Pattullo, $591.25; total, $1630.25; making a difference against the Ingersoll estate of $757.

The conclusion I have come to is, that the Master is right. It is true that in putting this construction on the statute, the county will be the loser because of the death of Mr. Ingersoll; and in fact it may so happen, and will so happen in the case of more than one incumbent occupying the office during any one year; and it may be, that in some cases, the county will not receive any portion of the fees over the statutory allowance made to each registrar; for instance, if it so happened that the whole fees for the year amounted to $7,500, and the registrar should die on May 1st, his deputy should fill the vacancy until September 1st, when his successor would be appointed, and that for each of these periods the sum of $2,500 was received, and no more, the county would not receive anything. In my judgment the meaning of the 98th section of the statute is, that each registrar is not to account to the county for any sum whatever, until after he has received the sum of $2,500; after that he is entitled to receive 90 per cent. of the excess of $2,500 up to $3,000; and after that, 80 per cent. up to $3,500, and so on according to the scale provided by the subsequent sections of the Act. It is argued that such a system would not only be contrary to the intention of the statute, but inequitable. I cannot subscribe to this. It must not be forgotten that before the passing of the Act of Ontario, 35 Vic. ch. 27, the registrars were entitled under the common law, to all the fees and emoluments in anywise appertaining to their said office, and in construing the statute which encroaches upon these rights, and especially in cases like this where the deceased held and enjoyed the office for more than fifty years, and over twenty years before the statute was passed, I think the registrars have the right to say that the statute shall be construed strictly, and its language "Neither

extended beyond its natural and proper meaning in order to supply omissions or defects, nor strained to meet the justice of his particular case," as was said by Burton, J. A., in the *Corporation of Bruce* v. *M'Lay*, 11 A. R. at p. 479.

If the Legislature meant to deal differently with each registrar, in my judgment it has not so declared, and until it does, I think I am only following in the wake of illustrious predecessors and cotemporaries, that so far as is necessary to give statutory provisions, which encroach upon, or are a departure from the common law, their full effect, I must hold the common law superseded by them, but it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief the Act was intended to give: per Draper, C.J., in *Kramer* v. *Glass*, 10 C. P. 475. For the reasons given by the Master, I think a great injustice would be done if the contention of the appellants was given way to, and I therefore dismiss the appeal, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

SMITH V. THE METHODIST CHURCH ET AL.

Charity—Mortmain—Charitable uses—Methodist church—9 Geo. II., ch. 36—14 & 15 Vic. ch. 142—47 Vic. ch. 88. (O.)

A testator devised all his estate, real and personal, to a trustee upon trust to convert the same into money, to hold upon trust to pay "to the treasurer for the time being of the Superannuated Fund of the Methodist Church, $1000;" and "to pay all the rest and residue unto the treasurer, for the time being, of the Trustee Board of the Brant Avenue Methodist Church, to be applied by them or their successors, in redeeming the debt existing against the church property."

Held, that the legacy to the Superannuated Fund of the Methodist Church was valid, for by 14 & 15 Vic. ch. 142, the corporation was empowered to take land devised in any manner whatever in its favour; and that all the benefits of the statute were extended to the Methodist Church, by the statutes of Union, 47 Vic. ch. 106, (D.); and 47 Vic. ch. 88, (O.) so far as the Superannuated Preacher's Fund was concerned.

Held, however, that the residuary devise was invalid, for neither by 47 Vic. ch. 88, (O.) nor by any other statute, was the new corporation "The Methodist Church" empowered to hold land *for all purposes*, including that for the endowment of particular churches, and the proper construction of sec. 6 of 47 Vic. ch. 88, (O.) as amended by 51 Vic. ch. 83, sec. 2, was that the corporation of the Methodist Church should have the rights, privileges, and franchises conferred upon the Connexional Society, but only for the purposes and objects of the said Connexional Society.

Held, lastly, that the residuary benefit intended was invalid both as to realty and personalty, because the direction was, as to money, that it should be applied in payment of incumbrances on the church property.

THIS was an action brought by Douglas Smith, executor of the will of Elihu Williams, deceased, for the construction of the said will and administration of the estate. The defendants were the Methodist Church, the trustees of the Brant Avenue congregation of the Methodist Church, Louisa Boswell, Mattie Helen Phillips, and Arthur W. Semmens.

The facts which were set out in the statement of claim, were as follows:

Elihu Williams died on May 22nd, 1886, leaving a will bearing date May 20th, 1886, whereby after appointing the plaintiff executor and trustee, he proceeded:

"I give, devise and bequeath all my estate, real and personal, of every kind, nature, and description unto my said trustee, his heirs, executors, and administrators, upon trust to convert the same into money as soon as conveniently may be after my decease, (but so far as the same relates

to real estate to be converted within one year after my decease) and when so converted, to be held upon the following trusts, that is to say: first, to pay all my just debts, funeral and testamentary expenses; second, to pay to each of the nieces of my late wife $50; third, to pay to my sister, Helen M. Hobart, $200; fourth, to pay to the treasurer for the time being of the Superannuated Fund of the Methodist Church, $1,000; fifth, to pay to each of my nieces (other than those above mentioned) $50; sixth, to retain out of the said fund $200 as compensation for his services as trustee in winding up my estate; seventh, to pay all the rest and residue unto the treasurer, for the time being, of the Trustee Board of the Brant Avenue Methodist Church, to be applied by them or their successors, in redeeming the debt existing against the church property."

The testator left personal estate worth $2,800, and real estate which the plaintiff had before this action sold for $3,200.

After setting out the will, the plaintiff went on to allege in his pleading that the defendants, the Methodist Church, were a corporate body incorporated under 47 Vic. ch. 88, (O.), the Methodist Church Act, 1884, and also under 47 Vic. ch. 106, (D.), an Act respecting the Union of certain Methodist Churches therein named, and by virtue of these statutes were custodians of the property of the Superannuation Fund, which was a corporate body incorporated by 14-15 Vic. ch. 142; that by an order of this Court made in this action on March 13th, 1888, the defendant Boswell was authorized to defend this action on behalf of, and for the benefit of the next of kin of the testator, and the defendant Phillips for the creditors of the said estate: that the defendant Semmens was, by an order of this Court, dated June 24th, 1886, appointed the receiver of the share of Helen M. Hobart in the said will mentioned; and that the defendants, other than the Methodist Church, and the trustees of the Brant avenue congregation of the Methodist Church, disputed the validity of the bequests to the said Superannuation fund, and the trustee board of the Brant Avenue Methodist Church, and the plaintiff claimed the declaration of the Court as to the rights and interests of the parties to this action in the estate of the testator; that the said estate might be administered by the Court; for further relief and costs of action.

The action came on trial on May 22nd, 1888, before Boyd, C., at Brantford.

E. Sweet, for the plaintiff.

W. R. Riddell, for the defendant Boswell, representing nieces, heirs, and heiresses-at-law, and next of kin of the testator.

H. S. Osler, for A. W. Semmens.

J. J. McLaren, for the Methodist Church.

W. S. Brewster, for the trustees of the Brant Avenue Congregation of the Methodist Church.

L. F. Heyd, for the defendant W. H. Phillips, representing creditors.

The following cases were cited on the argument: *Labatt* v. *Campbell*, 7 O. R. 250; *Corbyn* v. *French*, 4 Ves. Jr. 418; *Waterhouse* v. *Holmes*, 2 Sim. 162; *Davidson* v. *Boomer*, 15 Gr. 1; *Edwards* v. *Smith*, 25 Gr. 159.

June 11th, 1888. BOYD, C.—In *Corporation of Whitby* v. *Liscombe*, 23 Gr. 1, the Court of Appeal has held that the Act 9 Geo. ii. ch. 36 (commonly but inaccurately called the Mortmain Act), is in force in Ontario. The preamble of that statute declares the objects which the Legislature had in view: the first being to prevent lands from being locked up in perpetuity as being prejudicial to the common utility, and the second being to prevent persons being importuned in their languishing and dying moments, whereby large and improvident dispositions of their lands were made to the disherison of their lawful heirs. Personal property is not protected by this statute, but only lands and property savouring of realty, and it is really an Act to prevent the devising of lands for charitable uses. The Statutes of Mortmain proper are against the holding of land at all by corporations, and their scope and effect is considered in *Brown* v. *McNab*, 20 Gr. 179. See also *The Chaudiere Gold Mining Co.* v. *Desbarats*, L. R. 5 P. C. 277, and *Abbott* v. *Fraser*, *ib.* 6 P. C. at p. 122.

The statute relied on in this case to validate the provisions in the will disposing of real estate for the benefit of the Superannuated Ministers' Fund, and of the Methodist Church, is 14 & 15 Vict. ch. 142. That statute incorporated certain benevolent societies under the name of the Connexional Society of the Wesleyan Methodist Church in Canada. It recites that "whereas it would tend to promote the purposes of the said association, that it should be incorporated and empowered to hold property in mortmain without letters of license"; and it provides that the corporation may take by grant, devise, or otherwise, any land, or interest in land, and vests in the corporation all lands, &c., which shall thereafter be granted, * * devised or bequeathed in any manner or way whatsoever, to, for, or in favour of the said corporation. (Sec. 2.)

It is contended that all the benefits of this statute are extended to "the Methodist Church" for all the purposes thereof by the late Statute of Union and Incorporation passed by the Dominion and the Province: 47 Vict. ch. 106, secs. 1, 10, and 15, (D.) and 47 Vict. ch. 88, secs. 1 and 6 (O.)

The permission given by the Act of 1851, to "hold land in mortmain without letters of license," simply confers on the corporation a capacity to take and hold lands as a private owner may do. That, *per se*, as pointed out by Patterson, J. A., in *Corporation of Whitby* v. *Liscombe*, 23 Gr. at p. 31, would be ineffectual to enable the corporation to take lands for a charitable use by devise, or by deed made less than twelve months before the grantor's death. This mere provision does not exempt the corporation from the effect of the general restriction imposed by 9 Geo. II. ch. 36, which enacts in substance that the lands shall not be given to charitable uses at all except by deed, and that executed in a particular way and at a particular time. But when we reach the language in the body of the Act of 1851, by which the corporation is empowered to take lands by devise, that carries the privilege of the corporation much further, and supplies what is taken away by

the English statute, *i.e.*, the power to receive lands by devise for charitable purposes. This language appears to me to be decisive of the question, and is sufficiently apt and precise to indicate a repeal in favour of this corporation of so much of the charitable uses Act of 1736 as prohibited persons devising lands to a charity. That is the test which was applied by Malins, V.C., in *Perring* v. *Trail*, 18 Eq. 91, where a special Act enabled the corporation to take land by devise, and it was held that under this provision persons were at liberty to devise land for its benefit, and these lands could be taken and beneficially preserved by the charity. The correctness of this decision was recognized by the Court of Appeal in *Luckraft* v. *Pridham*, 6 Ch. D. 205.

I find no difficulty upon the evidence, as to certainty of the gift to the treasurer for the time being of the superannuated fund of the Methodist Church. There is such an officer who was examined; there is such a fund which is kept distinct under the terms of the Act of union, and is now vested in the defendants "The Methodist Church," and administered for the benefit of "worn-out ministers," of whom the testator was himself one who shared for some years in the benefits of this fund.

The Act of 1851 provides that the amount of real estate held by virtue of the Act shall not exceed £5,000 in annual value at any time (sec. 6). It was proved that this limit has not been reached as to this fund; but I incline to think this was not necessary, as no defence was raised on that head by the pleadings, and it is open for the Government to investigate this matter, if there has been any excess of benefit received under the Act.

There is no time or limit imposed under this statute with regard to testamentary or other voluntary dispositions of property, and I therefore come to the conclusion that the defendants, the Methodist Church, are entitled to receive the bequest of $1,000 for the use of the Superanuated Fund, though the will of the testator was executed but a few days before his death.

But different considerations apply to the residuary devise and bequest for the benefit of "the trustees of the Brant Avenue Methodist Church, to be applied by them in reducing the debt existing against the church property." I have been referred to no special law empowering these trustees to hold lands except under the statutes already referred to incorporating "The Methodist Church," and "The Connexional Society of the Wesleyan Methodist Church in Canada." This first Statute of 14 & 15 Vic. ch. 142, was intended to confer benefits mainly upon two objects: 1st, the book and printing establishment; and 2nd, the Superannuated Preachers Fund. It had no reference to individual churches at all. Now it is argued that section 6 of the Ontario Act, 47 Vic. ch. 88, enlarges indefinitely the capacity of the new corporation, "The Methodist Church," to hold land for all purposes, including that contemplated in this will for the endowment of particular churches of this body. That section (as amended by the Statute of Ontario, 51 Vic. ch. 83, sec. 2), provides that the corporation of the Methodist Church, "shall have for all the purposes and objects thereof, all the powers, rights, privileges, and franchises conferred upon the Connexional Society," by the Act of 14 & 15 Vic. ch. 142. That is not very felicitously expressed, but I take the meaning to be that as the Connexional Society has been merged in the new and larger corporation of the Methodist Church, the latter corporation shall stand in place of the other, with all its powers, rights, &c., for the purposes and objects thereof (*i.e.*, of the Connexional Society). See Statute of the Dominion 47 Vic. ch. 106, sec. 4. The language is not so clear and free from ambiguity as to lead me to understand that the special privileges granted by the Act of 1851, are to be extended to all the purposes and objects of the new ecclesiastical corporation. So to hold and construe section 6 would be (to use the phrase of Hall, V. C., in *Luckraft* v. *Pridham*, 6 Ch. D. at p. 211) to "alter the general law by a side-wind." Even in the academical view this construction is right. I may be allowed to cite some

apposite passages from the judgment of Lord Blackburn in *Ewing* v. *Ewing*, 8 App. Ca. 825: it is a rule not of law but of the grammatical construction of the English language that words of relation refer to the last antecedent. But what comes nearest to the words of relation is not necessarily to be taken as the last antecedent. On the contrary, I think that the context and the subject matter may shew that something more remote in the allocation of words really is the antecedent. Therefore I regard "thereof" in section 6 as referring not to the Methodist Church, but to the Connexional Society. This construction is aided also, in my opinion, by the concurrent legislation on the part of the Dominion which was had a month later than that of the Province. Knowing that section 6 had been passed by the Province on March 25th, 1884, the Parliament of Canada, on April 19th, 1884, enacted section 10 of their Act by which the Methodist Church are declared capable of taking, holding, and receiving land by devise: Provided that such devise of real estate shall be subject to the laws respecting devises of real estate to religious corporations in force at the time of such devise in the Province in which such real estate is situate, so far as the same apply to the said corporation.

The reference here is, so far as Ontario is concerned, to the general law contained in R. S. O. 1877, ch. 216, sec. 19, by which the devise is to be at least six months before the death of the testator. After the best consideration I can give to the matter, I find myself unable so to construe section 6 of the Ontario Act as to get rid of the restrictions as to time found in the general law. The residuary benefit intended, I hold to be invalid, both as to realty and personalty, because the direction is as to money, that it should be applied in the payment of incumbrances on the church property, which, according to the authorities, is just as obnoxious as the devise of land to a charity: *Stewart* v. *Gesner*, 29 Gr. 329.

In view of this holding, it does not seem necessary to administer the estate. If there is a dispute about any

creditor's claim, that may go to the Master, and the costs of the contest to be disposed of by him. As to the beneficiaries, there is no trouble in dividing as each is entitled. Costs of this action should be given to all parties (except the creditor and the receiver) out of the estate. I must know more about the circumstances of their being made parties, before I can give them costs. In any event as Louisa Boswell was defending for all next-of-kin and heirs of the testator, I do not see that more than one set of costs should be given to her and the receiver. But I will look at any authorities which may be handed in. At present it does not seem to me proper to make the creditor a party to the record before judgment. Her claim is paramount to that of the persons taking under the will, and their conflict does not affect her and other creditors.

A. H. F. L.

[CHANCERY DIVISION.]

RE JAMES CROSKERY.

Dower—Equity of redemption—Surplus after sale under mortgage—Husband and wife—Bar of dower—Payment into court—R. S. O. 1887, ch. 133, sec. 7.

Where one mortgaged certain lands in fee, his wife joining to bar dower, and subsequently in his life time conveyed away his equity of redemption, and the mortgagees afterwards sold under the power of sale and had a surplus in their hands, which they desired to pay into court under R. S. O. 1887, ch. 133, sec. 7.

Held, reversing the decision of the Master in Chambers, that they should be allowed to do so, in view of the conflict of opinion and decision as to sections 5 and 8 of R. S. O. 1887, ch. 133, entitled an Act respecting Dower.

There is a sharp distinction made in those sections between the wife's dower in the legal estate which she has barred in a mortgage for her husband's benefit, and as to which her rights accrue, or rather enlarge to their original extent the moment a sale is had for the purpose of satisfying the mortgage, and the dower which is given by sec. 1 in respect of a mere equitable estate; for by that section such equitable dower arises and attaches at the time of the husband's death and not before, and *non constat* that the widow had no claim to the surplus moneys in this case.

Smart v. *Sorenson*, 9 O. R. 640, considered.

THIS was an appeal from the order of Mr. Dalton, Master in Chambers, whereby he refused to permit the Canada Permanent Loan and Savings Company, as mortgagees, to pay the surplus money remaining in their hands after a sale under the power of sale in their mortgage, into Court, under R. S. O. 1887, ch. 133, sec. 7. The circumstances are stated in the judgment of the Master. It should, however, be mentioned that in the mortgage to the Building Society, the wife of the mortgagor joined to bar dower, and also that she did not join in the conveyance of the equity of redemption.

April 25th, 1888. THE MASTER IN CHAMBERS.—I understand that the law applicable to this case has already been decided against the claim of the doweress.

The order of events was this: Tenant in fee, Croskery, mortgaged to the Building Society in fee. After the mortgage, and before the sale by the mortgagees, Croskery assigned his equity to the sheriff of the county of

Huron; it was an assignment of all his estate and effects for the benefit of his creditors. Then after that assignment by Croskery to the sheriff, the Building Society, the mortgagees, sold under the power of sale in the mortgage; and after payment of the mortgagees, there is a surplus of $387.48. This surplus the mortgagees seek to pay into Court.

Then the case is concluded by authority. The right of the wife to dower in an equitable estate, depends now upon R. S. O. 1887, ch. 133, sec. 1. The right is defeated by the husband's alienation of the estate: *Smart* v. *Sorenson*, 9 O. R. 640, and the several cases cited there, where that clause, and clauses 5, 6, and 7 of the same chapter, are fully considered.

After the several decisions that have been had, I do not see that there can be any doubt to justify a payment of the surplus into Court.

Motion dismissed with costs.

The present appeal came on for argument before Boyd, C., on May 8th, 1888.

W. M. Douglas, for the mortgagees, appellants.
Hoyles, for the assignee for creditors.

The cases cited are referred to in the judgment.

May 9th, 1888. BOYD, C.—When the wife bars dower in land of which her husband is seized in fee for the purposes of his mortgaging it, the effect is, that she grants and releases all her dower and right and title which in the event of her surviving her husband, she might have in the land mortgaged: R. S. O., 1887, ch. 107, p. 967.

The provision as to surplus moneys in the event of a sale is, that the mortgagee shall hold it in trust to pay to the mortgagor, his executors, administrators, or assigns, or as he shall direct and appoint. (*Ib.* p. 972).

The law of dower was amended by 42 Vict. ch. 22, (1879,) with special reference to mortgaged estates. The first section enacts that "No bar of dower contained in any mortgage, * * shall operate to bar such dower to any

greater extent than shall be necessary to give full effect to the rights of the mortgagee." The law is here amended in language which is most suggestive of the decision in *Forrest* v. *Laycock*, 18 Gr. 611, (1871,) where it was held that if a wife joins in her husband's mortgage merely as security to the mortgagee, she parts with her dower so far only as may be necessary for that purpose, and she is a necessary party to a subsequent sale by the husband free from dower. That is to say, if it is necessary to absorb the whole value of the land to satisfy the mortgage, her dower is gone; but if there is a surplus after paying the mortgage, her right to dower accrues or exists as to that surplus. To carry out apparently that view of the law, section 2 of the Act was passed, by which her title to dower is declared to exist to the same extent as if the land had not been sold. That is, as I understand it, she is remitted to her right of dower as it was originally in the land owned by her husband. So that to that extent (as to measure of value) she is entitled to share in the overplus if she survives her husband. In other words, she will get dower based on the value of the land undiminished by the amount of the mortgage. The statute contemplates her rights of dower in the surplus being secured, while yet a married woman and her husband the mortgagor living, though it is only as a widow (surviving the mortgagor) that she can receive her share. See sections 3 and 4.

I cannot read these sections (5–8), as found in the late revision, as subject to sec. 1, ch. 133, which provides for dower out of equitable estates arising only when the husband died seized. That now covers cases where the wife never had dower in the legal estate, and only by the grace of the Legislature does she get it out of the equitable estate of which her husband is possessed at the time of his death. The law is amended by the Act of 1879, so as to protect the wife who bars her dower as a surety for her husband, and for that purpose joins with him in a mortgage. The case decided in 1878, of *Fleury* v. *Pringle*, 26 Gr. 67, in which it was said that after mortgage given

by a wife, it was in the power of the husband to sell his equity of redemption without his wife joining in the conveyance, she being only dowable of that equity in the event of his dying seized, appears to me to be over-ruled by the legislative authority of this statute and the view of the law enunciated in *Forrest* v. *Laycock*, to be thereby promulgated.

In *Calvert* v. *Black*, 8 P. R. 255, it was held by Galt, J., that the 2nd section of 42 Vict. did not apply to the proceeds of sale made by the husband voluntarily subject to certain mortgages. The learned Judge says: "this enactment has no application to cases of a voluntary sale by the husband." The judgment rests on the point that the case contemplated by the statute had not arisen; here, however, the very case provided for is to be dealt with; the moneys to be accounted for by the company have arisen out of a surplus derived from the exercise of the power of sale, so that the *ratio decidendi* in *Calvert* v *Black* does not apply. The point of objection here made is, that the husband has made an assignment for the benefit of his creditors, after mortgage and before the sale, the effect of which was to cut out his wife or extinguish her possible dower.

In *Smart* v. *Sorenson*, 9 O. R. 640, the matter arose in the same way as in *Calvert* v. *Black*, but the decision of my brother Ferguson was, no doubt, broad enough to cover this case, to the effect that a wife has dower in an equity of redemption only where her husband died seized, and that he may defeat this right by alienation.

In *Martindale* v. *Clarkson*, 6 A. R. at p. 6, the opinion of Patterson, J.A., was certainly contrary to that expressed by Ferguson, J., in 9 O. R. at p. 6. Patterson, J.A., speaking of the Act, says: "There is clearly a new right given—namely, dower out of an equitable estate of which the husband does not die seized." Thus is the matter reduced to this alternative: is this new right confined to cases where the equity of redemption is put an end to during the husband's life, by sale under legal process, or by the exercise of the power of sale? or does it extend to

all cases even where before the exercise of the power of sale the husband has aliened the equitable estate? Here he first assigned for the benefit of creditors, and then followed the exercise of the power of sale. Personally, I do not see why the wife's claim to dower should, in these circumstances, rest in the caprice of her husband. She has foregone her dower for a certain purpose, and that being satisfied, it revives, and all the world has notice of this; so that if the husband assigns or sells the equity, the assignee or grantee is not a purchaser for value without notice of her possible rights if the mortgage is more than satisfied out of the land. *Forrest* v. *Laycock* is, besides, a decision going in this very direction.

The point decided in that case is emphasized by the same Judge (Mowat, V. C.,) in *Baker* v. *Dawburn*, 19 Gr. at p. 118, where he says: "I held in *Forrest* v. *Laycock*, that as the law stood before a widow became dowable out of equitable estates of which her husband died seized, she did not lose her dower absolutely by joining her husband in a mortgage of the land." This view of the law was not, however, accepted by the Court of Appeal in England, in *Dawson* v. *Whitehaven*, 6 Ch. D. 218, (1877) though it did find favour in the Court below before Bacon, V. C., in 4 Ch. D. 639. But then came the Ontario Statute of 42 Vict., which, in my reading of it, put the law precisely as was held to be the law in *Forrest* v. *Laycock*. I, therefore, am entitled to read the opinion of Bacon, V. C., as a commentary upon the effect of this statute. He says, at p. 648: "Can anything be more plain or more just in itself than that the wife, who lends her dower (for that is exactly what she does) and pledges it for her husband's debt, is entitled to all that remains after that purpose is satisfied? * * The extent of the security which she gave was not greater than the sum which it was proposed to secure by the mortgage. But, beyond that, her right remains as if no mortgage deed had ever been executed, and her husband could not have deprived her of it under the terms of the proviso for redemption. By no legal means could she be

deprived of that which she had not, in the view of a Court of Equity," [and now by the express terms of the Act of Parliament] "parted with entirely, even if she had at law released her dower. Nothing could deprive her of that which belonged to her, and resulted to her, as soon as the limited purpose for which she surrendered her right to dower had been satisfied:" 4 Ch. D. pp. 648, 649. Again, I read the language of Mr. Justice Grove in *Meek* v. *Chamberlain*, 8 Q. B. D., at p. 34, as helping to elucidate the meaning and import of the first section of the Ontario Act, when he says: "The widow only extinguished her dower in order to give a good title to the mortgagees for the purposes of their security, and upon the reconveyance, things were restored to the condition in which they were before the mortgage was executed."

Forrest v. *Laycock* is mentioned with approval in *Beavis* v. *McGuire*, 7 A. R. at p. 713, and the value of that decision in throwing light on the Dower Amendment Act, is aided by the opinion of Spragge, C., in *Building and Loan Association* v. *Carswell*, 8 P. R. 73. There he held that if the wife of a mortgagor bars dower in a mortgage made before the Act, she is not improperly made a party defendant to a bill for foreclosing the mortgage, since the coming into force of 42 Vict. ch. 22. *Martindale* v. *Clarkson*, 6 A. R. 1, has of course over-ruled this, because of the Act not being retrospective, but it manifests the opinion of a very experienced Judge as to the new position of the wife's dower under this Act.

I think a critical inspection of sections 6 and 7 supplies intrinsic evidence that the enactments intend a benefit to the wife even though the husband choose to alien the equity of redemption. When the sixth section speaks of a sale of the land under power of sale, or under any legal process, the latter words do not refer to a sale of the equity of redemption by an execution creditor, which always takes place "subject to the mortgage:" R. S. O., 1887, ch. 64, sec. 22, sub-sec. 2. They apply to a sale of the *land* itself under process, whereby the mortgage moneys shall

be satisfied, though it is difficult to indicate just what is specifically meant. If the land was sold in an action or other proceeding, the Court would, as a rule, distribute the surplus, and it would not be left for the mortgagee or other person prosecuting the "legal process" to deal with. However this may be, the money for the whole estate in the land being realized, the surplus is, by section 7, to be paid into Court to the credit of the married woman, and "the other persons interested therein." Now these last words carry the idea beyond this, that only the mortgagor, the husband is interested in the proceeds. The suggestion of his executors, &c., is excluded, for the phrase, "married woman," contrasted with "widow," in the 8th section, implies that the husband is yet living. "The other persons" can only be used for the purpose of covering the case of subsequent incumbrancers or assignees of the husband; and if this be so, then the Act contemplates the contingency of a partial or total assignment by the husband of the equity of redemption, as not impairing his wife's inchoate right to dower. By section 6 the *extent* of this dower is to be same as if the land had not been sold; that means, I think, to the same extent as if the mortgage had been paid off or redeemed. It is intended to supply the measure of her right as regards the surplus, and to show that the computation is to be based on the value of her dower in the entire estate, and not merely in that of the equity of redemption. And so I work round again to the position with which I started, that these are unique provisions regulating the wife's dower in the legal estate which she has barred in a mortgage for her husband's benefit, and as to which her rights accrue or rather enlarge to their original extent the moment a sale is had for the purpose of satisfying the mortgage. There is thus a sharp distinction made in the Act between this dower and that which is given by section 1 in respect of a mere equitable estate; for by that section such equitable dower arises and attaches "at the time of the husband's death and not before." For which reason it is possible for the husband to prevent its now

existing, by disposing of the estate before his death: *Smith* v *Smith*, 3 Gr. 452.

The provision as to surplus in the Short Forms Act does not bind the wife (who joins only for the purpose of barring dower) any more than it would bind in the case of subsequent incumbrancers. And any way it must be read as controlled or modified by the special provisions of this later and express statute regarding dower in cases of mortgage. The bar of dower is for the purpose of the mortgage only, and the right of the wife as to dower, depends upon whether the whole of the land or the value of the whole of the land is needed for the satisfaction of the mortgage. That seems to me to be the fair and reasonable meaning of this special legislation having regard to the parliamentary canon of construction laid down in the Interpretation Act: R. S. O., 1887, ch. 1, sec. 8, sub-sec. 39, p. 8.

I may add that I feel compelled to express my own views, owing to the conflict of opinion and decision as to the effect of these sections in the Dower Act. It appears to me clear that the mortgagees as trustees of this surplus should not be driven to incur any risk by paying over the money to either claimant; and that it is eminently a case for the application of the safeguards provided by the Dower Act, (sec. 7.)

I do not pretend to overrule any of the cases which are opposed to my conclusions, for I sit in Chambers, and it is not needful to do so in order to protect the petitioners.

The appeal should, in my opinion, be allowed, and following the statute, the company should be at liberty to pay in the surplus, deducting their costs.

A. H. F. L.

[COMMON PLEAS DIVISION.]

THE BANK OF COMMERCE V. JENKINS.

Banks and Banking—Composition and discharge—Execution of deed by local manager—Validity—Agreement to accept part of claim—Authority—R. S. O. ch. 44, sec. 53, sub-sec. 7.

At a meeting of the defendant's creditors, at which the plaintiffs were not represented, an arrangement was made to accept 40 cents on the $, on the amount of the claims. A deed of composition with a covenant to accept the 40 cents was prepared, and was executed by C. N., the manager of the plaintiffs' branch at L. The execution was "for Bank of Commerce, C. Nicholson," opposite to which was an ordinary seal. At the time the manager executed the deed, there were two creditors mentioned in the schedule who had not executed. Before either of these creditors had executed, and before the composition notes had been tendered to the manager, he wrote defendants' solicitor withdrawing from the arrangement. It did not appear that the head office had repudiated the manager's authority. The composition notes were subsequently tendered to the manager, but he refused to accept them. By the plaintiffs' act of incorporation the management of the bank's affairs was to be by the directors who had authority to open branches and to appoint the officers. The chief place of business was to be at T., where the corporate seal was kept.

Held, that the deed was not binding on plaintiffs' corporation, not being under the corporate seal, nor under a signature or sign manual whereby it executed documents.

Held, however, on the evidence, that the manager had authority to agree to accept less than the whole of the claim, and did so agree, and that the debtor performed his part by tendering the notes: and that under R. S. O. (1887) ch. 44, sec. 53, sub-sec. 7, the agreement was irrevocable.

THIS was an action tried before Galt, C.J., without a jury, at London, at the Winter Assizes of 1888.

It was brought on six promissory notes made by the defendant, payable to John Evans, and endorsed by him to the plaintiffs.

The defence was, that the plaintiffs, by deed, dated the 31st May, 1887, covenanted and agreed to accept a composition of 40 cents on the dollar on the notes in six and twelve months; and that when the action was commenced, the time for payment had not elapsed.

The replications relied upon to meet the defence were:

1. That the deed was not executed under the plaintiffs' corporate seal.

2. That it was not executed on behalf of the plaintiffs by any one having authority to do so.

3. That the alleged deed, which was signed by the manager of the plaintiffs' branch at London, was so signed on the understanding that unless the deed was executed by the defendant's other creditors, and the promissory notes, provided to be given by way of composition, delivered to the plaintiffs, the same should not become an operative and binding instrument; and that the defendant failed to procure divers of his other creditors to execute the same, and the composition promissory notes were never delivered to the plaintiffs; and, while the said instrument remained inoperative, the plaintiffs' said manager withdrew his consent thereto and notified the defendant of such withdrawal; and that the deed did not become an operative and binding instrument upon the plaintiffs.

The plaintiffs were incorporated by 22 Vic. ch. 131, under the name of "The Bank of Canada," under which name they were to have perpetual succession and a corporate seal. The management of the affairs of the bank was to be in the hands of seven directors. The chief place of business was to be in Toronto, with authority in the directors to open in towns or cities in the Province, branches or agencies of the bank; and with power to appoint a cashier, assistant cashier, and clerks. By 29 & 30 Vic. ch. 88, the name was changed to "The Canadian Bank of Commerce."

The alleged deed of composition was executed by the manager at London, "for Bank of Commerce, C. Nicholson;" opposite to which was an ordinary seal.

On the 4th June, 1887, Nicholson, the plaintiff's manager, wrote the solicitor of the defendants, withdrawing from the arrangment entered into by his execution of the deed, at which time the composition notes had not been tendered, nor had two of the creditors, whose names were mentioned in the schedule of creditors attached to the deed, executed it. One of such scheduled creditors, Robert Geary, executed the deed after the plaintiffs had brought

their action; and another creditor, James Burgess, had not executed the deed at the time this action was tried.

The composition notes were tendered to the plaintiffs' manager at London after the letter of withdrawal; but he refused to accept them.

The learned Chief Justice entered judgment in favour of the plaintiffs for $830.

In Hilary Sittings, 1888, *Aylesworth* moved on notice to set aside the judgment entered for the plaintiffs, and to enter judgment for the defendant, on the grounds that the evidence established that the plaintiffs did compound the claim sued for with the defendant, and agreed to accept 40c on the dollar on their claim; and that if the instrument evidencing such agreement executed by the local manager of the plaintiffs was not binding on the plaintiffs, the evidence at the trial shewed a good and sufficient parol agreement between the parties in the terms of the said writing.

During the same Sittings, February 18, 1888, *Aylesworth* supported the motion, and referred to *Grant* on Banking, 4th ed., p. 464-8; *Morse* on Banking, 2nd ed., p. 77, *et seq.*; *Bridenbecker* v. *Lowell*, 32 Barb. 9; *Elwell* v. *Dodge*, 33 Barb. 336; *City Bank of New Haven* v. *Perkins*, 4 Bosworth 420; *Dobell* v. *Ontario Bank*, 3 O. R. 299, 303-4.

Lash, Q.C., contra, referred to *Rob. & Jos.* Dig., p. 82-84, where all the cases are collected.

June 29, 1888. MACMAHON, J.—The question for our decision is, whether the plaintiffs were bound by a deed of composition not under the corporate seal of the bank.

It was urged by counsel at the trial, and before the full Court, that the plaintiffs were bound by the parol agreement of their manager within the line of his authority, and that on the evidence the learned Chief Justice should have found it to be within the scope of the manager's authority to enter into such an

arrangement as provided by the deed of composition; and *Bradley* v. *Gregory*, 2 Camp. 383; *Boothby* v. *Sawdon*, 3 Camp. 175; and *Good* v. *Cheesman*, 2 B. & Ad. 328, were cited in support of the proposition that a good and sufficient accord and satisfaction had been created by parol with the manager by which the plaintiffs were bound.

At the meeting of the defendant's creditors, at which it was agreed to accept a composition of 40c. on the dollar, the plaintiffs were not represented; and Mr. Nicholson signed the deed after all the creditors mentioned in the schedule had executed, except Robert Geary and James Burgess.

Nicholson was called as a witness by the defendant, and stated:

Q. Are your instructions, or how is your authority defined, as manager? A. Well, it is a very difficult question to answer.

Q. I suppose a very great deal is left to your discretion? A. Well, a good deal is left to my discretion. I am authorized to issue bills of exchange, sign drafts for the bank, and conduct a general banking business.

Q. I suppose you frequently have to accept less than the amount of claims you have against persons in embarrassed circumstances? A. Sometimes.

Q. And that you, as manager, accept on behalf of the bank? A. Most of these questions are generally referred to the head office.

Q. But you have over and over again accepted less than the actual amount due the bank, wherever in your judgment it was in their interest to accept?

MR. LASH—You are leading. He has not shewn himself to be a hostile witness.

MR. MEREDITH—I ask you, whether you have, in a case in your judgment it is for the interest of the Bank, accepted less from a creditor? A. I have in cash sometimes.

Q. And extensions? A. I thought I had the power to sign that deed when I signed it.

MR. MEREDITH.—Just stop now; does not the bank permit you to take less than the face amount of a claim from a debtor to the bank if, in your judgment, it is in the interest of the bank to do so; is not that within your authority? A. I sometimes do so.

Q. And you have not been rapped over the knuckles for doing so? A. No.

Q. And you sometimes extend the time for payment; you must have done that hundreds of times before? A. I have never the like of this before.

Q. You give time; you renew notes every day? A. Yes; but that is different from this: that is in the ordinary course of business.

Q. Did you communicate what you had done in this case to the Head Office? A. I think so.

Q. You had no doubt at that time at all, that under your instructions you were authorised to do what you had done in this case? A. I thought so.

Q. You had frequently done so before? A. No.

Q. You had done it in Evans's case? A. No; that was done by the Head Office.

Q. Did you sign the deed of composition in that case? A. No.

Q. From any of the Evans's endorsers—did you accept less than the amount of the claims? A. Yes, I did.

Q. What was the nature of that transaction. A. I think we compromised the debts with them, without signing any document.

Q. Compromised the debts and gave time for payment? A. In some cases I extended the time.

Q. When was that? A. Oh, I did it in several cases after Evans failed.

Q. And before this transaction of the 31st of May last? A. Not long before the 31st of May.

Q. Did the bank make any objection to what you had done? A. No.

Cross-examined by MR. LASH:

Q. You did not communicate, then, to the head office before you signed this deed? A. No.

Q. Nor did you ask from them any authority? A. No.

Q. And that is the first compositian deed you ever signed? A. The first one I ever signed.

Q. The Evans you refer to; is that the endorser on these notes? A. The same Evans.

Q. He made a composition? A. Yes.

Q. There was a deed in his case? A. Yes, it was sent to the head office.

Q. And the seal of the bank attached? A. Yes.

Q. When you say you accepted from some of the Evans's endorsers less than the amount of their liability, what do you mean by Evans's endorsers? A. It was not Evans's endorsers, they were the makers or promissors of Evans's notes; Evans was the endorser on all; that was since the 31st of May. I did not sign any composition deed then.

Q. You say you have in some cases accepted cash less than the liability? A. Yes.

The head office of the bank is, as already stated, in Toronto, where the cashier or general manager is; and where the corporate seal of the bank is kept.

The evidence does not disclose what were the prescribed duties of a manager of a branch of the bank.

The head note to *Prince* v. *Oriental Bank Corporation*, 3 App. Cas. 325, states: "The position of branch banks is,

that in principle and in fact they are agencies of one principal banking corporation or firm, notwithstanding they may be regarded as distinct for special purposes, *e. g.*, that of estimating the time at which notice of dishonour should be given; or of entitling a banker to refuse payment of a customer's cheque except at that branch where he keeps his account."

Mr. Aylesworth referred us to some American authorities, defining the duties and powers of cashiers of banks in the United States; and urged that the powers possessed by the manager of a branch bank were of a similar character to those of a cashier. But in the United States there are no branch banks.

In *Morse* on Banking, 2nd ed., p. 4, the author states: "As a general rule, a bank can carry on business only in the place where it is empowered to do so by its charter. Branch banks cannot be established elsewhere, except under special legislative authority. * * But there is no case which holds that an agency for the more important and valuable functions, such as issuing circulating paper or discounting notes, or an agency designed to carry on the general business of banking, would be regarded as legal. For such nominal establishments of agencies might easily result in the practical establishment of a network of branch banks throughout the State."

The management of the affairs of the plaintiffs' bank is, under the Act of incorporation, in the directors, who appoint the cashier and other officers. "The cashier is the chief executive officer, through whom the whole financial operations of the bank are conducted." *Merchants Bank* v. *State Bank*, 10 Wall. 604 at p. 650.

"The office of cashier is strictly executive. He is the business officer of the bank, but in the sense of one who *transacts* the business, not of one who regulates and controls it. * * Acts which demand only confidence in the integrity of the official, and familiarity with the forms and customs of business, acts strictly of *performance*, which do not rise to the importance of the semi-judicial character, are those which

he is properly delegated to do. But the responsible conduct and management of the affairs of the institution upon the soundness and wisdom of which its prosperity and success depend, which call for the exercise of a high degree of care, knowledge, and experience, and a semi-judicial discretion, which demand general business qualifications of a high order are not, and never have been held to be, appurtenant to the office of cashier. He is properly the executive agent of the directors. It is his duty to carry out what they devise. * * They are the mind and he is the hands of the corporation:" *Morse* on Banking, 2nd ed., p. 152.

Looking at the Act incorporating the plaintiffs' bank by which the management is in the directorate with power to appoint a cashier, I think we may take the above extract as fairly defining the correlative duties of the directors, and the cashier or general manager.

The responsible conduct and management of the affairs of the bank not being appurtenant to the office of cashier, it follows that the manager of a branch of the bank cannot possess himself of that discretionary authority which it is said pertains exclusively to the directors. See *Bell* v. *Tuckett*, 3 M. & G. 785.

The power to compound a claim due the bank rests with the directors "where the exigencies of business require that this should be done."

The case of *Baird* v. *Bank of Washington*, 11 Serg. & R. 411, shews that they may commute a debt if it seems to them practically more advantageous to do so than it would probably be to push it at law, or retain the naked legal claim for the amount.

During the argument, the case of *Bridenbecker* v. *Lowell*, 32 Barb. 9, was cited as shewing that a cashier in the course of his duty in the collection of a debt may accept a compromise "where it was done in accordance with usage and the course of business." But "without these words it must be simply impossible to reconcile these decisions with those which have been already cited as conferring upon the directors the power of compromising claims of the

bank. Evidently the power is discretionary, and one which in its exercise may often call for considerable reflection and a high degree of judgment. It is strictly a sacrifice at least of nominal property of the bank. Evidently * * it should be a function of the board and not of the executive officer:" *Morse*, 2nd ed., pp. 161-2.

The deed in question to have been the deed of the bank, must have been under its corporate seal, which is not the case here. In fact Mr. Nicholson before this never signed any composition deed on behalf of the bank, although he admitted having on other occasions accepted from debtors of the bank less than the amount of their indebtedness, and that the directors had not found fault with his action.

What would have been the effect on the plaintiffs' cause of action had Mr. Nicholson attended the meeting of Jenkins's creditors, at which it was arranged to accept 40c. on the dollar, and Nicholson, on behalf of the bank, had assented to the arrangement, and thus induced Jenkins' other creditors to accept such composition, as was the case in *Bradley* v. *Gregory*, 2 Camp. 383, we are not called upon to consider. That case is not this case, because the bank was not represented at the meeting of Jenkins's creditors, and after the execution of the deed by Nicholson, and before any other of defendant's creditors had executed, Nicholson withdrew his consent, and refused on behalf of the bank to be bound by the arrangement.

Since writing the above my attention has been called to the Act 48 Vic. ch. 13, sec. 6; R. S. O. (1887), ch. 44, sec. 53 sub-sec. 7, (*a*) which was not referred to by counsel on either side during the argument; and I have also had the privilege of perusing the judgment prepared by my brother Rose, in which he lucidly explains the reasons leading him to the conclusion that under that statute the plaintiffs are bound by the act of their agent Nicholson, altogether apart from the execution of the composition deed.

(*a*) The sub-sec. referred to, is as follows; "Part performance of an obligation either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation."

I do not entertain the clear view as to the effect of the statute entertained by my brother Rose; and I cannot say that my mind has formulated a satisfactory opinion in opposition to the judgment at which he has arrived.

It may be that from Nicholson's own evidence the better course will be to hold that what was done by Nicholson in agreeing to accept the notes for 40c. on dollar, was done by him in what was regarded as in accordance with the usual course of business; and that the plaintiffs are therefore bound.

In this view the motion will be absolute, with costs.

ROSE, J.—I quite agree to the conclusion arrived at by the learned Chief Justice at the trial, that the deed in question as a deed was not binding upon the plaintiff corporation.

1. Because it did not become a party to the deed, the corporate seal not having been used, nor signature or sign manual by which the bank executes documents.

2. The execution was by C. Nicholson, "For the Bank of Commerce"; and it is not shewn that under the charter or otherwise such a signature could bind the plaintiffs.

3. Such signature does not purport to be an execution by the plaintiffs; but merely of "C. Nicholson," for the bank.

I am also of the opinion, apart from the statute 48 Vic. ch. 13, sec. 6; R. S. O. (1887), ch. 44, sec. 53, sub-sec. 7, to which I will shortly refer, that there was a *locus pœnitentiæ* for the bank, or for Nicholson acting for the bank, until some other creditor had entered into the agreement upon the faith of the bank agreeing to accept the composition. See observations of Lord Abinger, C.B., in *Reay* v. *Richardson*, 2 C. M. & R. 422, at p. 430.

Then, treating the agreement apart from the question of the deed, had Nicholson authority in fact to enter into an agreement of compromise, or to accept less than the whole debt?

The learned Chief Justice has not found as a fact how this was. I am of the opinion that the evidence clearly shews that he had.

In answer to Mr. Meredith the manager Nicholson said that a good deal was left to his discretion: that he was authorized to issue bills of exchange, sign drafts for the bank, and conduct a general banking business: that sometimes he had to accept less than the amount of claims the bank had against persons in embarrassed circumstances: that sometimes where in his judgment it seemed to be in the interest of the bank, he had accepted a cash payment of less than the whole indebtedness, and that he thought he had power to sign the deed when he signed it.

In answer to the following questions, viz.:

Q. "Does not the bank permit you to take less than the face amount of the claim from a debtor to the bank, if in your judgment it is in the interest of the bank to do so; is not that within your authority?" He said, "I sometimes do." Q. "And you have not been rapped over the knuckles for doing so? A. No."

* * * * *

Q. "Did you communicate what you had done in this case to the head office? A. I think so." Q. "You had no doubt at that time at all that under your instructions you were authorized to do what you had done in this case? A. I thought so."

Referring to the notes similar to the one sued upon, or held by the bank from the same debtor, he said:

"In some cases I extended the time." Q. "When was that? A. Oh, I did it in several cases after Evans failed." Q. "And before this transaction of the 31st of May last? A. Not long before the 31st of May." Q. "Did the bank make any objection to what you had done? A. No."

Apart from the question of the authority to execute the deed, or of the execution of the deed, it seems to be clear that the manager had authority to enter into an arrangement with the defendant to accept from him less than the whole amount of the claim, if, in his opinion, it was in the interest of the bank to do so.

The power of the bank to confer such authority was not questioned on the argument. See *Dobell* v. *Ontario Bank*, 3 O. R. 299, 303.

When the bank manager went to Mr. Macdonald's office, where he signed the deed, he told Mr. Macdonald that the bank had decided to accept the offer of 40c. on the dollar,

payable in 8 and 12 months. It further appeared that the payments were to be secured by the debtor's notes, which were subsequently tendered to the manager, and were refused. It is to be noted that the refusal was not because the head office had repudiated his action, or because he had exceeded his authority, but on other grounds.

I think, therefore, it must be held, that not only had Nicholson the authority to agree to accept 40c. on the dollar; but that he did in fact so agree; and that the debtor performed the agreement on his part by tendering the notes pursuant to such agreement. Then had Nicholson power to withdraw from such agreement? Apart from the statute above referred to, probably he had, before the position of the parties had been changed by other creditors coming in to the agreement on the faith of the bank's promise to accept the composition.

But the statute provides that "part performance of an obligation either before or after breach thereof, when expressly accepted by the creditor, in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation."

It will be observed that where there has been an agreement for that purpose the acceptance by the creditor in satisfaction is not required.

To give effect to the latter part of the section, it seems to me that it must be held that an agreement once entered into to accept part performance of an obligation is not revocable, otherwise a creditor might make the agreement, and, any time afterwards, when the debtor tendered the part performance the creditor might refuse to accept; and thus the provision would be ineffectual, for if the creditor accepted, the prior provision would apply.

While thus not differing from the learned Chief Justice on any point raised for his consideration, I am of the opinion that the agreement was binding upon the plaintiffs, and that the motion must be made absolute, with costs.

[CHANCERY DIVISION.]

RE GRACEY AND THE TORONTO REAL ESTATE CO.

Husband and wife—Real estate acquired before 1872—Conveyance by wife—Non-joinder of husband.

A woman married between 1859 and 1872, and who had issue living and capable of inheriting, acquired before the year 1872, a vested remainder in fee in land subject to a life estate, and in 1886 the life tenant still being alive, conveyed her remainder by deed without her husband joining therein.

Held, that the conveyance was valid to pass her whole interest freed from any right, interest, or control of her husband, and the life tenant having died, a good title in fee simple under the conveyance could be made.

THIS was an application under the Vendor and Purchaser Act, R. S. O. (1887), ch. 112, sec. 3.

The petition set out that prior to the year 1872 one George McDonell, who was entitled under the will of his father, Richard McDonell, to a vested remainder in certain lands subject to the life estate of his mother, Margaret McDonell, died intestate and unmarried: that his sister, Bridget Hewitt, who was one of his heirs, and was the wife of one Hewitt at the time of his (George's) death, and had issue living and capable of inheriting, had in the lifetime of Margaret McDonnell by deed dated March 19th, 1886, in which her husband did not join, conveyed her interest in said lands to one Mary McDonell, one of the former owners of the land in question. Subsequently to this conveyance, Margaret McDonnell, the life tenant, died.

The question was, whether the conveyance by Bridget Hewitt without her husband joining therein was sufficient to pass all her interest.

The seventh paragraph of the petition prayed for a declaration that Bridget Hewitt, by the deed of March 19th, 1886, conveyed all her interest in the lands in question to Mary McDonell freed from any estate, right, interest, or control of her husband.

The petition was argued on May 13th, 1888, before Robertson, J.

E. D. Armour (*G. G. S. Lindsay* with him), for the vendor. When George McDonell died, his mother, the life tenant, was living, so only a vested remainder passed to Bridget Hewitt as one of George's heirs. Bridget Hewitt was married before the year 1872, so her interest came under C. S. U. C. ch. 73. Her husband could only have one of two interests, viz., an estate by the curtesy or a controlling interest in the conveyance of the land. He plainly had no estate by the curtesy, because Bridget Hewett was not seised, the seisin being in the life tenant. Had he then any controlling power over the conveyance of the land? By R. S. O. ch. 127, sec. 3, the husband's consent to the wife's conveyance was necessary, but that was taken away by 47 Vic. ch. 19, sec. 22 (O.), which latter Act was in force at the time the deed in question was made; so, as the husband had no estate, and the requisite of his consent was taken away by 47 Vic. ch. 19, sec. 22 (O.), the deed was good and passed the whole estate in the land

E. T. Malone, for the purchaser. It is admitted that no tenancy by the curtesy exists. The marriage took place between the years 1859 and 1872, and the property was acquired before the year 1872, and the husband's consent is necessary: *Armour* on Titles 242 and 243. The Legislature considered it necessary to enact that concurrence was sufficient up to 1887: 50 Vic. ch. 7, sec. 23, (O.)

Armour in reply. The law cited by my learned friend is applicable to an estate in possession where the husband had a controlling interest, not to a case like this, where the life tenant was in possession. Sec. 23 of 50 Vic. ch. 7, was only passed to clear up a cloud cast on a number of deeds in which husbands had joined as assenting but not as granting, by a dictum in *Ogden* v. *McArthur*, 36 U. C. R. 246.

July 6, 1888. ROBERTSON, J.—Let it be declared as prayed by the seventh paragraph of the petition herein; and I direct and order that the purchaser pay to the petitioner, the vendor, his costs herein.

G. A. B.

[QUEEN'S BENCH DIVISION.]

REGINA v. COX.

Criminal law—Larceny Act, R. S. C. ch. 164—Information—Habeas corpus during remand on preliminary investigation—Bail—R. S. C. ch. 174, sec. 83.

The information charged that the prisoner at a named time and place "being a trustee of a sum of money * * the property of the C. B. of C. (a corporate body) for the use of the said the C. B. of C., did unlawfully and with intent to defraud, convert, and appropriate the same to his own use, contrary to the statute in that behalf."

Held, that the prisoner was by this information charged with a criminal offence under the Larceny Act, R. S. C. ch. 164.

Held, also, that a writ of *habeas corpus* should not issue where the accused is in custody pending a preliminary investigation before a magistrate, during a remand to enable the prosecution to supply evidence in support of the charge.

Held, lastly, that a Judge of the High Court has power under sec. 83 of the Criminal Procedure Act, R. S. C. ch. 174, to admit to bail in cases where the accused has not been finally committed for trial if he "think it right so to do"; but in this case, the charge being a serious one, the magistrate before whom the prisoner appeared having refused to admit him to bail, and no depositions having been taken, an order for bail was refused.

THIS was an application for a writ of *habeas corpus*, or for an order for bail, under the facts appearing in the judgment.

Murdoch and *A. C. Galt*, for the prisoner.
Badgerow, for the Crown.

August 30, 1888. MACMAHON, J.—This application was treated as if an order had issued calling on the keeper of the gaol for the county of York to shew cause why a writ of *habeas corpus* should not issue to bring up the body of the prisoner, E. Strachan Cox, and why, in the event of the order being made absolute, he should not be discharged from custody without the writ of *habeas corpus* actually issuing, and without his being brought personally before the Court.

There was a substantive application to admit the prisoner to bail in the event of the writ of *habeas corpus* being refused.

The material upon which the *habeas corpus* is asked is the petition of the prosecutor setting forth that he is now confined in custody and deprived of his liberty by being arrested at the town of Niagara on the 26th inst., by an officer named Reid, without, as he believes, any warrant or authority.

That on the 27th inst. he was conveyed in custody to Toronto, where he now is deprived of his liberty wrongfully; and that on the 28th (the date of the petition) he was brought before John Baxter, Esq., a justice of the peace for the city of Toronto, when the information, a copy of which is to the said petition annexed, was preferred against him, and the Crown not being ready to proceed, the justice remanded him to custody for eight days, and to appear on the 4th of September.

That an application for bail was made to the said justice, who refused to grant the same.

That he is not in custody or deprived of his liberty on any other charge than that disclosed in the copy of information to said petition annexed.

The prayer is for the issue of a writ of *habeas corpus* that the cause of the petitioner may be inquired into, and that, at all events, he may be admitted to bail.

There is an affidavit of the petitioner annexed verifying the petition.

The copy of the information referred to in the prisoner's petition was sworn to by William Stark, inspector of police, before George T. Denison, the police magistrate at Toronto, and charges "that E. Strachan Cox, on the 4th of November, A. D. 1887, at the city of Toronto, in the county of York, being a trustee of a sum of money, to wit, the sum of $10,000 of lawful money of Canada, the property of the Central Bank of Canada (a corporate body) for the use of the said the Central Bank of Canada, did, unlawfully and with intent to defraud, convert, and appropriate the same to his own use, contrary to the statute in that behalf."

The warrant of arrest was issued on the day the information was laid, and the charge against the prisoner is stated as alleged in the information.

A copy of the warrant of remand was not before me, but counsel for the prisoner stated that the charge on which the prisoner is remanded follows that laid in the information

I was referred to the Act 29 & 30 Vic. ch. 45 (D.), entituled "An Act for the more effectual securing the liberty of the subject" now forming ch. 70 R. S. O., which is wider than 31 Car. 2, ch. 2. It was urged that the power is given a judge in any case to issue a writ of *habeas corpus*. There is no question as to the power, either under the Act of Charles, or under that Act; but I have to consider whether this is a case in which that power should be exercised.

The first point urged was that the information did not charge the prisoner with any criminal offence.

The charge is laid under sec. 65 of the Larceny Act (R. S. C. ch. 164), against the prisoner, for that, being a trustee of certain property for another person, he, with intent to defraud, converted the same to his own use.

This clause in the Larceny Act is a transcript of sec. 90 of the 24 & 25 Vic. ch. 96 (Imperial Act), and looking at the form of the indictment under that section in *Arch.* Criminal Pleading (20th ed.) p. 526, I find that the information sworn to in this case follows the form of indictment given there. So that the application for the *habeas corpus* fails on that ground.

But apart from the question as to the sufficiency of the information, I do not think the writ should issue where the accused is in custody on remand pending a preliminary investigation before a magistrate. The diligence of counsel has been ineffectual in furnishing authorities for the contention that a *habeas corpus* has ever issued during a remand to enable the prosecution to supply evidence in support of the charge on which a prisoner has been arrested.

When the prisoner, with the depositions and warrant of commitment and the *habeas corpus*, are duly returned, the Court are to consider whether they will discharge, bail,

or remand him; and they may take a reasonable time for this purpose, and may bail him *de die in diem*, or direct him to be detained in custody until they have come to a decision (*Chitty's* Criminal Law, vol. 3, 128.) If the Court ascertain that there was no pretence for imputing to the prisoner any indictable offence, they will discharge him. (*ib.*).

A Judge cannot ascertain if there was a pretence for imputing an indictable offence unless the depositions are before him that he may judge whether the charge of the prisoner having committed such offence is well or ill founded.

Not being in a position to judge as to the charge without the depositions, and as no depositions have as yet been taken by the magistrate, the issuing of a *habeas corpus* in this case would be devoid of any benefit to the prisoner.

On this ground also the writ is refused.

As to the application for bail. By sec. 64 of the Procedure Act in Criminal Cases (R. S. C. ch. 174), it is provided: "If, from the absence of witnesses or from any other reasonable cause, it becomes necessary or advisable to defer the examination or further examination of the witnesses for any time, the justice before whom the accused appears or has been brought may, by his warrant, from time to time, remand the person accused to the common gaol in the territorial division for which such justice is then acting, for such time as he deems reasonable, not exceeding eight clear days at any one time."

Sec. 67 provides: "Instead of detaining the accused person in custody during the period for which he has been so remanded, any one justice, before whom such person has appeared or been brought, may discharge him, upon his entering into a recognizance, with or without sureties, in the discretion of the justice, conditioned for his appearance at the time and place appointed for the continuance of the examination."

Then secs. 64 and 67 must be read together, and they shew, I think, clearly that the right to bail a person

accused during the period for which he has been remanded rests in the discretion of the magistrate before whom he has appeared or been brought, or a Judge of the Superior Courts under the latter part of sec. 83.

Sec. 83 provides that: "No Judge of a County Court or justices shall admit any person to bail accused of treason or felony punishable with death, or felony under the 'Act respecting Treason and other Offences against the Queen's authority,' nor shall any such person be admitted to bail, except by order of a Superior Court of criminal jurisdiction, * * or of one of the Judges thereof, * * and nothing herein contained shall prevent such Courts or Judges admitting any person accused of felony or misdemeanor to bail when they think it right so to do."

It was under the authority conferred by the latter part of the 83rd sec. that I was urged to grant bail.

Power is given me to admit to bail by the general language of the latter part of that section. But having the authority to admit to bail in cases where the accused has not been finally committed for trial, I do not "think it right so to do" in this instance.

The charge is a serious one, and the magistrate before whom the prisoner appeared refused to admit him to bail; and until the depositions of the witnesses have been taken, so that I could judge of the nature of the case likely to be presented at the trial—in case the prisoner was committed for trial—I would not feel justified in granting bail in a case in which I cannot say the magistrate did not exercise a sound discretion in refusing it.

The motion is, therefore, dismissed on both grounds.

[CHANCERY DIVISION.]

GLASS V. GRANT ET AL.

Estoppel by record—Fraudulent mortgage—Foreclosure judgment against assignee of insolvent—Subsequent action by assignee to set aside mortgage as fraudulent—Demurrer—Res judicata—48 Vic. ch. 26, sec. 7, sub-sec. 2 (O.)

Plaintiff as assignee for the benefit of creditors under 48 Vic. ch. 26 (O.) brought this action on behalf of certain creditors under sec. 7, sub-sec. 2 of that Act to set aside as fraudulent a mortgage made by his assignor, while insolvent, to the defendants.

The defendants set up as a defence, *inter alia*, a judgment for foreclosure on the said mortgage to which the plaintiff as assignee was a party defendant.

On demurrer to this it was *Held*, that the judgment of foreclosure was on bar to this action.

The plaintiff acted in a dual capacity as assignee of the mortgagor's equicy of redemption, and also as a trustee for creditors. It was in the former capacity he was made defendant in the foreclosure action, in which he could not have set up the fraud of his assignor, nor was he bound to have counter-claimed for his present cause of action; while in this action he was suing as trustee for creditors, and in another right.

THIS was an action brought by William Glass, who was assignee under 48 Vic. ch. 26 (O.), for the benefit of certain creditors of Benjamin Cronyn, who had obtained an order of the Court under sub-sec. 2 of sec. 7, of that statute, against Robert Grant and Hamilton Tovey, to set aside a mortgage made by said Cronyn to them while insolvent, as fraudulent and void.

The statement of defence set up, *inter alia*, foreclosure proceedings on the mortgage taken by Grant and Tovey, to which Glass was made a party, as an answer to this action, and the plaintiff demurred to such portion of the statement of defence.

The material parts of the pleadings are set out in the judgment.

The demurrer was argued on the 16th day of May, A.D. 1888, before Robertson, J.

Hellmuth, for the demurrer. In the foreclosure action there was no obligation on the assignee to set up a defence that the mortgage was obtained by fraud, and he is entitled

to bring an action subsequently for the purpose. R. S. O. (1887) ch. 124, sec. 7, sub-sec. 1, provides for the bringing of actions, and gives the assignee the right to bring them. The proper course is to institute an action to annul the mortgage, and not to set up its invalidity by way of defence: *Kains* v. *McIntosh*, 10 Gr. 119, at p. 124. The assignee was not bound to raise the facts in the foreclosure suit, for he might not then be aware of them. The only effect of the judgment in that suit was to bar the equity of redemption, and it is not the right to the equity of redemption that we are setting up. The assignee represents Cronyn as to the equity of redemption, and the creditors as to their rights, and thus occupies a dual position. It may be that the plaintiff is estopped as to the matters put in issue in the foreclosure action, such as the making of the mortgage, the default, the right to have the equity of redemption barred. *Cochrane* v. *The Hamilton Provident Loan Society*, 15 O. R. 128, clearly distinguishes the grounds *Howlett* v. *Tarte*, 10 C. B. N. S. 813, is referred to in that case. Section 8 of R. S. O. (1887), ch. 124, permits the assignee to follow the proceeds of sales by creditors who obtain fraudulent preferences. Even if Cronyn had given a release of the equity of redemption, the plaintiff could follow the property, and the decree in foreclosure is nothing more than a conveyance by the Court of Glass's equity of redemption. As to the effect of the foreclosure, see *Paget* v. *Ede*, L. R. 18 Eq. 118. I also refer to *Taylor* on Evidence, 8th ed., 1462, sec. 1711; *Carter* v. *James*, 13 M. & W. 137; *In Re Campbell*, 25 Gr. 480; *Wells* on Res Adjudicata, &c., p. 8, sec. 13; 2 *Hermann* on Estoppel, p. 1021, par. 899; *Lewis* v. *Smith*, 11 Barb. N. Y. at p. 157; *Mitchell* v. *Strathy*, 28 Gr. 80; *Everest & Strode's* Law of Estoppel, 33, 34.

James Maclennan, Q. C., contra. This case is decided by the Ontario Judicature Act, sec. 16, *Maclennan*, p. 15. It was only a question of convenience that was decided in *Kains* v. *McIntosh*, *supra*, but the system of pleading of that time is all changed. If this action should succeed, it would destroy the foreclosure decree. That

action was brought against Glass who was then the owner of the equity of redemption, and owed the money to Grant et al. Surely the issue was: Had Grant any encumbrance upon the land? This suit seems to shew he had not. In *Carter* v. *James*, 13 M. & W. 137, the matter was not put in issue, and so could not be tried. I refer to *Heath* v. *Pugh*, 6 Q. B. D. 345; 7 App. Cas. 235; *Farquharson* v. *Seton*, 5 Russ. 55, 56, 57, 62; *Henderson* v. *Henderson*, 3 Ha. at p. 115; *Srimut Rajah, &c.* v. *Katama Natchiar, &c.*, 11 Moore's Ind. App. 50; *The Marquess of Breadalbane* v. *The Marquess of Chandos*, 2 My. & Cr. at p. 732; *Priestman* v. *Thomas*, 9 P. D. 70, 210; *Flitters* v. *Allfrey*, L. R. 10 C. P. 29; *The Duchess of Kingston's Case*, 2 Sm. L. C. 8th ed., 784 to 803; *The Bellcairn*, 10 P. D. 161, at p. 165.

Hellmuth, in reply. A judgment is only an estoppel as to facts set up, but not as to facts not put in controversy. I refer also to *Hindley* v. *Haslam*, 3 Q. B. D. 481.

July 17, 1888. ROBERTSON, J.—This is an action to declare a mortgage given by Cronyn, while he was insolvent, to defendants, fraudulent and void as against creditors.

So far as is necessary to dispose of the question raised by the demurrer, the pleadings are as follows:

STATEMENT OF CLAIM.

"2. On or about the 19th day of September, 1887, the said Benjamin Cronyn, then being insolvent, made an assignment of his estate and effects to the plaintiff under the said Act (*a*); and the plaintiff accepted the said assignment, and is now the trustee of the said estate.

3. Prior to the execution of the said assignment, and on the 19th day of March, 1887, the said Benjamin Cronyn, being then in insolvent circumstances, and unable to pay his debts in full, with intent to defeat, delay, and prejudice his creditors, did, upon the alleged consideration of ten

(*a*) R. S. O. (1887), ch. 124.—REP.

thousand dollars, grant and mortgage to the defendants, subject to a proviso for redemption upon repayment of the sum of $10,000, and interest, &c.

The plaintiff charges, and the fact is, that no consideration whatever was paid by the said defendants to the said Benjamin Cronyn at the time or subsequent to the execution of the said mortgage, but the said mortgage was made and given with intent to defeat, delay, and prejudice the creditors of the said Benjamin Cronyn, and with intent to give the said defendants a preference over the other creditors of the said Benjamin Cronyn, and had and has such effect.

5. The plaintiff brings this action for the benefit of the Federal Bank of Canada, creditors of the said Benjamin Cronyn, and in pursuance of an order of this honourable Court dated the 3rd day of February, 1888.

The plaintiff claims, &c."

STATEMENT OF DEFENCE.

"4. The defendants Grant and Tovey, say, that after the making and acceptance by the plaintiff of the assignment made by the said Benjamin Cronyn to the plaintiff, in the second paragraph of the said statement of claim mentioned, to wit: on the 21st day of October, A.D. 1887, these defendants Grant and Tovey commenced an action in this honourable Court against the said plaintiff and one Mary Gomen Cronyn, for the foreclosure of the said mortgage; and thereupon the said plaintiff was served with process in the said action, and such proceedings were thereupon had therein, that afterwards, on the 15th day of November, 1887, a judgment of foreclosure in the usual form was entered in the said action against the said plaintiff and the said Mary Gomen Cronyn.

5. In and by the said judgment it was referred to the Master in Ordinary of the Supreme Court of Judicature for Ontario to take the accounts and make the enquiries usual in mortgage cases; and thereupon, by his report made on the 20th October, bearing date the 20th day of

December, A.D. 1887, the said Master found that there was due to these defendants, Grant and Tovey, under and by virtue of the said mortgage for principal money the sum of $10,000, for interest, subsequent interest, and taxed costs, the sum of $875.61, all which in and by his said report the said Master ordered to be paid by a subsequent incumbrancer to these defendants on the 20th day of June next.

6. And the said Master, in and by his report, found that there was due to these defendants at the date of the said report, the sum of $10,575.61 for principal money, interest, and costs in respect of the said mortgage.

7. The said report was duly filed according to the practice of this honourable Court, on the 23rd day of December, 1887. and had became absolute long before the commencement of this action.

8. The said judgment and report are still in full force, virtue, and effect, and unreversed; and these defendants Grant and Tovey plead the same as a bar to the said action by the plaintiff, and pray that the said action of the plaintiff may be dismissed against them with costs."

DEMURRER.

"1. The plaintiff demurs to so much of the statement of defence of the defendants as is contained in paragraphs 4, 5, 6, 7, and 8, of the said statement of defence, setting out the taking of foreclosure proceedings on the mortgage in question in this action, and obtaining of a judgment of foreclosure in the usual form, and the report of the Master in Ordinary of the Supreme Court of Judicature for Ontario thereupon, and the allegation and plea that said judgment and report are a bar to the said action by the plaintiff, and says that the same is bad in law on the ground that it is not shewn or alleged that the matters in issue in this action were put in issue by the pleadings and proceedings in such foreclosure proceedings, or were determined or concluded by the said judgment of foreclosure, and thereupon and on other grounds sufficient in law to sustain this demurrer."

Joinder in demurrer.

The plaintiff is in a dual capacity; and the action brought to foreclose his equity of redemption in the mortgaged premises was instituted against him as assignee of the mortgagor, Cronyn, of the equity of redemption, and not against him as a trustee for the creditors of Cronyn. In this action he sues as trustee and for and on behalf of the creditors, who complain that the mortgage transaction between Cronyn and these defendants, was and is fraudulent and void, as against them, so that in my judgment the positions of the parties respectively, to this action, are no better or worse, than they would be had the foreclosure proceedings been taken against Cronyn, before he assigned to the plaintiff. That being the case, I cannot see how the foreclosure proceedings afford any bar to this plaintiff's action. The now plaintiff when he was defendant in the foreclosure action, could not set up the fraud of his assignor any more than the assignor could had the action been brought against him as mortgagor. It was in his capacity as holder of the right to redeem that the action was brought against him And now by force of the statute which authorizes assignments for the benefit of creditors, on behalf of those creditors he is seeking to recover from these defendants that which any creditor would have had a right to do, had Cronyn never made an assignment at all.

Sub-sec. 1 of sec. 7 of the Act (R. S. O., 1887, ch. 124) gives him the exclusive right of sueing for the rescission of agreements, deeds, and instruments (save as is provided in sub-sec. 2) made or entered into in fraud of creditors, &c. So that as mere holder of the equity of redemption, as before stated, he could not in the foreclosure action, have set up, as an answer or defence, the subject matter of this action.

Then could he have counter-claimed in that action? If he could, it would not have been in the capacity in which he was sued, but as trustee, under sub-sec. 1 of sec. 7. Then was it competent for him to have so counter-claimed?

In *Macdonald* v. *Carington*, 4 C. P. D. 28, it was held, that a defendant must not set up, by way of counter-claim,

against the claim of the plaintiff, sueing only in a distinct personal character, claims against him personally, and also as an executor. Let us suppose an action brought by A. on a promissory note made by B. in his individual capacity, but it turned out that B., as executor of C., had a cause of action against A. Could B. counter-claim as executor of C. against A. in his action? I certainly cannot read Order 15, Rule 3, (Marginal Rule 127) to go that far. The words of the rule are: "A defendant in an action may set off, or set up by way of counter-claim, against the claims of the plaintiff, any right or claim whether such set-off or counter-claim sound in damages or not." But all this is predicated upon the supposition that the now plaintiff having been sued in the foreclosure action, was bound, if he could, to set up by way of counter-claim, his cause of action in this action.

In my judgment he was not bound to do so: for all that appears he allowed judgment to go by default, and there was no issue tried between him and these defendants. On principle then, I do not see how it can be said that the judgment in that action is a bar to his claim now to have the mortgage on which that judgment was obtained declared fraudulent and void as against creditors.

Mr. Maclennan cited the *Duchess of Kingston's Case*, 2 Sm. L. C. 7th ed., 792; but I think that case is against the defendants' contention here. The principle laid down is, in my judgment, altogether in favor of the plaintiff here. It is this: "It must be observed that a verdict against a man sueing in one capacity, will not estop him when he sues in another distinct capacity, and in fact is a different person in law." In fact the rule laid down is that he must not only be the same person, but he must be sueing in the same right. And as explained by me in the foregoing, the plaintiff here is not in the same right, as he was sued in the foreclosure action. There he was sued as the owner of the equity of redemption, and because he was such owner; here he sues as trustee on behalf of the creditors.

It has been held that an action brought by an adminis-

tratrix under Lord Campbell's Act, for damages arising to the wife and children of a person killed by reason of the negligence of the servants of a railway company in which the plaintiff recovered judgment, was no bar to the same administratrix maintaining another action against the same defendants for an injury to the deceased, whereby he was entirely unable to attend to his business from the day of the accident until the day of his death, and in consequence of which he incurred great expense in providing other persons to manage his business, and was otherwise greatly damnified in his business, &c.: *Leggott* v. *Great Northern R. W. Co.*, 1 Q. B. D. 599.

I have come to the conclusion, therefore, that the plaintiff is entitled to judgment on demurrer, with costs.

See also *Hindley* v. *Haslam*, 3 Q. B. D. 451.

G. A. B.

[CHANCERY DIVISION.]

FRASER V. NAGLE ET AL.

Mortgage—First and second mortgagee—Part discharge of second mortgage—Consolidation—Apportionment—Equities.

Two mortgages of a lot of land were made at different periods for different sums by the owner thereof, who afterwards conveyed the equity of redemption in thirty-six feet of the lot to one of the defendants, with a covenant against incumbrances which was partially carried out by the discharge from the second mortgage of the land conveyed. Subsequently the mortgagor conveyed the equity of redemption in the remainder of the lot to another of the defendants.

The plaintiff was the assignee of both mortgages, but acquired the second after the discharge therefrom of the thirty-six feet, and now sought payment of the amount due on both mortgages or foreclosure.

Held, that she was not entitled to consolidate her securities against the owner of the thirty-six feet, who however had the right as against the owner of the residue of the land to cast the whole burden of the incumbrances on it; but had no such right against the plaintiff: that the whole of the land, if not redeemed, should be sold charged with the first mortgage, which should be apportioned between the two parcels according to their respective values.

On the owner of the 36 feet paying the amount of the first mortgage, the remainder of the land only should be sold and the proceeds divided amongst the parties interested, including the plaintiff as second mortgagee.

THIS was an action for foreclosure of certain mortgaged lands, and was brought by Olivia R. Fraser, as plaintiff, against Mary Nagle, John Nagle, Samuel Kelly, Jemima Ann Kelly, and William Blackley, defendants. In her statement of claim the plaintiff set up that by virtue of a mortgage dated May 15th, 1866, by Thomas Shannon, and his wife, to one Solmes, and an assignment thereof dated May 16th, 1871, and also of another mortgage dated January 7th, 1873, also by Shannon to Solmes, and an assignment thereof dated December 8th, 1879, she was mortgagee of certain freehold property in the town of Picton, having a frontage of about sixty feet: that there was owing upon the said mortgages $2,065: that by deed dated August 29th, 1878, Shannon and his wife conveyed the equity of redemption in thirty-six feet of the said land to the defendant Samuel Kelly, and this portion was by a certificate signed by Solmes and dated September 9th, 1878, discharged from the second mortgage above

mentioned, but was still subject to the first mortgage: that Jemima Ann Kelly, was the wife of Samuel Kelly; that by a deed dated the March 15th, 1881, Shannon and his wife conveyed the equity of redemption in the 24 feet of the said land west of the 36 feet above mentioned to the defendant Mary Nagle, the wife of the defendant John Nagle, and she by deed dated December 31st, 1881, conveyed the same to the defendant William Blackley as trustee for her creditors; and the plaintiff claimed payment of the sum of $2,065 and interest and costs, or foreclosure, immediate possession and further relief.

By their statement of defence Kelly and his wife set up that the conveyance by Shannon to Kelly was registered in the proper registry office on August 29th, 1878, before the deed to Nagle: that it contained the short form covenant by Shannon, that he had the right to convey notwitsstanding any act of his or any other person, and that he had done no act to encumber and for further assurance: that in the conveyance to Nagle of March 15th, 1881, which was registered August 25th, 1881, Nagle covenanted with Shannon to pay off the two mortgages under which the plaintiff claimed: that the defendant Blackley could not stand in any better position as against them, the Kellys, in respect of the plaintiff's claim than Shannon, and that the effect of all the above facts was that the lands of Samuel Kelly were wholly discharged from any liability under the mortgage of January 7th, 1873, and the lands now claimed by the defendants Nagle and Blackley should bear and be first charged with the mortgage of May 15th, 1866, and the lands of Kelly should be charged only with such deficiency (if any) in the amount properly due in respect of such last mentioned mortgage as might arise on a sale of the lands of Nagle and Blackley: that there was not and never had been any privity of contract between them and the plaintiff or her assignor as respects the causes of action alleged, and that the plaintiff had upon her own shewing no cause of action as against the land of Kelly in respect to the mortgage of January 7th, 1873; and the defendants

Kelly prayed a sale instead of a foreclosure; and a declaration that their portion of the lands was freed and discharged from all liability in respect of the mortgage of January 7th, 1873; and that the said portion of the lands was liable only for such deficiency, if any, in the amount properly due as against the lands embraced in the mortgage of May 15th, 1866, as might arise on a sale of the the lands conveyed to Nagle, and that the last mentioned lands might be first sold and the whole proceeds applied in payment of the last mentioned mortgage.

The action came on for trial on September 24th, 1887, at Picton, before O'Connor, J., when the evidence was taken and judgment reserved, and the learned Judge having died before delivery of judgment, the case was afterwards argued on February 29th, 1888, before Boyd, C., in Toronto.

McMichael, Q. C., for the plaintiff. We say we have a mortgage on both the lots, and another mortgage on the Nagle lot, and it must be divided between them so that we get our money out of one or the other: *Jennings* v. *Jordan* 6 App. Cas. 698.

F. Arnoldi, for the defendants Kelly. Solmes, the second mortgagee, prior to his assignment to the plaintiff, had released the other mortgage. His assignee did not stand in any better position than himself. There could not be any consolidation as to a piece of land which had been expressly released. Shannon having sold another piece first to Kelly, that which remained in Shannon became solely liable to pay the outstanding mortgages: *Pierce* v. *Canavan*, 7 A. R. 187; *Barker* v. *Eccles*, 17 Gr. 277; 18 Gr. 440; *Jones* v. *Beck*, 18 Gr. 671; *Brower* v. *Canada Permanent Building Association*. 24 Gr. 509.

McMichael, in reply. The only point in question between us is that the plaintiff having a mortgage covering both these lots, and another mortgage on one, while the rights of the parties are to be protected and indemnified in every way, still there is nothing in the cases to shew

the mortgagee is not to get his money out of some of them. [BOYD, C.—Mr. Arnoldi admits the thirty-six feet may be called on to pay the first mortgage, but should be levied on last. You don't object to that.] But we never released the thirty-six feet. We say the second mortgagee would have a right that his mortgage should be satisfied, and that there should be a portion taken from the other piece to pay the first mortgage. Our paramount rights are as mortgagees to take our first mortgage out of both of these lands, and we cannot be compelled to confine ourselves to the one piece. We are entitled also to go to the other to supply what is wanting. The land held is sufficient security for the two mortgages, and if one piece of land will pay both mortgages well and good, but if not our rights as to the other piece of land have not been affected. When Kelly bought the land it was held subject to both the mortgages and he bought it subject to the one mortgage. None of the cases interfere with the right of the mortgagee to take his money out of both pieces: *Harter* v. *Colman*, 19 Ch. D. 630; *Miller* v. *Brown*, 3 O. R. 210.

Arnoldi. Our position is, that the second mortgage must be taken as wiped out.

April 9th, 1888. BOYD, C.—A mortgage is made affecting the whole lot; a second mortgage is next made of the like extent. Then a sale of thirty-six feet of the land by the mortgagor with covenant against incumbrances, which is partially carried out by the procurement of a discharge which is in operation only as to the second mortgage. Then a sale of the rest of the land by the mortgagor to defendant Nagle. As against this defendant the owner of the thirty-six feet has the right to cast the whole burden of the incumbrances on the remainder of the property: *Jones* v. *Beck*, 18 Gr. 671. But it does not appear to me that he has this equity as against the second mortgagee. The second mortgage is not subsequent to the sale of the thirty-six feet, but prior; so that that mortgagee is not in the same position as the mortgagor, and burdened with the

exoneration of that parcel from the first incumbrance. The Court ought not then to do as the defendant Kelly claims, and compel the plaintiff to take the first mortgage debt exclusively from that part not owned by the defendant Kelly; for this would be to relieve him at the expense of the second mortgagee (who is in this case the plaintiff.) But neither should the plaintiff's contention prevail who asserts her right to levy from the Kelly's land first of all, for that would be clearly not equitable. The proper method is that adopted in *Barnes* v. *Racster*, 1 Y. & C. C. C. 401, by which the first mortgage debt will be apportioned ratably upon the two parts of the land, *pari passu*, according to their value. If not redeemed, the land will be sold to satisfy the claim of the first mortgage, to which the respective parts will contribute according to the values put upon them by the Master; any balance in excess will go to the owner of the thirty-six feet and the second mortgagee respectively: *Boucher* v. *Smith*, 9 Gr. 347, and *Wellesley* v. *Lord Mornington*, 17 W. R. 355.

The plaintiff cannot consolidate her securities against the defendant Kelly, for this defendant became owner of part of the equity of redemption before both mortgages were in the hands of the plaintiff, and did so on faith of having his purchase exonerated from the second mortgage: *Harter* v. *Coleman*, 19 Ch. D. 630.

The contentions raised by the parties were proper to be brought before the Court, and for this reason the plaintiff should get all the costs to be added to her security and apportioned as I have indicated between the parcels: *Bird* v. *Wenn*, 33 Ch. D. 219. Whatever remedies the parties may have upon the covenant against incumbrances will of course remain open for prosecution as they may be advised.

The judgment was finally settled, and issued as follows:

1. This Court doth declare that the plaintiff is not entitled to consolidate her securities in the statement of claim mentioned against the defendants Samuel Kelly and Jemima Ann Kelly, and this Court doth further declare that as between the owners of the equity of redemption of the parcels of land described in the 10th and 12th paragraphs of the said statement of claim (sc. the lands respectively conveyed to Nagle and Kelly)

the said parcels are respectively liable for and bound to bear the amount due under the mortgage dated May 15th, 1866, and the plaintiff's costs of this action rateably according to their respective values and doth order and adjudge the same accordingly.

2. And this Court doth further order and adjudge that it be referred to the Master of the Supreme Court of Judicature at Picton to ascertain the respective values of the said two parcels of land and to apportion the amount due under the said mortgage and the said costs between them.

3. And this Court doth further order and adjudge that all necessary enquiries be made, accounts taken, costs taxed and proceedings had for redemption or sale and for these purposes that the cause be referred to the said Master.

4. And this Court doth further declare that if the defendants Samuel Kelly and Jemima Ann Kelly shall neglect or refuse to pay the amount found due, under the said mortgage and for costs, the whole premises described in the said 10th and 12th paragraphs of the statement of claim, shall be sold and that if after payment of the said mortgage of the 15th day of May, 1866, and the said costs according to the declaration aforesaid there shall remain any balance, such balance shall be apportioned between the parties interested as the said Master shall direct.

5. And this Court doth further order and adjudge that if the defendants Samuel Kelly and Jemima Ann Kelly shall pay the first mentioned mortgage and costs the lands mentioned in paragraph 12 of the said statement of claim shall be sold and the proceeds shall be divided between the parties interested in the manner mentioned in the preceding paragraph hereof.

6. And this Court doth further order and adjudge that that the defendants Mary Nagle, John Nagle and William Blackley do forthwith deliver to the plaintiff or to whom she may appoint possession of the lands and premises in question in this action or of such part thereof as may be in the possession of the said last named defendants and that if the lands and premises in question in this action are sold, then that the defendants Samuel Kelly and Jemima Ann Kelly do forthwith thereafter deliver up possession to the purchaser of the said land, or of such part thereof as may be in their possession.

A. H. F. L.

[QUEEN'S BENCH DIVISION].

BANK OF HAMILTON v. TAMBLYN ET AL.

Bill of sale and chattel mortgage—Undisclosed trust—Informality cured by taking possession—Insolvency of mortgagor—Prior seizure by mortgagees under execution—Preference—48 Vic. ch. 26, sec. 2 (O.).

A chattel mortgage made by D. to McL. was given to secure a sum made up of debts due to McL. and two other persons; McL. made the usual affidavit of *bona fides*, asserting that the whole sum was due him; no trust of any kind appeared upon the mortgage, though the intention was that McL. should hold it as trustee for the other two. The mortgage was filed within the proper time after its execution. McL. assigned the mortgage to the plaintiffs, who afterwards obtained judgment against D. and under the execution the sheriff seized the property covered by the mortgage. After this seizure the plaintiffs instructed the sheriff to withdraw, and then took and held possession of the property under the mortgage. The defendants placed writs of execution against the goods of D. in the hands of the sheriff after the plaintiffs had taken possession under their mortgage. D. was solvent when he gave the chattel mortgage, but insolvent when the plaintiffs took possession.

Held, that the fact that no trust was declared on the face of the mortgage was nothing more than an informality, and was cured by the taking possession before the rights of creditors had attached on the chattels; and neither the insolvency of the mortgagor at the time of taking possession, nor the fact of the seizure under execution before taking possession, affected the position of the plaintiffs.

Held, also, that the taking possession could not be viewed as a preference within 48 Vic. ch. 26, sec. 2 (O.).

MOTION by the defendants (execution creditors) to reverse the judgment of MacMahon, J, in favour of the plaintiffs (claimants) upon an interpleader issue, tried before him at Walkerton, without a jury.

May 22, 1888, the motion was argued by
H. J. Scott, Q.C., for the defendants, and
J. J. Scott, for the plaintiffs.

The facts and arguments are set out in the judgment of Street, J.

The following cases, in addition to those mentioned in the judgments, were cited: *Barker* v. *Leeson*, 1 O. R. 114; *River Stave Co.* v. *Sill*, 12 O. R. 557; *McKellar* v. *McGibbon*, 12 A. R. 221; *Coats* v. *Kelly*, 15 A. R. 81; *Pettigrew* v. *Thomas*, 12 A. R. 577.

May 25, 1888. STREET, J.—For the purposes of the decision of the points raised upon the argument of this issue the facts may be taken to be as follows: On 28th September, 1886, Wm. Durrell was indebted to Hugh McLean and Archibald McLean in one sum of money, and to their brother, Norman McLean, in another sum, the whole amounting to some $2,000 or upwards. On that day he gave a chattel mortgage upon three scows or barges to Norman McLean for the whole debt, and Norman McLean made the usual affidavit of bona fides, asserting that the whole sum was due to him: no trust of any kind appears upon the mortgage, which was filed within the proper time after its execution.

On 30th September, 1886, Norman McLean assigned this chattel mortgage to the plaintiffs. Before the month of July, 1887, the plaintiffs recovered judgment against Durrell, the mortgagor, and under their execution the sheriff seized the three scows in question, but was afterwards instructed by the plaintiffs to withdraw from the seizure under the execution, and they in July, 1887, seized and took and held possession of the property under their chattel mortgage. The defendants are execution creditors of Durrell under writs which were placed in the sheriff's hands after the plaintiffs had taken possession under their chattel mortgage. At the time the plaintiffs so took possession Durrell was insolvent, but he was solvent at the time the chattel mortgage was given. This interpleader issue is directed to ascertain whether the plaintiffs are entitled to hold the scows under their chattel mortgage as against the execution creditors, who are defendants in the issue. It was contended on the part of the defendants that the chattel mortgage, having been made to Norman McLean, without any trust appearing on its face for his brothers, to secure a debt of theirs, was invalid, and that this was a defect which could not be cured by the fact that the assignees of the mortgage had taken possession before the executions of the defendants came into the sheriff's hands. It was, however, established that, so far as the

mortgage was intended to secure the debt due by the mortgagor to Hugh and Archibald McLean, it was taken with the intention that it should be held by Norman McLean as trustee for them, and I think that the fact that no trust was declared on its face was nothing more than an informality which, however fatal it might be as against creditors, would be cured by possession being taken by the mortgagee before the rights of creditors had actually attached upon the goods. It does not strike me as being a defect more serious in its consequences than the absence of an affidavit of execution; as to which see *Smith* v. *Fair*, 11 A. R. 755; or the somewhat similar objection to the validity of the instrument in question in *Parkes* v. *St. George*, 10 A. R. 496; or the absence of a proper affidavit of bona fides, as in *Robins* v. *Clark*, 45 U. C. R. 362.

It has been established by these cases that the mortgagee under a chattel mortgage which, though good between the parties, is declared by the Chattel Mortgage Act to be void as against creditors for some informality in its form, its proof, or its registration, may, by taking possession under it of the goods covered by it, before the rights of creditors have attached by means of executions, entitle himself to hold the goods as against the creditors of the mortgagor. The defendants, however, say that at the time possession was taken by the mortgagees the mortgagor had become insolvent, and that the mortgagee can have no better rights than they would have had under a chattel mortgage given at the time they took possession. I cannot see upon what principle this contention can be supported. The chattel mortgage was good as between the parties to it, and passed to the mortgagees the right of property; it was subject, owing to the defect above mentioned, to the rights of any creditors who might place executions in the sheriff's hands before the mortgagees cured it by taking possession; but once possession was taken under it there was nothing to let in the rights of subsequent execution creditors.

The fact that the plaintiffs had themselves seized the goods under their execution before they took possession under

their chattel mortgage did not avail to destroy their rights as mortgagees, and render void the transfer of the right of property, which had been effected as between the parties when the instrument was delivered; and when they withdrew their execution their rights under the chattel mortgage remained unaffected by the seizure which they had abandoned. The Chattel Mortgage Act ceased to have any operation when the plaintiffs took rightful possession of the property, which was theirs by virtue of the chattel mortgage.

It was suggested that under sec. 2 of ch. 26, 48 Vic., Ontario Statutes of 1885, the possession taken was void as having the effect of preferring the plaintiffs to the other creditors of the mortgagor: but that section does not appear to me to touch or affect such a state of things as we have here: all the transactions avoided by that section are acts of the insolvent: here the act of taking possession was no act of the insolvent, but was that of the mortgagees, against the will of the insolvent, the mortgagor, and is clearly to be distinguished upon this ground, if upon no other, from the acts which by that statute are declared void as against creditors.

I think, therefore, that the defendants' motion should be dismissed with costs.

ARMOUR, C. J.—It was contended that taking possession did not have the effect of making the transaction good. The expressions of opinion of some of the judges of the Court of Appeal in *Smith* v. *Fair*, 11 A. R. 755, are not binding upon us, as they were not necessary for the decision of that case, and there are decisions in this Court the other way.

I think the motion should be dismissed.

FALCONBRIDGE, J., was not present at the argument, and therefore took no part in the judgment.

Motion dismissed with costs.

[QUEEN'S BENCH DIVISION.]

REGINA v. AMBROSE AND WINSLOW.

Canada Temperance Act—Conviction—Jurisdiction of police magistrate—Place where offence committed—Question of fact—Statute not proved to be in force—Certiorari—Want of jurisdiction to be shown affirmatively—Joint conviction—Imprisonment of one defendant for default of the other—R. S. C. ch. 178, secs. 87, 88.

The defendants were convicted by the police magistrate of the town of Peterborough, of selling intoxicating liquor in that town, contrary to the provisions of the Canada Temperance Act. It was contended that only the contract for sale was made in Peterborough, but that the actual sale took place in Port Hope; there was no conflict of evidence; the magistrate held upon the undisputed facts that the sale was in Peterborough. Upon a motion to quash the conviction,

Held, that the question where the sale took place was one of fact, and the magistrate having found, as shewn by the conviction, that the defendants had sold intoxicating liquor in Peterborough, the Court could not review his decision.

Held, also, that the defendants were not entitled to a *certiorari* to remove the conviction on the ground that the Act was not proved to be in force in Peterborough, because on their application for the *certiorari* they did not shew affirmatively that the Act was not in force there. But

Held, that the conviction was bad and must be quashed, because in the award of punishment it was directed that each of the defendants should pay half the fine and costs, and that in default of distress the defendants should be imprisoned, and under such award one of the defendants, having paid his half of the fine and costs, might be imprisoned for the other's default; and this defect was not cured by secs. 87 and 88 of the Summary Convictions Act, R. S. C. ch. 178.

February 11, 1888. *Aylesworth*, for the defendants, obtained leave to file the return to a *certiorari* and an order *nisi* to quash a conviction of Thomas H. Ambrose and Albert Winslow, by the Police Magistrate in and for the town of Peterborough, made on the 25th of November, 1887, for unlawfully selling intoxicating liquor at the town of Peterborough, contrary to the provisions of the second part of the Canada Temperance Act. Among the grounds taken in the order *nisi*, were the following:

1. The Police Magistrate had no jurisdiction, because the offence alleged was not in fact committed within the territorial limits of his jurisdiction.

5. The Canada Temperance Act was not, and was not proved to be, in force in the town of Peterborough.

9. The adjudication of imprisonment in the conviction was illegal, because under it either defendant, although he

might have paid his half of the fine and costs, might still be detained in gaol until the remaining half should be paid.

The defendants were in partnership as brewers in Port Hope. The evidence and admissions proved that the defendants kept a salaried servant in Peterborough, whose duty it was to solicit and take orders for the defendants' ale, to collect payment, &c. The servant took orders for ale in Peterborough within the time charged in the information, forwarded the orders to his employers, the defendants, who delivered the ale in Peterborough within the time charged. The agent swore that the orders were for fixed quantities, at fixed prices in Peterborough, the freight being paid by the defendants. There was no conflict of evidence or dispute as to the facts.

The magistrate gave a written judgment, in which he said: "The defendants' counsel urges that there was no sale in Peterborough; that the agent had no authority to make a binding sale; that the defendants retained the power (as proved) to refuse to fill his orders; that if any sale, it was in Port Hope, and was complete when ale put on cars; and that no offence cognizable was committed in Peterborough. I am of opinion that the servant in taking the order represented his employers, and that they, as represented by him, were in Peterborough, exactly in the same way as if, being personally present, they took the orders themselves. I am of the opinion that the taking of the order for a fixed quantity of ale at a fixed price, the freight being paid by the vendor, coupled with the delivery of the ale at Peterborough within the time charged, completed and made a sale at Peterborough."

The adjudication of punishment in the conviction was as follows: "I adjudge the said Albert Winslow and T. H. Ambrose, for their 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 George Cochrane (the complainant) the sum of $3.88 for his costs in that behalf, one half to be paid by each defendant; and if the said several sums be

not paid on or before the 5th day of December next, I order that the same be levied by distress and sale of goods and chattels of the said Albert Winslow and T. H. Ambrose, and in default of sufficient distress, I adjudge the said Albert Winslow and T. H. Ambrose to be imprisoned in the common gaol of the said county of Peterborough, there to be kept for the space of two months, unless the said several sums and all costs and charges of the said distress [and of the commitment and conveying of the said Albert Winslow and T. H. Ambrose to the said gaol] be sooner paid, one half to be paid by each aforesaid."

May 21, 1888. *W. R. Riddell* supported the order *nisi*. The Police Magistrate had no jurisdiction if the offence was not committed in Peterborough. [ARMOUR, C. J.—The question where the sale took place was one of fact: it was a matter for the Police Magistrate.] The magistrate decided as a matter of law that there was a sale in Peterborough, not as a matter of fact; and I submit that he was wrong in his law. There was a contract for a sale in Peterborough, but not a sale. [ARMOUR, C. J.—The conviction shews that the police magistrate found that the defendants sold intoxicating liquor at the town of Peterborough.] There was no evidence of a sale in Peterborough; beer was delivered in Port Hope according to the evidence; the defendants' control over it ceased at Port Hope. [ARMOUR, C. J.—It is not a case as to the effect of evidence. We do not sit here as a Court of Appeal to review the magistrate's finding on the evidence. We cannot interfere on that ground.] Then, no evidence was given that the Canada Temperance Act was in force in Peterborough; that is a fact that must be proved in the same way as any other fact; the objection was taken before the magistrate. I refer to *Regina* v. *Elliott*, 12 O. R. 524. [ARMOUR, C. J.—In your affidavit used when the *certiorari* was granted you did not shew affirmatively that the Act was not in force in Peterborough; and you were, therefore, not entitled to your *certiorari*; before you can get a *certiorari* you must

shew that the magistrate had no jurisdiction. The statute means something when it takes away the right to *certiorari*. *Regina* v. *Roddy*, 44 U. C. R. 605, is an authority against you on this point.] The magistrate exceeded his jurisdiction by adjudicating that one half of the fine and costs be paid by each defendant, and that in default of distress, the defendants should be imprisoned for two months; because one of the defendants having paid his half of the fine and costs, might be imprisoned for the other's default; *Regina* v. *Cridland*, 7 E. & B. 853; 3 Jur. N. S. 1213; *Regina* v. *Elliott*, *supra*; *Morgan* v. *Brown*, 4 A. & E. 515. [The Court called upon counsel for the magistrate and complainant to argue the last point only.]

Watson, for the magistrate. There would be no default for which a defendant could be imprisoned if he paid his half of the fine and costs. If the conviction is bad in this respect, the part should be stricken out; *Regina* v. *Dunning*, 14 O. R. 52. [ARMOUR, C.J.—The majority of the Court held the contrary in that case.]

Delamere, for the complainant, referred to secs. 87 and 88 of the Summary Convictions Act, R. S. C. ch. 178, and argued that they cured a defect of this kind in a conviction.

Riddell in reply. This is not a case of insufficiency in a conviction which is to be cured by secs. 87 and 88: *Reg.* v. *Bleasdale*, 4 T. R. 809; *Paley* on Convictions, 5th ed., 257.

ARMOUR, C. J.—The conviction is regular in all respects except in the provision for the payment of the penalty and costs, and for enforcing payment thereof. We are all of opinion that this defect makes the conviction bad, and that it is not cured by secs. 87 and 88 of the Summary Convictions Act. The result is to be regretted, because the conviction is otherwise unassailable. The conviction will be quashed without costs. There will be the usual order for the protection of the magistrate.

FALCONBRIDGE and STREET, JJ., concurred.

Order absolute quashing conviction.

[QUEEN'S BENCH DIVISION.]

REGINA V. SELBY.

Criminal law—Forgery—Corroboration—Interest of witnesses—R. S. C. ch. 174, sec. 218.

The defendant was convicted of uttering, with knowledge that it was a forgery, the indorsement of the name "Taylor Brothers" upon a promissory note, which had been discounted by a bank but given up and destroyed before maturity, upon security being furnished to the bank. The manager of the bank and the business partner of the defendant gave evidence of the forgery, and the three members of the firm of Taylor Brothers were also called as witnesses, and denied having indorsed the note, or having any knowledge of it.

Held, that the members of the firm of Taylor Brothers were not persons interested or supposed to be interested in respect of the indorsement, within the meaning of R. S. C. ch. 174, sec. 218, and their evidence therefore was sufficient to corroborate that of the other witnesses.

A CROWN case reserved.

The prisoner was tried and convicted before Street, J., at Toronto, 4th April, 1888, on the second count of an indictment for forgery and uttering. The first count was that the prisoner, having in his custody and possession a certain promissory note for the payment of $4,000, feloniously did forge on the back thereof the forged indorsement "Taylor Brothers," with intent thereby then to defraud.

The second count was for offering, uttering, disposing, and putting off the forged indorsement with intent thereby then to defraud, well knowing the indorsement to be forged.

The case set out the following facts:—

The promissory note described in the indictment was made by Selby & Co. payable to the order of Taylor Brothers, the indorsement of whose signature upon it was the forgery charged in the indictment.

The firm of Selby & Co. was composed of the prisoner and one Thomas B. Taylor.

The firm of Taylor Brothers was composed of John F. Taylor, George A. Taylor, and William T. Taylor.

The two firms were entirely distinct from one another.

The note in question was offered for discount by the

prisoner to the Traders' Bank, and was discounted by that bank shortly after its date.

After the discount of the note, and before its maturity, the bank, suspecting that the indorsement was forged, sent for the prisoner, who admitted to H. S. Strathy, the cashier of the bank, that the indorsement by Taylor Brothers was forged; and thereupon the bank took from the prisoner a new note for the amount of the note so discounted made by the prisoner and Thomas B. Taylor, individually and by the firm name of Selby & Co., and indorsed by one Rogers, and destroyed the note so discounted.

Each member of the firm of Taylor Brothers was called by the Crown as a witness and denied having indorsed the note in question, or having any knowledge whatever of it.

H. S. Strathy was also called as a witness.

The note indorsed by Rogers was subsequently paid to the Traders Bank by him. The amount so paid by him was not repaid to him.

On behalf of the prisoner it was objected that the only evidence against him was that of persons interested or supposed to be interested; that there was no corroboration of their evidence; and that being all interested or supposed to be interested, they could not corroborate one another.

At the request of the counsel for the prisoner, STREET, J., reserved the following questions for the consideration of the Queen's Bench Division of the High Court of Justice for Ontario; assuming for the purposes of the case that the evidence was sufficient in terms to sustain the conviction; the questions reserved relating to the status of the witnesses under R. S. C. ch. 174, sec. 218, which is as follows:—"The evidence of any person interested or supposed to be interested in respect of any deed, writing, instrument or other matter given in evidence on the trial of any indictment or information against any person for any offence punishable under the '*Act respecting forgery*,' shall not be sufficient to sustain a conviction for any of the said offences unless the same is corroborated by other legal evidence in support of such prosecution."

1. Was the evidence of each member of the firm of Taylor Brothers sufficient corroboration of that of the other members of that firm to satisfy the requirements of R. S. C. ch. 174, sec. 218?

2. Was the evidence of any one member of that firm sufficient evidence without corroboration to satisfy the requirements of the above section?

3. Were Henry S. Strathy and Thomas B. Taylor both persons interested within the meaning of the above section?

4. Even if they were persons interested or supposed to be interested within the meaning of the above section, was their evidence or that of either of them, as above stated, sufficient corroborative evidence of the evidence of the members of the firm of Taylor Brothers, within the meaning of the above section?

June 4, 1888. The case was argued before the Court.

Osler, Q.C., for the prisoner. All the five persons whose evidence went to prove the charge were parties interested within the meaning of sec. 218; it is not necessary for them to be interested in the writing; they were interested in the matter—interested in making it out a forgery. The section in question is in advance of the law in England. See ch. 17 of *Taylor* on Evidence, 8th ed., "Matters not provable by a single witness." The analogy is to accomplices; in the case of accomplices twenty are of no greater weight than one; *Taylor* on Evidence, 8th ed., sec. 967. The wording of sec. 218 must be observed; the multiplication of interested witnesses is of no avail to satisfy the last part of the section; the word "other," refers to evidence of persons not interested. The word "interest" in this section must have a broader meaning given to it than it has in the older cases. The rule is, once an accomplice, always an accomplice; and so, once interested, always interested. The interest need not be at the time of the trial. I refer to *Reg.* v. *Bannerman*, 43 U. C. R. 547; *Reg.* v. *Giles*, 6 C. P. 84; *Reg.* v. *Hagerman*, 15 O. R. 598.

Irving, Q. C., for the Crown, was not called upon, but asked leave to refer the Court with regard to the history of the enactment in question to the Imperial Act, 9 Geo. IV. ch. 32, sec. 2; *Rex* v. *Hughes*, 2 East P. C. 1002; and the Act of the Province of Canada 10 & 11 Vic. ch. 9, sec. 21, which last is not referred to in *Taschereau's* Criminal Statute Law, p. 900.

ARMOUR, C. J.—How could the members of the firm of Taylor Brothers be said to be interested, or be supposed to be interested, in respect of the promissory note, for the forging of the indorsement of the name of Taylor Brothers, on which the prisoner was convicted? For even if the indorsement had been genuine, that firm had long before the trial ceased to be in any way liable in respect thereof. None of us has the slightest doubt about it; we think the conviction ought to be affirmed.

FALCONBRIDGE and STREET, JJ., concurred.

Conviction affirmed.

[QUEEN'S BENCH DIVISION.]

RE BOBIER AND ONTARIO INVESTMENT ASSOCIATION.

Vendor and purchaser—Requisitions—Certified copies of deeds—Removing clouds on title—Lis pendens—Power of attorney—Compensation for deficiency in land sold.

Upon a petition under the Vendor and Purchaser Act;

Held, (1.) that the purchasers were entitled to certified copies of registered deeds or memorials of deeds in the chain of title which the vendors were unable to produce.

McIntosh v. *Rogers*, 12 P. R. 389, followed.

Cooper v. *Emery*, 1 Phil. 390, distinguished.

(2.) That the purchasers were entitled to have removed from the registry as clouds upon the title: (*a.*) A certain certificate of *lis pendens* in an action upon a mortgage which appeared by the registry to be discharged; because it could not be ascertained from the registry itself that the action was in respect of the discharged mortgage; (*b.*) A second certificate of *lis pendens* in an action to set aside as fraudulent a deed in the chain of title under which the vendors claimed, the vendors not being parties to it; because the vendors, and, if the title passed, the purchasers, might be added as parties; (*c.*) A power of attorney to sell the lands in question, although registered after the mortgage under which the vendors were selling; because the vendors might be affected with notice of the interest claimed by the donor of the power, such interest having accrued, if at all, before the vendors obtained title.

(3.) Upon the evidence, that the purchasers were not entitled to a conveyance of or compensation for a small part of the land contracted for, to which the vendors were not able to make title.

THIS was a petition by James Bobier and others, under R. S. O. (1887), ch. 112, sec. 3, showing that on the 14th July, 1888, the petitioners agreed to purchase from the Ontario Investment Association the south-east half of lot 17 and the south-west quarter of lot 18 in the 9th concession of the township of Dunwich, and praying for the order of the Court, under the statute, to settle certain questions between the petitioners and the vendors.

The vendors were selling the lands under the power of sale in a mortgage dated 13th September, 1886, made to them by William Bodkin.

1. The vendors refused to give the purchasers certified copies of certain deeds registered against the lands in question, and not affecting other lands, the originals of which they had not in their possession. (Paragraphs 4 and 8 of the petition).

2. The purchasers required the removal from the registry of: (1) A *lis pendens*, registered 16th September, 1886, in an action of *South-Western Loan Society* v. *Peter Dickinson*. (2) A power of attorney, registered 9th June, 1887, made by Ann Bodkin in favour of Angus McCrimmon, authorizing him to lease or sell the lands in question, and purporting to create a charge upon the lands. (3) A *lis pendens*, registered 26th June, 1888, in an action of *John Lyons* v. *Peter Dickinson, William Bodkin, and Ann Bodkin*, brought to set aside as fraudulent and void a deed of the lands in question, dated 22nd August, 1885, made by Peter Dickinson in favour of Ann Bodkin; also a deed of one half of the lands, dated 2nd September, 1886, made by Ann Bodkin in favour of William Bodkin; also a deed of one-half of the lands, dated 1st September, 1886, made by Peter Dickinson to William Bodkin; also a life lease, dated 22nd August, 1885, made by Ann Bodkin in favour of Peter Dickinson; also a deed, dated 9th September, 1886, made by Peter Dickinson in favour of William Bodkin; all of which the purchasers alleged to be material and necessary links in the chain of title.

3. On the 25th June, 1884, a deed was registered on the lands in question, made by Peter Dickinson in favour of Eliza Walker, of one acre, part of the lands in question, of which Eliza Walker was in possession at the time of the contract of sale to the petitioners. The purchasers required a re-conveyance of the one acre, or an abatement of the purchase money.

September 28, 1888, the petition was argued before ARMOUR, C. J., in Court.

Hoyles, for the purchasers. The vendors are bound to furnish certified copies of deeds not in their possession; *Sugden* (ed. of 1862) p. 448; *Armour* on Titles pp. 82, 83, 98; *Dart* (6th ed.) p. 764; *McIntosh* v. *Rogers*, 12 P. R. 389; *Harrison* v. *Joseph*, 8 P. R. 293; *Barr* v. *Doan*, 45 U. C. R. 491.

Any instrument on the registry which is not a link in

the chain of title is a cloud which the vendor must remove; and it is not material that the instruments are subsequent to the mortgage under which the vendors are selling; *Keefer* v. *McKay*, 10 P. R. 345; *Re Charles*, 4 Ch. Chamb. R. 19; *Weir* v. *Niagara Grape Co.*, 11 O. R. 700; *Armour* on Titles pp. 132, 136, 182. The vendors are not parties to the action brought by Lyons, but they may be added as parties.

The petitioners are entitled to the acre conveyed to Eliza Walker, or to compensation for it. The mortgage under which the vendors are selling covers this acre, and in the advertisement of sale it was not excepted.

W. R. Meredith, Q. C., for the vendors. This is not a case of verifying an abstract by the production of deeds; that has been completed; what the purchasers want is to have copies of deeds to keep. *McIntosh* v. *Rogers* is thus distinguishable; and *Re Charles* and *Harrison* v. *Joseph* are in point. Where documents are of record the general rule laid down in *Sugden* and *Dart* does not apply.

The circumstances of this case take it out of the general rule as to the removal of clouds. The South-Western Loan Company's *lis pendens* is in an action upon a mortgage, which is now discharged [ARMOUR, C. J.—But there is nothing on the registry to identify the mortgage with the *lis pendens*.]

As to the power of attorney, it is subsequent to the vendors' mortgage, and it must be assumed that the claim of which it gives notice is something subsequent to the mortgage.

In the action brought by Lyons the vendors are not made parties, though it is subsequent to their mortgage, and their title must be taken to be admitted. A *lis pendens* to be regarded as a cloud must be something which affects the title.

As to the one acre, the purchasers are making a dishonest claim. The evidence shows that they knew perfectly well that they were not buying it.

October 5, 1888. ARMOUR, C. J.—The purchaser is, in my opinion, entitled to the production of the deeds in the fourth and eighth paragraphs of the petition mentioned, and if they cannot be produced, to certified copies of the memorials of such of them as were registered by memorial only, and to certified copies of such as are themselves registered.

This is in accordance with the view expressed by my brother Street in *McIntosh* v. *Rogers*, 12 P. R. 389, in which I agree; and I do not think that the statute 10, Anne ch. 18 bears such analogy to our registry laws that the decision in *Cooper* v. *Emery*,* 1 Phil. 390, is an authority to the contrary.

The purchaser is also entitled to have the certificate of *lis pendens* in the suit of the *South-Western Company* against *Dickinson* removed from the registry. As it stands, it is a cloud upon the title, and it cannot be ascertained except from inquiry elsewhere than in the registry office that the suit is in respect of their mortgage, which has been discharged; and if not in respect of it, the registry of the discharge of their mortgage would not affect it.

He is also entitled to have the certificate of *lis pendens* in the suit of *Lyons* against *Dickinson* and *William* and *Ann Bodkin* removed from the registry. It is a cloud upon the title, and necessitates search elsewhere than in the registry office, and is said to attack, as fraudulent and void as against creditors, one of the deeds in the chain of title under which the vendors claim, and it may be that the vendors may be made parties to the suit, and in case the title passes to the purchaser, that he may be made a party to the suit, and I do not think that he should be compelled to be subject to any risk of cost or trouble in respect of it.

He is also entitled to have the power of attorney from Ann Bodkin to Angus McCrimmon removed from the registry. It, too, is a cloud upon the title, and is notice to the purchaser that she claims an interest in the lands; if

* Cited in *Re Charles*, 4 Ch. Chamb. R. 19.

she has such interest, it accrued to her before the vendors obtained title,* and she may be able to affect the vendors with notice of her interest, and the purchaser ought not to be subjected to such a risk.

The purchaser is not entitled to a conveyance of the one acre in the petition referred to, nor to any abatement of the purchase money in respect of it, as it is quite manifest that he did not buy the acre, and knew that it was not being sold by the vendors.

The purchaser will pay all costs of the petition and incidental thereto occasioned by his making claim to this acre and to an abatement of the purchase money in respect thereof; and the vendors will pay all the other costs of the petition and incidental thereto.

* This appeared from the abstract of title.

[QUEEN'S BENCH DIVISION.]

PRICE v. GUINANE.

Landlord and tenant—Overholding Tenants' Act—Powers of County Judge —"Colour of right"—Writ of possession—Stay of proceedings.

The expression "colour of right" in the Overholding Tenants' Act, R.S.O. ch. 144, means such semblance or appearance of right as shews that the right is really in dispute.

The Act confers no authority upon the County Judge to try the question of the tenant's right or title; and as soon as it is made to appear that the right is really in dispute, there is then that colour of right which the Act contemplates, and the Judge is bound to dismiss the case.

Gilbert v. *Doyle*, 24 C. P. 60, and *Woodbury* v. *Marshall*, 19 U. C. R. 597, not followed.

Upon the proceedings before the County Judge being commanded to be sent up, the High Court has power to stay proceedings upon the writ of possession under the Act.

THIS was a proceeding by the plaintiff under R. S. O. ch. 144, "an Act respecting Overholding Tenants," had before the Judge of the County Court of the county of York, to recover possession from the defendant of certain premises demised by the plaintiff to the defendant by lease dated the 5th May, 1883, to hold for five years from the 1st September, 1883, which term had expired.

The defendant set up in answer to this proceeding that an agreement had been made between the plaintiff and the defendant, some time in the summer of 1887, for a new lease for the term of three years, to commence at the expiration of the said term, at an increased rent; and that upon the faith of this agreement the defendant had expended large sums of money in the improvement of the premises, of his intention to make which improvements the defendant had notified the plaintiff at the time of the making of the agreement, and to which the plaintiff had then assented.

The fact of this agreement having been made was deposed to by five witnesses on the part of the defendant, who stated that the agreement was made in the said premises.

The plaintiff positively denied ever having made such an agreement, and also positively denied having been in the said premises at the time it was alleged to have been made; and said that she was in poor health at such time, and as to her state of health at the time she was corroborated by her daughter.

The learned Judge found on the evidence that no such agreement was made; that it was so utterly and circumstantially denied by the plaintiff, in such a satisfactory way, that he had no hesitation in coming to that conclusion, notwithstanding that it compelled him to hold that the evidence given by the Guinanes and by Gardner and Smith was a matter of pure invention, and he ordered a writ to issue to the sheriff commanding him to put the plaintiff in possession of the demised premises.

On the 23rd October, 1888, *Lash*, Q.C., for the defendant, obtained from ARMOUR, C. J., an order commanding the County Judge to send up the proceedings and evidence in the case to the High Court, and staying proceedings upon the writ ordered to be issued to the sheriff.

The proceedings having been sent up by the County Judge, *Shepley*, for the plaintiff, on the 25th October, 1888, moved to set aside the stay of proceedings.

Lash, Q.C., shewed cause.

ARMOUR, C. J., held that upon the proceedings being commanded to be sent up, the High Court had power to stay proceedings upon the writ.

On the 30th October, 1888, *Lash*, Q.C., moved to set aside the proceedings, on the ground that it was not shewn that the defendant held without colour of right, but that colour of right was shewn, and having been shewn, that the learned Judge had no right to try the question of the right to the possession of the premises.

Shepley shewed cause.

November 1, 1888. ARMOUR, C. J.—The origin of the Act R. S. O. (1887) ch. 144, "an Act respecting Overholding Tenants," is to be found in the Act 4 Will. IV. ch. 1, secs. 53 to 58 inclusive, and the preamble to these sections is: "And whereas the wrong committed by tenants, in holding over vexatiously and without colour of right, after their term has expired, requires a more speedy and less expensive remedy than is now provided by law."

It is manifest from this preamble, and from the provisions of the Act R. S. O. ch. 144, that authority is by it conferred upon the County Judge only in the plainest cases—cases in which the tenant holds, not only without any right, but without even a colour of right.

It is only upon its appearing to the County Judge upon affidavit that the tenant wrongfully holds without colour of right, and that the landlord is entitled to possession, that the Judge is warranted in making an appointment.

And it is to enable him to judge of this that such affidavit is required to state "the refusal of the tenant to go out of possession, and the reasons given for his refusal if any were given, adding such explanation in regard to the ground of the refusal as the truth of the case may require."

The appointment by the Judge is of "a time and place at which he will inquire and determine whether the person complained of was tenant to the complainant for a term or period which has expired, or has been determined by notice to quit or otherwise, and whether the tenant, without any colour of right, holds the possession against the right of the landlord, and whether the tenant does wrongfully refuse to go out of possession, having no right to continue in possession, or how otherwise."

This, it will be observed, is merely an appointment for the purposes therein mentioned, and does not point out what the issues are which the Judge is to try, but the issues which he is to try are pointed out in this manner, "if the tenant appears at such time and place, the Judge shall, in a summary manner, hear the parties, and examine into

the matter, * * and if after such hearing and examination it appears to the Judge that the case is clearly one coming under the true intent and meaning of section 2 of this Act, and that the tenant holds without colour of right against the right of the landlord, then he shall order the issue of such writ," &c.

The issues, therefore, which the Judge is to try are: firstly, is the case clearly one coming under the true intent and meaning of sec. 2 of the Act? Secondly, does the tenant hold without colour of right against the right of the landlord?

Under the second issue, the Judge has no authority to try whether the tenant holds without right: all he can try is, whether the tenant holds without colour of right.

If the Judge cannot find that the tenant holds without colour of right, he is to dismiss the case.

That the Judge cannot try whether the tenant holds over without right, is apparent, not only from what has been said, but from what is to be done by the High Court after the proceedings have been sent up; they "may examine into the proceedings, and, if they find cause, may set aside the same, and may if necessary, order a writ to issue to the sheriff, commanding him to restore the tenant to his possession in order that the question of right, if any appears, may be tried, as in ordinary actions for the recovery of land."

It would be strange indeed if the County Court Judge should be held to have authority under this Act to try whether this tenant holds over without right, when the County Court would not have jurisdiction to try it: R. S. O. (1887) ch. 47, sec. 20.

I think it clear that the Act confers no authority upon the Judge to try the question of right or title at all, and that as soon as it is made to appear that the right is really in dispute there is then that colour of right which the Act contemplates, and the Judge is bound to dismiss the case.

I take the meaning of "colour of right," as used in the Act, to be such semblance or appearance of right as shews that the right is really in dispute, for there may be

colour of right where there is no right: *Wright* v. *Mattison*, 18 How. 50; *Lawson's* Concordance, Title *Colour*.

In this case it appeared that the right was really in dispute, and upon its so appearing, I am of opinion that the learned Judge had no authority to proceed and try the right, but ought to have determined that there was colour of right, and ought not to have found that the tenant was holding without colour of right, against the right of the landlord, but ought to have dismissed the case.

I express no opinion upon the finding of the learned Judge upon the evidence, further than that he had no authority to try the right.

The question raised in this case was not expressly raised in *Longhi* v. *Sanson*, 46 U. C. R. 446, nor in *Dobson* v. *Sootheran*, 15 O. R. 15; it was expressly raised, however, in *Gilbert* v. *Doyle*, 24 C. P. 60, and decided by a majority of the Court against the view I have expressed.

The effect of the judgment of the majority of the Court in that case seems to me to make the words "colour of right" in the Act, the same as if the word "right" had been used instead thereof.

The judgment of the Chief Justice, who dissented, appears to me to put the authority of the Judge under the Act upon a more correct footing.

In *Woodbury* v. *Marshall*, 19 U. C. R. 597, it was also raised, and decided against the view I have expressed. See, however, *Re Reeve*, 4 P. R. 27.

If there were any appeal from my decision, I would follow the cases of *Woodbury* v. *Marshall* and *Gilbert* v. *Doyle*, leaving it to the defendant to appeal, if he were so advised; but as I understand there is no appeal from my decision, I think I ought to give my independent judgment upon the question. If I do, the plaintiff will suffer no injury, but merely delay; if I do not, the defendant will be irretrievably injured.

The proceedings will, therefore, be set aside.

[CHANCERY DIVISION.]

MOORE V. ONTARIO INVESTMENT ASSOCIATION.

Company—Action for deceit—Demurrer—Fraudulent representations in annual reports and by officers of corporations—Vendor and purchaser of shares—Rights of action.

An action for deceit will lie against a corporation.

Demurrer to a statement of claim for damages against a company, wherein it was alleged that the plaintiff was induced by fraudulent statements in the annual reports, and in letters written to him by the President to purchase stock practically from the company, which stock was valueless, overruled with costs.

Semble, that if the plaintiff had been induced to buy the stock from a private holder by the false representations aforesaid, the corporation would not have been liable, but only the individual officers; but that if the vendor of the shares was privy to the representations, the plaintiff could also recover against him.

DEMURRER to a statement of claim in an action for deceit brought against the defendant corporation. The pleadings and demurrer are set out in the judgment.

The demurrer came on for argument on June 6th, 1888.

Shepley for the demurrer. The plaintiff does not allege any contract, sale, or purchase of stock from the defendants: *Stevens* v. *Midland Counties R. W. Co.* 10 Ex. 352; *Western Bank of Scotland* v. *Addie*, L. R. 1 Sc. App. 145; *Henderson* v. *Midland R. W. Co.*, 20 W. R. 33; *Duranty's Case*, 26 Bea. 268; *Abrath* v. *North-Eastern R. W. Co.*, 11 App. Cas. 247; 25 Am. Law Reg. at p. 757; *Cook* on Stock and Stockholders, sec. 157. An action will not lie against a corporation in a case of fraud or deceit where the contract has been induced by the representation of the company unless the contract has been made by the company: *Duranty's Case, supra*; *Ex parte Worth*, 4 Drew. 529. Again, the plaintiff, who is a shareholder in the defendants' company, cannot sue himself and others of his colleagues for fraud: *The Deposit and General Life Insurance Co.* v. *Ayscough*, 2 Jur. N. S. 812; S. C. 6 E. & B. 761. This action will not lie, because a company is incapable of having a motive.

Moss, Q.C., contra. This action is not one for deceit and asking for damages: *Oliver* v. *Great Western R. W. Co.*, 28 C. P. 143, 182. The representation being made for the benefit of the company by an agent of the company, the company is accountable: *McKay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301; *Blake* v. *Albion Life Assurance Society*, L. R. 4 C. P. D. 94; *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259; *Hoblsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317; *Chapleo* v. *Brunswick Permanent Building Society*, 6 Q. B. D. 696; *Edwards* v. *Midland R. W. Co.*, 6 Q. B. D. 287. As to the plaintiff not being able to sue himself for fraud, *The Deposit and General Life Insurance Co.* v. *Ayscough*, 6 E. & B. 761, shewed only that so long as the defendant remained a stockholder he was bound to pay calls.

Shepley, in reply. The allegation is not that the plaintiff bought the stock from the defendants, but "practically from the defendants." There is no contract between the plaintiff and defendants to rescind.

October 5th, 1888. ROBERTSON, J.—The action is for deceit, whereby plaintiff was induced to purchase shares of stock in defendants' company, which were valueless. Demurrer that an action for deceit will not lie against a corporation. The following is the statement of claim:

1. The defendants are a joint stock company incorporated under the statute of the Province of Ontario, known as "The Joint Stock Company's Act."

2a. On the 2nd day of February, 1887, the defendants issued an annual report or financial statement to the public relating to the defendants' affairs.

2b. The said annual report or financial statement contained misrepresentations, of which the following are particulars:

"A. The report stated notwithstanding the continued abundance of money and keen competition for investments, the directors have pleasure in stating that profits have been sufficient, after payment of all charges and expenses of management, to maintain the dividend at the rate of 8 per cent. per annum, free of income tax, leaving a surplus of $7,214.09."

Whereas, in fact, the profits were not sufficient to pay such dividend.

B. The said report stated the general business for the "year has been very satisfactory."

Whereas, in fact, the general business was very disastrous.

C. The said statement stated, "the capital stock paid up amounted to $700,914.21."

Whereas, in fact, the paid up capital stock did not amount to $430,000.

D. The said statement stated, "That the reserve fund was $500,000."

Whereas, in fact, there was no reserve fund.

2C. The defendants knew of the real facts as to the above particulars.

3A. In answer to a letter from the plaintiff enquiring as to the value of stock in the defendants' association, the defendants, on the 11th day of May, 1887, by their President, one Charles Murray, who in reality managed the defendants' business, replied as follows:

"Dear Sir,—There is a lot of 65 shares of stock offered for sale at 117¼, equal to $3,810.62. I know the party was offered 117, but he is a peculiar man, and won't vary his price. We will pay 4 per cent. this half year, and I see no reason why we should drop the rate, so the stock should be a bargain.

"I need hardly tell you that I have no interest whatever in the sale except to facilitate transactions in the interest of our shareholders. The party I refer to has 400 paid up shares besides this, and this is an odd lot.

"Yours, etc.,

"(Sd.) CHARLES MURRAY."

3B. In answer to a second letter from the plaintiff, the defendants, by their said President, on the 16th day of May, 1887, replied as follows:

"Dear Sir,—I have your favor of 13th inst. You cannot purchase the stock here at less than 117½, at which price I consider it a first-class paying investment. I will be glad to assist you to get a cheap bargain in the stock, and tell you all I know.

"Kind regards,

"Yours, etc.,

"(Sd.) CHARLES MURRAY."

3C. At the time when the said replies were so sent by the defendants as aforesaid, the said stock was not worth 100 cents on the dollar, as the defendants well knew.

4. The plaintiff, then a large shareholder in the defendants' association, thoroughly relying upon the said annual report and financial statement published by the defendants, and the said letters from the defendants by the said Charles Murray to him, was induced to and did purchase practically from the defendants 47 more shares in the stock of the said defendants, for which stock he paid the defendants the sum of $2,726 on the 17th day of June, 1887, or thereabouts.

5. The said stock so purchased has never since been worth the amount paid for it, and is now of little or no value whatever, and quite unsaleable.

6. The plaintiff desires to have the 47 shares purchased by him cancelled.

The plaintiff claims:

1. The said sum of $2,726, with interest.
2. Such further and other relief as the nature of the case requires.

The case involves the question whether a corporation is liable for fraudulent acts and representations of its officers. In our own Courts there are several cases on the subject relied upon by defendants, in which, however, there is exhibited a great diversity of opinion. In *Oliver* v. *Great Western R. W. Co.*, 28 C. P. 143, Hagarty, C. J., dissented from the other members of the Court, Gwynne and Galt, JJ. And in *Erb* v. *Great Western R. W. Co.*, 42 U. C. R. 90, Harrison, C. J., dissented from Wilson and Morrison, JJ., and in appeal the Court was equally divided; and when carried to the Supreme Court, 5 S. C. R. 179, Fournier and Henry, JJ., dissented from the rest of the Court, upholding the opinion of the majority of the Court of Queen's Bench. But in my judgment these cases are not applicable to the case now under consideration. Here the defendants reaped the benefit of the sale of stocks to plaintiff, which was induced by the false and fraudulent representations of its officers.

The allegations in the 4th and 5th paragraphs of the statement of claim are as follows: "The plaintiff, then a large shareholder in the defendants' association, thoroughly relying upon the said annual report and financial statement published by the defendants, and the said letters from the defendants by the said Charles Murray to him, was induced to and did purchase, practically from the defendants, 47 more shares in the stock of the said defendants, for which stock he paid the defendants the sum of $2,726 on the 17th day of June, 1887. 5. The said stock so purchased has never since been worth the amount paid for it, and is now of little or no value whatever, and quite unsaleable."

The demurrer admits that the sale of the stock was by the defendants to the plaintiff through their President, Murray;

also that the representations were made by Murray in the letters written by him to the plaintiff; and also that the annual report and financial statement were false and fraudulent. This being the case I cannot see why defendants are not liable. You may call the action for deceit, or whatever you choose; the facts are these: The corporation held this stock; through the representations put forth by the president and directors the plaintiff was induced to purchase at a high figure; the defendants got the plaintiff's money; that money has been wholly lost to the plaintiff, and so lost by reason of the fraudulent and false representations made by the defendants through their officers. It would be quite a different state of things if the plaintiff had been induced to buy this stock from a private holder by reason of these false representations; then, in my judgment, the authorities shew that defendants as a corporation would not be liable, and plaintiff's remedy would lie against the individual officers. If, however, it could be demonstrated that the vendor of his shares was a party or privy to the fraudulent representations, could plaintiff not recover against him?

It is said that a corporation cannot be held liable in an action for deceit for the reason that it has no mind, and can therefore have no motive; nor can it be guilty of a malicious act. Lord Bramwell, in *Abrath* v. *North-Eastern R. W. Co.*, 11 App. Cas. 247, so expressed himself in the most positive language. But other noble lords, viz., Lord Selborne and Lord Fitzgerald, took particular pains to express themselves as not having found it necessary to form any opinion on the point, as it really was not brought up or argued in the case. And in *Stevens* v. *Midland Counties R. W. Co.*, 10 Ex. 352, Alderson, B., says, at p. 354: "It seems to me that an action of this description (malicious prosecution) does not lie against a corporation aggregate, for, in order to support the action, it must be shewn that the defendant was actuated by a motive in his mind, and a corporation has no mind." On the other hand, Platt, B., said: "I do not say that a case might not

arise, in which a motive might be assigned upon which the action could be maintained." And Martin, B.: "I think it unnecessary to give any opinion upon the question whether this form of action would lie against a corporation."

In *MacKay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 394, the action was for a deceitful representation by the bank manager made to parties, by which they were induced to accept bills discounted by the bank, and the bank was held liable for the manager's deceit. And in giving judgment their lordships said, at p. 410: "It is settled law that a principal is answerable where he has received a benefit from the fraud of his agent acting within the scope of his authority." And the Court refers to *Smith* v. *Winterbotham*, L. R. 8 Q. B. 244, in which *Barwick* v. *The English Joint Stock Bank*, L. R. 2 Ex. 259, is cited and referred to as conclusive to shew that a banking company is liable for the fraudulent representation of its manager made in the course of conducting the business of the company.

On the whole, therefore, I have come to the conclusion that the plaintiff is entitled to succeed in the demurrer; and although the question may be somewhat unsettled, this case presents such a fraudulent state of things that I think it incumbent upon me to give the plaintiff judgment, leaving it to defendants to carry the case further should they be so advised.

Judgment for the plaintiff on demurrer, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

RE GODSON AND THE CORPORATION OF THE CITY OF TORONTO.

Municipal corporations—Investigation by county Judge—R. S. O. ch. 184, sec. 477—Necessity for specific charges—Scope of inquiry—Prohibition—When writ of prohibition will lie—Taking evidence in foreign country—Evidence—Perjury.

The corporation of the city of T. passed a resolution whereby, after reciting that one of their officers had been guilty of misconduct in relation to his duties as inspector of materials furnished and work done by contractors in certain specified respects, and amongst others, in permitting a certain contractor to furnish inferior material to the corporation, and in receiving from such contractor bribes, and wrongfully conveying to him information to facilitate him in securing contracts; they referred it to the county Judge "to investigate and enquire into the several matters and things therein referred to, and every matter and thing connected therewith, and with the relations which may have existed, or do exist, between the said W. L. (the officer in question) and any contractor having, or having had contracts with the city of T., in order that the truth or falsity of the alleged charges of malfeasance, breach of trust, gross negligence, and other misconduct made against the said W. L. may be ascertained."

Held, that under R. S. O. (1887), ch. 184, sec. 477, the corporation had power to pass the said resolution, specifically referring, as it did, to the officer, and the county Judge had power to make the necessary enquiries, and for that purpose to summon witnesses, &c., and in doing so, to proceed with enquiries against other individuals, besides the contractor, so far and so far only, as it might be necessary to the enquiry against such officer; but the Judge was not authorized to branch off into matters between the contractor and the corporation, in which such officer was in no manner concerned; and on the authority of *Re Squier*, 46 U. C. R. 474, the contractor was entitled to a writ of prohibition to prevent such investigation as to any future proceedings therein, but as to past proceedings, he having appeared and taken part, could not now complain as to them.

The corporation, under authority of the same Act, also referred it to the said Judge by three resolutions to enquire generally into the relations between the corporation, its officials and contractors, tending to undue influence in favour of contractors, and as to whether contractors or other persons wrongfully obtained money from the corporation by fraudulent means, and as to the whole system of tendering awarding fulfilling and inspecting contracts.

Held, that these resolutions were altogether of too general a character to authorise the Judge to proceed with any enquiry in reference to the said contractor in the subjects referred to, and that he was in like manner entitled to a writ of prohibition to prevent such enquiry.

The statute does not mean, or contemplate, that the corporation shall authorize in such general and undefined terms an investigation and inquiry into corporation affairs which implicate individuals generally without naming the person or persons implicated, and without much greater particularity in specifying the nature of the misconduct to be investigated.

Held, that in holding an investigation under the statute, the Judge was acting in a judicial capacity and not as a mere investigator or commissioner.

Semble, that if the county Judge in the course of such investigations proceeded to the United States to take evidence, any oath administered by him in the United States would have no legal significance, and any false statement made by a person sworn before him under such circumstances would not have attached to it the consequences of perjury.

THIS was an application by A. W. Godson for a writ of prohibition directed to Judge Macdougall, County Judge of the county of York, to prohibit him from proceeding to Chicago to take evidence in an enquiry pending before him under R. S. O. 1887, ch. 184, sec. 477. The circumstances of the case, and the arguments of counsel, are sufficiently stated in the judgment.

The motion came up for argument before Robertson, J., on June 8th, 1888.

McCarthy, Q. C., *Ritchie*, Q. C., and *T. P. Galt*, for the applicant.

Aylesworth and *Fullarton*, for Judge McDougall.

C. R. W. Biggar, for the city of Toronto.

July 6th, 1888. ROBERTSON, J.—This is an application for a writ of prohibition to be directed to Joseph S. Macdougall, Esq., Judge of the County Court of the county of York, to prohibit him from proceeding to the city of Chicago or elsewhere out of this Province, for the purpose of taking the examination of one Mr. Hardy, in respect of the said investigation, in the matter of the Board of Works of the city of Toronto, and from taking the evidence of said witness, or further proceeding in anywise with the said investigation; and also for an order setting aside all proceedings had under a certain resolution passed by the said corporation on March 12th, 1888, and for a declaration that all proceedings had thereunder are null and void, or for such other order as to the Court may seem proper, upon the grounds:

1. That the Judge of the County Court of the county of York has no jurisdiction or authority to take evidence in connection with the said investigation in the United States of America, or to hold the said investigation therein.

2. That the said resolution is illegal and not authorized by section 477 of the Municipal Act.

3. That no direct charges are contained in the resolution against the said Godson, and the said section of the Municipal Act contemplates that the matter or matters to be referred to shall be specifically stated in the said resolution.

4. That the Judge of the County Court of the County of York, refused to make any order for particulars or to direct that specific charges of malfeasance or misconduct should be made against the said Arthur William Godson.

5. That the proceedings before the said Judge have not been conducted fairly, and are contrary to natural justice.

The resolutions referred to are as follows:

"Whereas it has been alleged, that William Lackie has been guilty of malfeasance, breach of trust, gross negligence and other misconduct in relation to his duties and his obligations as an officer of the corporation of the city of Toronto, employed as an inspector thereof for the purpose of inspecting materials furnished to and work done for the said corporation by contractors, and of certifying to the measurement, quantity, and quality thereof, in that amongst other things he wilfully and negligently—

Firstly. Made and certified from time to time to false measurements in respect of stone, gravel and other materials furnished to the said corporation, whereby contractors were enabled to receive from the said corporation payment for large quantities of such stone, gravel and other material which were not actually received by the said corporation.

Secondly. Permitted one A. W. Godson and one R. West, contractors with the said corporation, to furnish the said corporation and to use in connection with works belonging to the said corporation stone and other material inferior to that called for by their contracts with the said corporation.

Thirdly. Falsely certified to the said corporation that such inferior material was of the kind and quality called for by the contracts, whereby contractors were enabled to receive payment as if the contracts had been fully complied with in regard to said kind and quality.

Fourthly. Falsely certified that certain persons had, as labourers employed by the corporation, broken stones upon the city streets for the

corporation, and by means of such certificates caused moneys of the said corporation to be paid therefor, when in fact such persons had not been employed by nor had they broken stones for the said corporation.

Fifthly. Permitted the said Godson to sell and deliver to the Toronto Street Railway Company stone which had been delivered by him to the corporation of the City of Toronto, and wrongfully to convert to his own use and benefit other property of the said corporation, and concealed the facts herein stated from the corporation.

Sixthly. Wrongly furnished information from time to time to the said Godson with reference to contracts tendered for, which assisted the said Godson to secure such contracts.

Seventhly. Certified as such inspector to deliveries of materials by contractors when in fact such materials had not been delivered.

Eighthly. Received gratuities of moneys, goods, services, and other favours from Godson while the said Godson was such contractor, such gratuities having been intended by the said Godson to influence improperly the actions of the said Lackie as inspector in respect of work done and materials furnished by the said Godson to the said corporation.

Be it therefore resolved that it be referred to the County Judge of the County of York.

(1). To investigate and enquire into the several matters and things herein referred to and every matter and thing connected therewith, and with the relations which may have existed or do exist between the said William Lackie and any contractor having or having had contracts with the City of Toronto, in order that the truth or falsity of the alleged charges of malfeasance, breach of trust, gross negligence and other misconduct made against the said William Lackie may be ascertained.

Then there is another preamble which states that it is publicly charged that his affairs generally in the Inspection department of the Corporation are in an unsatisfactory condition, &c., and that some of its officials have failed in their duties, &c., and the resolution goes on then to require the Judge

2. To investigate and enquire into every matter and thing connected in any manner with the past or present relations which may have existed or do exist between the City of Toronto, contractors and officials and other persons who are or who have been connected with this corporation, and which relations might or may tend to unduly influence the action of the said officials and persons in favor of said contractors when dealing with them on behalf of the city.

3. To investigate and enquire into and ascertain whether contractors or other persons wrongfully obtained from the City of Toronto payment of moneys by deception, fraud or other unlawful means, and if so, who are the parties, and to what amount were such moneys obtained unlawfully.

4. To investigate and enquire into the whole system of tendering, awarding, carrying out, fulfilling and inspecting contracts made with the city of Toronto, and to ascertain whether the present system and conduct of that part of the public business has been or is defective, and that the said County Judge do report to this council on as early a day as possible the result of the enquiry into the matters and things referred, and the evidence taken therein.

The Municipal Corporations Act (R. S. O. 1887, ch. 184), sec. 477, gives the corporation power to pass a resolution requiring the Judge of the County Court of the county in which the municipality is situate, to investigate *any matter mentioned in the resolution*, and relating to a supposed malfeasance, breach of trust, or other misconduct on the part of *any member* of the council or officer of the corporation, *or of any person having a contract* therewith in relation to the duties or obligations of *the member, officer,* or *other person* to the municipality; * * or concerning any matter connected with the good government of the municipality, or the conduct of any part of the public business thereof; and if the council at any time passes a resolution requesting the Judge to make the enquiry, the Judge shall do so, and shall for that purpose have all the powers which may be conferred upon commissioners under the Act respecting enquiries concerning public matters, (R. S. O. 1887, ch. 17), and the Judge shall, with all convenient speed, report to the council the result of the enquiry and the evidence taken thereon. By section 1 of the last cited Act power is conferred on the Judge so appointed, and by whom such inquiry is to be conducted, of summoning before him any party or witnesses, and of requiring them to give evidence on oath, orally, or in writing, &c., and to produce such documents and things as he may deem requisite to the full investigation of the matters into which he is appointed to examine; and by section 2, he shall have the same power to enforce the attendance of witnesses, and to compel them to give evidence and to produce documents and things as is vested in any Court, in civil cases; but no party shall be compelled to answer any question by his answer to which he might render himself liable to a crimi-

nal prosecution. So far then, it appears to me that there is no doubt of the power of the corporation to pass resolutions of the character of (No. 1) which specifically applies to William Lackie. Nor is there any doubt in my mind as to the power of the County Court Judge to make the necessary enquiry into the matters therein charged and referred to him, and for that purpose to summon all witnesses, &c.

On the argument counsel for the County Judge urged that paragraphs 2, 3, and 4, of the resolutions covered everything that had been done by the Judge, and were intended to give him all the scope and power necessary to pursue the inquiry in so far as past or present relations which may have existed or do exist between the corporation contractors and officials and other persons, and the corporation, and that under these paragraphs he was authorized to pursue the inquiry against Godson. I cannot agree with this proposition—in my judgment these paragraphs (2, 3, and 4,) are altogether of too general a character to authorize the Judge to proceed with any inquiry in reference to Godson in the subjects therein referred to. The statute does not mean, or contemplate, that the corporation shall authorize in such general and undefined terms an investigation and inquiry into corporation affairs which implicate individuals generally without naming the person or persons implicated, or without much greater particularity in specifying the nature of the misconduct to be investigated; and therefore I am of opinion that the 2nd, 3rd, and 4th paragraphs of the resolutions, are not sufficiently explicit to give jurisdiction to the learned County Judge to enable him to make such an enquiry where it reflects upon officers or persons connected with the corporation, and report thereupon, as the statute contemplates.

In reference to the first paragraph, or first resolution, as it may be called, which relates to the enquiry into alleged misconduct of William Lackie, the objection is taken by this motion to the scope which the investigation has been allowed to take, and that it should be confined more strictly to the charges against Lackie, and that the enquiry should not branch off into matters which materially affect the

dealings and business transactions of Godson, the applicant, he not being a party charged specifically.

On the other hand it is said that the applicant, A. W. Godson, is mentioned as the principal person, (he being a contractor,) with whom Lackie has been connected in reference to the alleged acts of malfeasance, &c., and that the resolutions made it clear, that in order to get at the facts and circumstances connected with Lackie's alleged misconduct, the applicant and his books and papers must, of necessity, be examined. This is conceded by counsel for the applicant, but they say, in pursuing that course the applicant is involved in various charges, and in order that he may defend himself against undue aspersion, he should have the nature of the charges with which it is sought to connect him with Lackie, in some way defined and specified so that he will have an opportunity of defending himself, and that if the corporation determine to have the dealings and transactions between it and the applicant during the last eight or ten years investigated, they are bound by the statute to so resolve, and they may then request or direct an enquiry as to them, but in specific terms.

At the outset, counsel for the learned County Judge took the objection that the writ of prohibition would not lie in such a matter as this—that the purport and object of this investigation was one of enquiry only, and that the result of it, so far as the learned County Judge is concerned, did not impose any obligation on any one of the parties implicated. That his duty is to take evidence touching and concerning the matters referred to him, and to report the result, with the evidence, to the council of the corporation; and in support of that contention he cited *Chabot* v. *Morpeth*, 15 Q. B., 446; *Queen* v. *Hastings Local Board of Health*, 6 B. & S. 401; *Osgood* v. *Nelson*, 5 H. of L. 636; *Queen* v. *Local Government Board*, 10 Q. B. D. 309; *Cote* v. *Morgan*, 7 S. C. R. 1., and other cases. (a)

(a) Other cases cited were: *Poulin* v. *The Corporation of Quebec*, 9 S. C. R. 185; *Re Bell Telephone Co.*, 7 O. R. 605, 609; *Re Chisholm and the Corporation of Town of the Oakville*, 12 A. R. 285; *Cox* v. *Coleridge*, 2 D. & R, 86; *Siddall* v. *Gibson*, 17 U. C. R. 98.—REP.

The argument of Mr. Aylesworth, supported as it is very strongly by these authorities much impressed me, but I was referred by Mr. McCarthy to the judgment of the then Chief Justice of the Queen's Bench, now Sir Adam Wilson, in *Re Squier*, 46 U. C. R. 474, in which he at p. 491, held in these words, "I am of opinion it (the writ of prohibition) may issue, in this case, to restrain the execution of this commission, as the commission is, for the reasons I have stated, not maintainable in law:" and I sitting here as a Judge in Chambers, am bound to follow that case, as an authority.

That was a commission of His Excellency the Governor General under the great seal of the Dominion of Canada, appointing the commissioner therein named, to examine into and report upon the matters and things charged against a County Court Judge, and particularly set forth in the petition, praying that the same might issue. And after conferring full powers on the commissioner named of summoning before him any party or witness, and of requiring them to give evidence on oath, orally, in writing (or on solemn affirmation, if they were parties entitled to affirm in civil matters) and to produce such documents and things as such commissioner might deem requisite to the full investigation of the matters into which he was appointed to examine, and forthwith after the conclusion of such inquiry to make full report touching the said investigation, together with a return of all or any evidence taken by him concerning the same, which is exactly what is to be done here, and after a very careful review of the authorities applicable to that case, the learned Chief Justice held, as before stated. So it is argued, that there being no legal authority in that case for holding the enquiry, there is likewise no legal authority vested in the learned County Judge to hold an enquiry against Godson, in this matter, for the reason that the resolutions do not specifically charge Godson with any malfeasance, nor request any specific enquiry to be made against him; or to put it in another way, if an enquiry can be prohibited under a void commission, it should likewise be restrained, under these resolutions, in so

far as Godson is concerned, for the same reason. That in fact there is no authority for any such enquiry, nor can there be unless conferred by the corporation in terms of and by virtue of the statutory powers conferred upon it by the section of the Municipal Institutions Act already referred to. The words are, "to investigate any matter to be mentioned in the resolution, and relating to a supposed malfeasance, &c., on the part of any member of the council, or officer of the corporation, or of any person having a contract therewith, &c." Now, here the malfeasance, &c., alleged is by an officer of the corporation (William Lackie, an inspector), and the matter mentioned is in regard to his dealings with several persons in the preamble named. So that it is clear that the conduct of Lackie, and not that of the other persons, is what is to be investigated, and the statute, in so far as Lackie is concerned, is complied with. But in reference to the other matters in the other parts of the resolution and preamble, they are altogether too general, and afford no authority whatever; in fact the charges must be specified, and the parties who are alleged to be implicated must be named and charged. If *Re Squier* is applicable, it is my duty, as I understand the rule which has been adopted at Osgoode Hall since the constitution of the several Courts of co-ordinate jurisdiction, for the one Court to follow the decisions of the other, until disaffirmed by Court of Appeal,—and it is not necessary, nor in fact would it be becoming in me, sitting here, with no higher jurisdiction than the learned Chief Justice had when he decided that case, to treat it otherwise than authority which I should follow. It will be well, however, in passing to note the *dicta* of several learned Judges, both in England and Canada, in reference to the Court exercising this power: Lord Justice Brett, in the *Queen* v. *Local Government Board*, 10 Q. B. D. at p. 321, says: "I think I am entitled to say this, that my view of the power of prohibition at the present day is, that the Court should not be chary of exercising it, and that wherever the legislature entrusts to any body of persons, other than to the superior Courts,

the power of imposing an obligation upon individuals, the Courts ought to exercise, as widely as they can, the power of controlling these bodies of persons, if those persons admittedly attempt to exercise powers beyond the powers given to them." And in *Cote* v. *Morgan*, 7 S. C. R. at p. 21, Henry, J., says: "It is necessary to the proper administration of Justice * * in every part of the world, that a superior Court of a country should exercise a summary jurisdiction, to prevent immense wrong and injury being done by one party to another." And Gwynne, J., at p. 34, referring to the case of *Mayor of Sorel* v. *Armstrong*, 20 L. C. Jur. 171, in which the proceedings by writ of prohibition were disallowed upon the ground that the plaintiff alleged no want of jurisdiction in the municipality to make the assessment upon the land there assessed, &c., says: "Sanborn, J., in giving judgment, * * expresses his opinion to be that where municipal councils exercise jurisdiction which is in its nature judicial, and usurp power given by law, a writ of prohibition may issue to restrain them from proceeding with such usurpation." And he adopts that as being in his opinion a true exposition, or rather a proper expression of what the Courts should do, when the circumstances present themselves. And in my judgment these *dicta*, and others that I might quote, apply with great force in this matter, which, I think, comes within the scope of the remarks made by Lord Justice Brett, in regard to "imposing an obligation upon individuals:" the learned County Judge has that power, to the extent, at all events, of imposing upon witnesses the obligation of attending before him, and the production of documents, and things, &c., and supports the opinion of the learned Chief Justice in *Re Squier*, *supra*, and that being the case, the only question is, does the law as declared there, apply to, or meet the case now under consideration before me?

Mr. Aylesworth did not argue that it did not, but he contended that the authorities cited by him go to shew and I understand that to be the proper test, myself, viz.,

that the writ will only go when the Legislature entrusts to any body of persons, or any person or functionary, other than the superior Courts, the power of imposing an obligation upon individuals. Now what power would have been conferred on the commission in *Re Squier* had the commission been held good? The answer, I think, is, "The same that is conferred on the learned County Judge in this matter." That is to make enquiry into the subject matter of the charges referred to him, to command the attendance of witnesses, to compel the production of papers, books, documents and things, and to report the result of the enquiry and the evidence taken therein. If therefore it would go to restrain the commissioner from acting under a void commission, I think it follows that it would go to restrain him from extending the enquiry beyond the subject of the enquiry authorized by a good commission. For example, for argument sake, suppose that in the course of the investigation it came out that the party into whose conduct enquiry was being made, had dealings or transactions with another person in which the borrowing of money from that other person was concerned, and it turned out that the money lent to the party had been procured on a promissory note which had been forged by the person from whom the money was borrowed, and it was not pretended that the borrower had any knowledge of the forgery, and the commissioner laid aside for the moment the enquiry clearly authorized, and proceeded to enquire, whether that note was a forgery or not, and received or proposed to receive opinion testimony as to the handwriting, &c., as well as other evidence to establish the forgery, would the commissioner have any more authority for such a proceeding because of his commission to make the other enquiry than he would under a void commission? I think, clearly not; and that being so, why could he not be prohibited from proceeding with his enquiry against the alleged forger, just as legally as he could be prevented from executing the void commission?

So that in my judgment it comes to this, if the decision in *Re Squier* is correct, and as before stated, I am bound to consider it so, then it follows, that the learned County Judge can be restrained from proceeding with any enquiry against Godson's conduct in reference to any matter whatever, except in so far as it may be necessary to investigate the specified charges against Lackie. The question then is, has that been done in this case?

In order to come to a proper conclusion in reference thereto, it is necessary to consider how it came about that this investigation was ordered. Among the papers produced before me, by the counsel who appeared on behalf of the learned County Judge, we have a statutory declaration, made by one John Thomas Cooper, on July 28th, 1888, in which he solemnly declares, *inter alia*, that he was for more than fifteen years in the employment of A. W. Godson, who was and is a contractor for delivering stone and other materials, and for constructing sewers and other works for the corporation of the city of Toronto, and that he, Cooper, while in such employment, obtained a personal knowledge of the matters in the declaration set forth. And then he goes on to declare that "William Lackie, an officer of the said corporation, employed for the purpose of inspecting materials furnished to, and work done for the corporation by contractors, and of certifying to the measure, accounts, quantity, and quality thereof, and upon whose certificate as such officer moneys of the corporation have been paid, &c., to said Godson and other contractors, has been, as he believes and charges, guilty of malfeasance, breach of trust, &c., (in the words of the statute.) And then he goes on and sets forth eight different classes of general charges against Lackie. Upon this declaration being made, the council of the corporation, on March 12th, passed the resolutions referred to.

Before this declaration was made, however, it appears before me, that Cooper wrote several letters to Godson, one of which, bearing date January 10th, 1888, and an extract from another of a previous date were filed. From these let-

ters it appears that Cooper was making a claim on Godson for money, and informs him if he does not accede to his demand, he will act upon the advice of a Mr. Dennison, and lay his books, papers and memoranda, before the mayor, &c. Godson having failed to comply, Cooper carried out his threat, with the result as stated. It is apparent, therefore, that it was not Lackie that the informer intended to attack, but Godson; but for some reason not given, the council of the corporation did not request an enquiry into these matters, as against Godson, as they might have done, but they have directed an enquiry against Lackie, in regard thereto. And, so far as that is concerned, the corporation, in my judgment, was and is within its powers, and the learned County Judge within his jurisdiction. But if, in pursuing that enquiry, he has branched off into matters between Godson and the corporation, in which Lackie was not in any manner concerned, then, in my judgment, he has brought himself within the authority of *Re Squier*. In dealing with this matter several difficulties have presented themselves to me, and not the least of them has been created by Godson himself. As before noted, the action of the corporation took place on the occasion of the passing of the resolutions on the 12th March last, and the enquiry was opened by the learned County Judge on the 25th of that month, and on reference to the notes of the proceedings, I find on that day, the "representatives of the parties concerned appeared before his Honour Judge Macdougall, in his chambers. Counsel present were: C. R. W. Biggar, for the city of Toronto, C. Ritchie, Q. C., for A. W. Godson, G. F. Shepley for inspector Lackie. His Honor appointed Thomas Sanderson, of the city clerk's office, to be registrar, and R. W. Clewlo, of the city treasurer's office, to be stenographer," and fixed April 3rd, in the City Council Chambers, for "the taking of evidence," when the investigation was subsequently adjourned till April 16th, and afterwards till the 24th. On the 24th the taking of the evidence was commenced, when C. Ritchie, Q. C., appeared as counsel for

A. W. Godson. The matter was proceeded with from time to time, until and inclusive of May 8th, when it was adjourned until the 22nd, on all of which occasions Godson was represented by counsel (Mr. T. P. Galt taking Mr. Ritchie's place, on one, when Mr. Jopling, city engineer, was examined at his residence), who cross-examined the witnesses from time to time, in the interest of Godson. It therefore suggests itself to my mind, why did Godson thus appear if he did not consider himself charged or implicated, and bound to answer? and having done so, can he now complain that the scope of the investigation has extended to matters with which Lackie had nothing to do, but with which it was evident he, Godson, was being charged with very serious wrong-doing? I may say that I have most carefully perused all the evidence taken on these several occasions, covering as it does, 71 pages of large foolscap type-writing, and I have failed to discern a tittle of evidence against Lackie, or that it was attempted to establish thereby that he had anything whatever to do with the subject then under enquiry, which was wholly in reference to the creation and construction of what is called the "Eastern Avenue Bridge," and the embankments or approaches thereto, but in which it was apparent that the prosecution sought to charge Godson with having received from the corporation, he being a contractor in connection therewith, large sums of money to which he was not entitled. In regard, therefore, to that part of the investigation, I am of opinion, the learned County Judge exceeded the scope of his authority, as conferred by the resolutions; but Godson, having appeared by counsel and having taken part, and defended himself as best he could by the cross-examination of the several witnesses, and treated the matter as within the scope of the enquiry, I think, so far as that is concerned, he, having lain by and acquiesced in the proceedings, is too late in complaining in regard to what has already been done; but in regard to any future proceedings in reference to that particular matter, I am clearly of opinion, that unless it can be shown that Lackie

is implicated, the learned Judge should not further proceed with the enquiry; and I have come to that conclusion for the reason that the resolutions do not, in my judgment, authorise or request him to make enquiry as to any specific charge against Godson, in reference thereto.

Again referring to the notes of the evidence, I find that, on the 25th of May, in pursuance of the adjournment from May 8th, the evidence was continued in reference to other matters not in any way connected with the Eastern Avenue Bridge, and it is there noted at the commencement of the proceedings, as follows: "C. Ritchie, Q. C., for Mr. A. W. Godson, and Mr. G. F. Shepley, for Inspector Lackie, asked his Honour to order particulars for specific charges to be furnished their clients. His Honour declined to do so. Mr. Ritchie and Mr. Shepley said there was no use remaining, and then withdrew."

Now here it is proper to point out and refer to the objection taken on the motion, and already referred to, that the very fact of there being no specific charge against Godson, it was impossible for his Honour to comply with the request for particulars. He was not supposed to know anything about charges against Godson, it was against Lackie that the charges were made, so that his Honour could not make any order as to Godson in the matter, except to treat him as a witness against Lackie, and until the council specify the charges, his Honour could not. The enquiry is then proceeded with, and the informer, Cooper, is sworn and examined from time to time, as well as several other witnesses, and is continued until and inclusive of the 1st of June, up to which time testimony covering 143 more pages of type-writing is taken down, all of which I have carefully read over; and while I cannot say that this testimony is not pertinent to the enquiry in reference to the alleged charges against Lackie, I must not be understood as being of opinion that it has been confined as strictly to that point, as in my judgment in the interest of justice it should have been. I am conscious of the fact that the conduct of the enquiry is wholly within and under the control of the

learned County Judge, and that it must resolve itself into a question of how far he thinks proper to allow the prosecuting counsel, and the witnesses examined, to go in their statements in reference to matters which are not absolutely necessary for the purpose of enabling him to "report the result" in reference to Lackie in such a way as will insure to that report the force and entitle it to the respect and consideration which the statute contemplates such a report should be worthy of —but I think no one can, after reading the evidence and proceedings, come to any other conclusion than that this enquiry is being extended chiefly into an investigation, which would be quite legitimate were it the misconduct of contractor Godson which was the subject thereof. And that being the case I cannot refrain from pointing out (although I do so without in any way wishing it to be inferred that the learned County Judge is acting thoughtlessly, or without due regard to his proper duty, as he himself understands it) that in my judgment he has misconceived the position which the Legislature intended he should occupy in such a matter. According to Mr. Fullerton's affidavit, he, Mr. Fullerton, was appointed as counsel for the city to assist his Honour, in this investigation, and upon being so appointed he says, his Honour informed him that he (the learned Judge) did not consider that he was acting in this matter in his judicial capacity, but simply as an investigator, or commissioner required to report the result of his enquiries &c., and Mr. Fullerton says he was "further informed by him that my duties would be to assist him, and under his direction so far as might be necessary, to make enquiries and obtain what evidence could be obtained bearing upon the matters, &c., and to cause the same to be brought before him." And Mr. Fullerton goes on to say that in such capacity he from time to time consulted with the learned Judge in reference to the scope and direction the said investigation should take and in reference "to lines of evidence he should bring before him," &c. It may be that the learned Judge is right in the conclusion that he has come to, in so far as his judicial position as

Judge of the County Court of the county of York, is concerned, but whether that be so or not, I think it beyond controversy, that he sits in a judicial capacity in regard to this particular investigation; and for the simple reason that the Legislature intended that enquiries of such grave importance, as may be gone into, or required by the corporation charging men "with malfeasance, breach of trust, or other misconduct," should be conducted in a judicial manner, and not merely in an inquisitorial way. It is quite true the learned Judge is not to adjudicate upon the charges specified against Lackie in such a way as to place him under any obligation, so far as he is individually concerned. The council will attend to that. But nevertheless the statute says, "the Judge shall, with all convenient speed, report to the council the result of the enquiry, and the evidence taken therein." In my judgment therefore after first determining what is evidence, and in that respect he must act judicially, and not ministerially, he is to "report the result," which clearly means the judicial result or the legal result, of the legal testimony, all of which goes to shew that the enquiry should be conducted in a judicial way. The learning of the Judge, and his experience on the Bench, eminently qualify him to adjudicate upon the scope of the enquiry and the manner in which it should be conducted; but it is for the council by resolution to formulate the charges against the party whose conduct it wishes to be enquired into; and it is only according to the first principles of justice, and as has been well expressed by more than one English Judge, "it is essential that the charge should be intimated to the supposed delinquent, and that he should have a fair opportunity of refuting it if he can." "The laws of God and man both give the party an opportunity to make his defence, if he has any. * * Even God Himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also." Fortescue, J., in

The King v. *The Chancellor and Masters, &c., of Cambridge*, 1 Strange, at p. 567.

And this brings me to consider the first ground on which this motion is made viz., that the Judge of the County Court of the County of York has no jurisdiction or authority to take evidence in connection with the said investigation in the United States of America or to hold the investigation therein. As to this I am of opinion that any oath administered by him in the United States would have no legal significance and any false statement made by a person sworn before him under such circumstances, would not have attached to it the consequences of perjury; in fact it would not be perjury in the legal sense of the term; but I cannot restrain the learned Judge from going to the United States; and when he is there he is beyond the jurisdiction of the Courts of this Province, and having already determined as to the extent to which I think he should proceed with this enquiry I must leave the matter as to conducting any part of it outside of Ontario to his own judgment.

In conclusion then, I am of opinion that the writ should go to restrain His Honour from further proceeding with any enquiry against the applicant A. W. Godson, under the present resolutions, except in so far as it may be necessary to the enquiry against William Lackie, but I make no other order in the matter, and I presume it will not be necessary for the writ to issue, as his Honour I have no doubt will act in accordance with the view I have expressed.

A. H. F. L.

This case has been carried to the Court of Appeal.—REP.

[CHANCERY DIVISION.]

IN THE MATTER OF THE CENTRAL BANK OF CANADA.

BAINES'S CASE.

NASMITH'S CASE.

Banks and banking—Winding-up Act—Banking Act—Payment of the ten per cent. on subscription—Transfer of shares—Marginal transfer—Shareholders within month of suspension—Bank dealing in its own shares—R. S. C. ch. 129, ss. 20, 29, 45, 70, 77.

Where ten per cent. was not paid at the time of original subscription of bank shares, nor within thirty days thereafter, as required by the Banking Act, R. S. C. ch. 120, sec 20, but was paid before the first transfer took place, and was accepted by the bank.

Held, that subsequent transferees of the shares were properly placed upon the list of contributories in winding-up proceedings.

The provision as to payment is for the protection of the public, and till payment is made the person subscribing may not be able to deal with the stock, but he is at least equitable owner, and may become legally entitled on making the prescribed payment.

Where the evidence showed that the bank had adopted the practice of dealing with their shares by way of marginal transfer, the first transfer being made in blank, subject, as by marginal note, to the order of a broker, and the ultimate purchaser signing an acceptance in the book immediately under the transfer so signed in blank by the seller, the intermediate dealing of the broker being omitted from extended record in the bank books, and the transferees were duly entered as shareholders in the stock ledger of the bank.

Held, that this amounted substantially to an acceptance of shares transferred in blank, which was lawful where transfer by deed was not prescribed, and the entry in the stock ledger amounted to registration within the meaning of the Act.

Where it appeared that in one such case the transferee did not sign the acceptance, but that he subsequently dealt with the shares by selling and transferring them.

Held, that the transferees from him were properly placed upon the list of contributories, notwithstanding anything in the Banking Act, R. S. C., ch. 120, sec. 29.

Where one of those placed upon the list of contributories acquired his shares within one month from the suspension of the bank.

Held, that he was liable as a contributory. R. S. C. c. 120, s. 77, is cumulative so as to make also liable those who have been holders during the month preceding the suspension, leaving them to discuss among themselves their respective liabilities.

Where the shares which had been transferred to one placed on the list of contributories had been previously held by the cashier of the bank in trust, as alleged, for the bank, which it was objected was thus trafficking in its own shares.

Held, that even if the cashier did hold the shares in trust for the directors of the bank, this would not be necessarily illegal, as he might have such shares, under s. 45 of the Banking Act, as security for overdue debts; and, besides, this was a matter which, though it might give the appellant a right to rescind during the currency of the banking institu-

tion, became of no moment after the rights of creditors represented by the liquidators arose. The matter was not an absolute nullity, but, at most, one which the shareholders could waive as voidable, and it became, by the suspension, of unimpeachable validity as between the appellant and the liquidators.

THESE were appeals from the rulings of the Master in Ordinary in respect of the list of contributories to the Central Bank of Canada, then in process of winding up. The appellants were W. J. Baines, C. C. Baines, and J. D. Nasmith, and the appeals, giving rise in many respects to the same legal questions, were argued together.

The cases of W. J. Baines and C. C. Baines may be said to have been identical, and the grounds given in the latter's notice of appeal, with the forms of alleged transfer of shares, and the matters stated in the judgment of Boyd, C., sufficiently indicate the circumstances of these two cases.

The said grounds of appeal, so far as they need be set out here, were as follows:

1. The evidence adduced by the liquidators failed to establish that C. C. Baines was the holder of the said five shares.

2. The evidence shewed that C. C. Baines had agreed with Cox & Co., to purchase five shares of the said bank stock, but no valid transfer of the said five shares by Cox & Co. to C. C. Baines was proved in accordance with the requirements of 34 Vic. ch. 5, sec. 19, (D.) and C. C. Baines never became the legal holder of the said shares.

3. * *

4. If the said shares were ever legally transferred to said C. C. Baines, they were transferred to him within one month before the commencement of the suspension of payment by the said bank, and under the provisions of the Bank Act; one Alfred Boultbee, who was the apparent holder of the said shares at the commencement of the said month, was alone liable to be settled upon the said list, and the said Act contemplates that all subsequent holders should be treated merely as equitable owners of the said stock successively, and that each should have the right to defend himself against any claim made by his immediate transferor * * .

This last ground was expressed in amended grounds of objection of the said C. C. Baines, as follows:—

Five of the shares set opposite to C. C. Baines's name in the printed list of contributories, purport to have been transferred to him in the books of the said bank within one month before the commencement of suspension of payment by the said bank, and C. C. Baines is therefore not liable to be settled on the list in respect thereof.

The alleged transfers in this case were as follows:—

In the transfer book of the bank, under date November 4th, 1887, was the following entry.

"For value received, I, Robert Cochrane, of Toronto, do hereby assign and transfer to of five shares on which has been paid $100, amounting to to the sum of $500, in the capital stock of the Central Bank of Canada, subject to the rules and regulations, of the said bank."

(Sgd) ROBERT COCHRANE.

Witness: (Sgd) T. W. TROUNCE.

In the margin were the words: "Subject to the order of Cox & Co." "R. C." And underneath this: "Subject to the order of C. C. Baines." "C. & Co."

Underneath the entry of transfer was the following: "I do hereby accept the foregoing assignment of five shares in the stock of the Central Bank of Canada assigned to me as above mentioned at the bank, this 4th day of November, 1887."

(Sgd) C. C. BAINES.

The initials "R. C." were admitted by the appellant to be signed by Robert Cochrane, and the initials "C. & Co." by Cox & Co.

When asked before the Master if he ever bought any shares from Mr. Cochrane, he answered that he never bought any shares from Mr. Cochrane, and never had any transactions with him at all.

Evidence was given that it was customary for brokers to make such marginal transfers for the purpose of lessening the number of entries; that they were notes for brokers

acting as brokers, the marginal signatories being intermediaries between the transferors and acceptors.

NASMITH'S CASE.

The grounds of appeal in this case also indicate the facts upon which the objections to the placing of J. D. Nasmith on the list of contributories were based, and were as follows:

1. The evidence shews that the shares in question were portion of a block of 25 shares originally subscribed for by James Langstaff, and the liquidators endeavoured to prove that the shares passed by transfer to Mr. Nasmith as follows:

1st. From James Langstaff to Ernest Franklin Langstaff, by transfer dated May 12th, 1884.

2nd. From Ernest Franklin Langstaff to R. H. Temple, "in trust," by transfer dated August 13th, 1886.

3rd. From R. H. Temple to Cassels Son & Co., by transfer dated August 18th, 1886.

4th. From Cassels Son & Co. to A. A. Allen, Cashier, in trust, by transfer dated August 18th, 1886.

5th. From A. A. Allen, Cashier, in trust, to J. D. Nasmith, by transfer, dated August 28th, 1886.

It appears by the evidence that no payment of ten per cent. or any other sum was made by James Langstaff the original subscriber upon the said shares at the time or within thirty days after the time of subscribing as required by 34 Vic. ch. 5, sec. 18, (D.) whereby the said subscription became null and void before the date of the first alleged transfer.

2. The second alleged transfer in favor of R. H. Temple, "in trust," was never accepted by him as required by 34 Vic. ch. 5, sec. 19, (D.) whereby the said shares never vested in said Temple.

3. By reason of the non-acceptance of the said shares the said Temple never was the lawful owner thereof, and the third transfer above mentioned was always invalid, and

passed no shares to Cassels Son & Co., and neither said Temple nor Cassels Son & Co., had any other shares in their power to transfer so that for the reasons aforesaid no shares passed to A. A. Allen, cashier in trust, by the fourth transfer.

4. The fifth or last alleged transfer by A. A. Allen, cashier in trust, to said J. D. Nasmith, conveyed no shares to said Nasmith for the reasons aforesaid, and because said Allen was not the holder of any other shares which he had the power to transfer. Even if any shares had passed to said Allen under the said fourth transfer they would have become vested in one Stayner to whom said Allen had agreed to sell and transfer 300 shares, or thereabouts, of the said stock prior to the said fifth transfer, and said Allen never afterwards was in a position to transfer to said Nasmith, and he never did transfer to him any other shares of the said stock.

5. The evidence establishes that the shares in question and all other shares which purport to have been transferred to said "A. A. Allen, cashier in trust" were so transferred to him by way of security or pledge for loans and advances made by the said bank with the knowledge and consent of the directors of the said bank, and to enable the said bank to traffic in its own shares contrary to law, and contrary to the statutes in that behalf, of which facts the said Nasmith was wholly ignorant. That the alleged transfers from Cassels Son & Co. to said Allen as such cashier as aforesaid, and the alleged transfer of said Allen to said Nasmith were in fact transactions by the bank in which the said Allen had no personal interest, and that the said attempted sale and transfer to said Nasmith was null and void.

And by amended grounds of objection, Nasmith set up:

1. That he is not and never was a shareholder in the said Central Bank of Canada.

2. That the shares which are alleged to belong to the said J. D. Nasmith, never had any legal existence and no liability attaches thereon.

3. That according to the books of the said bank the said shares appear to have been transferred to the said J. D. Nasmith, on or about August 28th, 1886, by one A. A. Allen, as cashier of said bank, in trust.

The said J. D. Nasmith says that at the time of the said apparent transfer the said A. A. Allen was not the lawful holder of the shares in question, and in fact had no power or authority to make the said transfer, and that the said J. D. Nasmith, did not by virtue of the said transfer, or otherwise, become the holder of any shares in the said bank.

4. That the failure of the said bank was caused by the gross carelessness and neglect of the directors thereof, and that no calls should be made on any shareholder to pay the liabilities of the said bank until the property and assets of the said directors shall have been exhausted.

The evidence shewed that Nasmith received dividends: that his name was on the printed list of shareholders and returned to the Government in the annual statement as the holder of ten shares; and that he attended a meeting of the shareholders for the appointment of a liquidator, and, as he himself thought, gave the president a proxy.

The following resolutions and entries in the books of the Provisional Directors of the bank were also put in evidence:—

"Moved by Mr. Howard, seconded by Mr. Robinson, that it being desirable to commence the organization of the bank without further delay, the directors agree to take up (in addition to their present holdings) the balance of the stock unsubscribed up to $500,000, in trust to hold the same for such persons as may desire to subscribe for stock, and such subscriptions by directors in trust shall be cancelled or transferred *pro rata* so as to reduce or cancel each holding in proportion, it being understood that no calls are to be payable on such trust

holdings until such time as the stock is transferred to or taken by other parties. Carried.

(Sgd.) D. BLAIN."

"Provisional Directors meeting, January 10th, 1884. Amount of stock taken to date $329,000. The Chairman spoke of the necessity of the bank being opened at once, and suggested that the directors should take up and hold in trust the balance of the stock to be cancelled *pro rata*.

Whereupon it was moved and carried, that the share so subscribed etc. be allotted."

The appeals came on for argument, together, before the Chancellor, on September 13th, 1888.

C. C. BAINES AND W. J. BAINES' CASES.

A. C. Galt, for the appellants. The bank charter is under a statute of 1883, 46 Vic. ch. 50 (D.), and is made subject to the Banking Act of 1871, 34 Vic. ch. 5 (D.) The two sections, now secs. 19 and 20 of R. S. C. ch. 120, have not been observed. All the appellants are transferees of shares. The ten per cent was not paid at the time of subscription as required by the Act. The transfer of shares to C. C. Baines from R. Cochrane we say is illegal and invalid, because the transfer by Cochrane is a blank transfer, which is said in the margin to be subject to the order of Cox & Co. Cox & Co. sell to Baines, and by margin it is made subject to the order of Baines, and then he accepts on November 4th. Again, only the party who held a month before the suspension is liable. We say there is no transfer from R. Cochrane to Cox & Co., and none from Cox & Co. to Baines: *Societe Générale de Paris* v. *Walker*, 11 App. Cas. 20; *Colonial Bank* v. *Hepworth*, 36 Ch. D. 36; *Ex parte Robert Swan*, 7 C. B. N. S. 400. There is nothing to shew that Cochrane has parted with the shares: *Nanney* v. *Morgan*, 37 Ch. D. 346; *In re Imperial Mercantile Credit Association, Merino's Case*, L. R. 2 Ch. 596. Cochrane's dealings were wholly with Cox & Co.

In W. J. Baines's case the same irregularities appear. As to the shares being taken within the last month before the suspension: R. S. C. ch. 120, sec. 70-77; English Companies Act, 1862, 25-26 Vic. ch. 89; *Healey's* Joint Stock Companies, 2nd ed., pp. 672, 678; The Winding-up Act, R. S. C. 129, secs. 42, 45. See also *Healey, ib.*, p. 4. The transfer in this case to Pellatt and Pellatt is invalid, and so is their transfer to W. J. Baines: *Lethbridge* v. *Adams*, 13 Eq. 547; *Walker* v. *Bartlett*, 18 C. B. 845; *Sayles* v. *Blane*, 14 Q. B. 205; *Killock* v. *Enthoven*, L. R. 9 Q. B. 241; *In re Barned's Banking Co., Andrew's Case*, L. R. 3 Ch. 161; *In re Alexandra Palace Co.*, 23 Ch. D. 297; *Healey, ib.*, p. 557; *La Banque Jacques Cartier* v. *La Banque D'Epargne*, 13 App. Cas. 111; *Maxwell* on Statutes, 2nd ed., pp. 189-90, 482; *Riche* v. *Ashbury R. W. Carriage and Iron Co.*, L. R. 7 H. L. 653; *Trevor* v. *Whitworth*, 12 App. Cas. 409; *Chitty* on Contracts, 11th ed., p. 611; *Murray* v. *Bush*, L. R. 6 H. L. 37; *France* v. *Clark*, 26 Ch. D. 257.

Foster, Q. C., contra. The transfer to C. C. Baines, is complete on the face of the book from Cochrane. The initials are "R. C." *i. e.*, Cochrane's. Baines dealt with the stock and sold it by power of attorney after the bank had suspended. The bank is estopped from denying that Baines was the holder: *Smith* v. *Bank of Nova Scotia*, 8 S. C. R. 558, 573; *Port Dover and Lake Huron R. W. Co.*, v. *Grey*, 36 U. C. R. 425; *Cook* on Law of Stock and Stockholders sec. 383. As to the non-payment of the ten per cent. *Cook ib.*, p. 172, sec. 172. This is for the protection of the bank, and may be waived: *Buckley* on the Companies Acts, p. 68; the Banking Act, R. S. C. ch. 120, sec. 30. In the stock ledger, which is the register, his name appears as shareholder. Under sec. 70 of the Banking Act, shareholders in *præsenti*, are liable. They vote to appoint liquidators: sec. 98 of Winding-up Act, R. S C. ch. 129. See also *ib.* sec. 44, 45; and R. S. C. ch. 120, sec. 77. The Master is not settling who shall pay, but he is settling the list of contributories, not in what order they shall pay.

A. C. Galt, in reply. The person who holds the certificate is liable: *Bigelow* on Estoppel, 4th ed., p.p. 534, 552.

J. D. NASMITH'S CASE.

A. C. Galt, for appellant. This appellant was entered up as a shareholder on August 28th, 1886, as transferee from A. A. Allen, in trust. On June 22nd, Allen had parted with all his shares, and had none thereafter, till August 18th, when he got twenty-five shares, of which he transferred ten shares to Nasmith. But on August 17th, Allen undertook to transfer 100 shares to Stayner. He had none then, and gets twenty-five next day, which we say are applicable to Stayner's account of 100 shares. As to all Allen's trust account of stock, none of the transfers were valid at all. The first subscriber was Langstaff, who subscribed on December 21st, 1883, but did not pay the ten per cent. He paid, however, afterwards, on January 29th, 1884. On August 13th, 1886, he transferred to R. H. Temple in trust for Ernest Langstaff. Temple did not accept at all, and when he assigned he did so as R. H. Temple, and not in trust, to Cassels Son & Co. These shares were transferred to Allen to enable the bank to traffic in its own shares, of which Nasmith was ignorant, and therefore the transfers are null and void. These shares were then originally allotted before any payment was made at all. It was a bogus subscription to bring the subscribed shares up to $500,000, and then all came back to Allen to dispose of to purchasers. There is a direct infringement of the Banking Act. It was a void transaction, a purchase from the bank itself, and cannot be validated even as against creditors. Allen really held in trust for the bank. Nasmith received dividends on this stock, and paid up the whole in full: *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20; *Colonial Bank* v. *Hepworth*, 36 Ch. D. 36; *Williams* v. *Colonial Bank*, 38 Ch. D. 388; *Roots* v. *Williamson*, 38 Ch. D. 485; R. S. C. ch. 120, sec. 45; *La Banque Jacques Cartier* v. *La Banque D'Epargne*,

13 App. Cas. 111, 115; *Trevor* v. *Whitworth*, 12 App. Cas. 409; *Addison's Case*, L. R. 5 Ch. 294.

Foster, Q. C., contra. Nasmith is estopped by his conduct: *Buckley's* Companies Acts, pp. 67, 68; *Sewell's Case*, 3 Ch. 131; *Gooch's Case*, L. R. 8 Ch. 266; *Everhart* v. *West Chester and Philadelphia R. W. Co.*, 28 Penn, 339. It is too late after the winding-up order: *Buckley, ib.* p. 110. The original subscribers assumed personal liability for the shares, and were not buying them for the bank: *Preston* v. *Grand Collier Dock Co.*, 2 Railway Cases 358; *Union Fire Ins. Co.* v. *O'Gara*, 4 O. R. 359. Allen was authorized to dispose of these shares. And the source of supply was the unissued shares of the company. Temple paid for the shares, and his subsequent transfer amounted to an acceptance, according to the meaning of the statute.

Galt, in reply. No estoppel can work against the statute. What is cited from *Buckley* on Joint Stock Companies, applies only where the contract is voidable, not where it is void. None of Langstaff's shares really ever came to us, I argue. There is no authorisation to issue unissued shares, and there are no transfers of directors' trust shares to Allen. As to the words "in trust" they cannot be taken as nothing, R. S. C. ch. 120, sec. 38.

September 22nd, 1888. BOYD, C.—It is argued because payment of 10 per cent. was not made on the shares in question at the time of the original subscription or within thirty days thereafter, that the present holders of the shares are not validly on the list of contributories. The objection is untenable. The 10 per cent. was paid before the first transfer took place and was accepted by the bank. I agree entirely with the language used by Gwynne, J., in disposing of a like objection in *Port Dover and Lake Huron R. W. Co.* v. *Grey*, 36 U. C. R., at p. 435. He was dealing with an Ontario Statute which enacted that no subscription of stock shall be legal or valid unless 10 per cent. shall have been actually and *bonâ fide* paid thereon within five days after subscription, &c. Here the Domin-

ion Banking Act, sec. 20, provides that no share shall be held to be lawfully subscribed for unless a sum equal to at least 10 per cent. on the amount subscribed for is actually paid at the time or within thirty days after the time of subscribing. I adopt the language of the learned Judge, and say that it would be quite competent for a person who had omitted to pay the 10 per cent. within the time, to become entitled to the privileges of a shareholder, and also to be subject to the liabilities as such, by renewing his subscription at the time of paying his 10 per cent. without signing his name again. The principle of such decisions as *East Gloucestershire R. W. Co.* v. *Bartholomew*, L. R. 3 Ex. 15, and *McEuen* v. *West London Wharves and Warehouses Co.*, L. R. 6 Ch. 655, applies to answer this objection. The provision as to payment is for the protection of the public, and till payment is made the person subscribing may not be able to deal with the stock, but he is at least equitable owner, and may become legally entitled on making the prescribed payment.

It is again objected that the transfer of the shares is not in form as required by the 29th sec. of the Banking Act. No assignment or transfer, it is there said, shall be valid unless it is made and registered and accepted by the person to whom the transfer is made in a book or books kept by the directors for that purpose.

The statute says that the assignment shall be according to such form as the directors prescribe. The practice appears to have been adopted in the books of this bank, of dealing with the shares in the way now objected to, technically called "marginal transfer." The seller placed his shares in the hands of a broker by means of a transfer in blank, which, by marginal note, is subject to the order of the broker. This marginal note the broker initials. The broker thereafter having negotiated a sale, the purchaser then signed in the book an acceptance immediately under the transfer so signed in blank by the seller. This becomes perfectly certain on the completion of the trans-

action: the intermediate dealing of the broker being omitted from any extended record in the bank books.

This manner of dealing may be regarded as arising from commercial necessity, because when the transaction is carried on through the medium of a broker, the vendor usually does not know the vendee's name. In point of form the transfer would have been complete, if at the time of acceptance the name of the purchaser had been inserted in the transfer signed by the seller. But this is, I take it, only a matter of form, not at any time likely to be of special importance. What was done in this case amounted substantially to an acceptance of shares transferred in blank which has been considered lawful both in English and American Courts, and in all cases where the transfer by deed is not prescribed; *Williams* v. *Colonial Bank*, 38 Ch. D. 388; *Upton* v. *Burnham*, 3 Biss. C. C. 431 and 520; *Walker* v. *Bartlett*, 18 C. B. 845. The transferees were duly entered as shareholders in the "Stock Ledger" of the bank, and this amounts to a registration of the assignment within the meaning of the Act.

In another case the transferee does not sign the acceptance, but he deals with the shares by selling and signing the transfer of them to another person in the claim of holders. These shares so dealt with are purchased by the appellant Nasmith. This dealing therewith, which is detailed in the evidence, entirely shuts his mouth in making any such formal objection. All these points are not of substance when the transactions are viewed as between the contributories and the liquidators; (see *Straffon's Executors' Case*, 1 DeG. M. & G. 576), and they must be over-ruled.

The further objection is made that in the Baines Case, his acquisition of the shares was within a month of the bank's suspension, and it is stated that the effect of sec. 77 of the bank Act is to make liable in the first instance the former holder. That section reads, "persons who having been shareholders in the bank have only transferred their shares or registered the transfer thereof within one month before the commencement of the suspension of payment by

the bank shall be liable to all calls on such shares as if they had not transferred them, saving their recourse against those to whom they were transferred." This, however, is to be read with section 70, which shows that the last shareholder, or the one who appears in the record of shares to be a holder *in præsenti* at the time of failure is liable. Section 77 is cumulative so as to make also liable those who have been holders during the month preceding the suspension. These should all be on the list of contributories, leaving them to discuss among themselves their respective liabilities: *Humby's Case*, 26 L. T. N. S. 936. Sec. 45 of the Winding-up Act may also be read in this connection. Even if the statute had the effect contended for as to primary liability (with which opinion I do not agree), it would be still proper to put the name of this appellant on the list of contributories.

It is urged lastly, that Nasmith is not liable because his transferor Allan was an officer of the bank, and either had no shares to transfer, or held what he had in trust for the bank, which was thus trafficking in its own shares. The broad answer is that the conduct of the appellant in regard to the shares precludes him from now saying that he is not a shareholder. But again, it appears that Allan was *de facto* a shareholder at the time of the transfer. It is true he had assumed to sell 100 shares to Stayner at a time when it is said he had none. Then he acquires 25 shares of which he disposes of ten to Nasmith.

I do not follow the contention that these twenty-five shares should be applied on the prior sale of 100 to Stayner, because it was for the latter to say whether he would take an instalment of what he had bought or not. But I gather from all the facts that there was a *residuum*, so to speak, of other shares of which Allen had control, held in trust, it may be for the directors or the bank. This would not be necessarily illegal, as he might have such shares under sec. 45 of the Bank Act as security for overdue debts. But this again is a matter which though it might give the appellant a right to rescind during the

currency of the banking institution becomes of no moment after the rights of creditors represented by the liquidators arise. This is not an absolute nullity, but at most a matter which the shareholder could waive as voidable, and it becomes by the suspension of unimpeachable validity as between the appellant and the liquidators: *Stone* v. *City and County Bank*, 3 C. P. D. 282; *Adam* v. *Newbiggin*, 13 App. Ca. 308, 322.

The result is, that the appeals should be dismissed, with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

LEMAY V. MCRAE ET AL.

Arbitration and award—Motion to set aside award—Conduct and jurisdiction of arbitrator—Draft award—Admissions of arbitrator—Discovery of fresh evidence—Absence of material witness.

Held, that an award, good on its face, and made upon a reference without provision for appeal, could not be set aside because of an alleged mistake in law or excess of jurisdiction disclosed in a draft award, not being a part of or delivered with or accompanying the award, or because of admissions made by the arbitrator in conversations with the defendants' solicitors.

Dinn v. *Blake*, L. R. 10 C. P. 388; *Hodgkinson* v. *Fernie*, 3 C. B. N. S. 189, followed.

Re Dare Valley R. W. Co., L. R. 6 Eq. 429; *East and West India Dock Co.* v. *Kirk*, 12 App. Cas. 738, distinguished.

Held, also, that no case was made out for remitting the action to the arbitrator on the ground of the discovery of fresh evidence, it not being shewn that the evidence could not have been obtained by reasonable diligence; nor on the ground of the absence of a material witness, of whose evidence the defendants were aware during the progress of the reference, and neglected to ask for a commission or a postponement.

THIS action was commenced on the 14th May, 1886, and the plaintiff claimed therein that in the years 1883 and 1884 he, at the defendants' request, performed certain work and supplied timber and materials for the construction of certain bridge work, east of Port Arthur, on the line of the Canadian Pacific Railway; and after giving credit for certain sums paid in cash and sundries, claimed a balance due to him of $13,256.01.

The defendants pleaded never indebted, payment, and that the firm of Lemay & Son, of which the plaintiff was a partner, entered into articles in writing dated 11th August 1883, 22nd November, 1883, and 15th March, 1884, respectively, with the defendants, whereby Lemay & Son, in consideration of the payments therein mentioned, agreed and contracted to do certain works and supply certain materials for the defendants in connection with certain railway works then being executed by the defendants for the Canadian Pacific Railway Company; and that in pursuance thereof

Lemay & Son did perform certain works and supply certain materials for the defendants, and also performed certain extra work in connection therewith; and the defendants from time to time paid to Lemay & Son the prices contracted for, and certain prices for extra works; and that the work and material alleged to have been done and supplied by the plaintiff were the work and material done and supplied by Lemay & Son, and no other. They also pleaded a set-off for money paid and work done and material supplied by the defendants for and at the request of Lemay & Son. They also counter-claimed in respect of the matters set up by way of defence.

Upon which issue was joined and the cause was entered for trial at the sittings of the High Court, held at Port Arthur on the 17th July, 1887, when the parties consented "to the reference of this action and all matters of account and counter-claim herein, and all matters in difference between the parties hereto to the arbitration and final end and determination of George H. Macdonell"; and they also consented "to the said arbitrator having all the powers of a Judge at *nisi prius* as to amending pleadings and particulars, and as to certifying for costs and otherwise." No provision was made for an appeal.

On the 20th February, 1888, the arbitrator made his award, and thereby awarded that the defendants were indebted to Lemay & Son in the sum of $9,900.52 in respect to all the demands of Lemay & Son and the plaintiff, &c., and so that the action and all matters of account and counter-claim in the action and all matters in difference between the parties should be finally determined by the payment of $9,900.52, in respect of all matters referred to him, and over and above the costs of the action and counter-claim, and of the reference and award, and of his fees as arbitrator, which costs and fees he awarded should be paid by the defendants to the plaintiff.

On the 1st June, 1888, the defendants gave notice of a motion to set aside the award upon the grounds that the arbitrator illegally, and in excess of his jurisdiction received

evidence of a verbal contract or understanding between the plaintiff and defendants varying the written contracts between them relating to and covering the same subject matter, and illegally and without jurisdiction upon such evidence awarded payment to the plaintiff for the timber supplied to the defendants, not by board measure as required by the written contracts, and as the defendants received payment therefor from the Canadian Pacific Railway Company, for whom the timber was required, and supplied by the defendants, as the plaintiff well knew, but upon another and different basis and system of measurement, alleged to have been substituted therefor by the verbal contract or understanding, or verbal contracts or understandings, and in so doing the arbitrator misconducted himself, and proceeded contrary to law; and on the ground of the discovery of new evidence and the absence of material witnesses, and on the grounds disclosed in the papers filed, and especially in the memorandum or draft award shewing the grounds upon which the award was arrived at; and on the ground that the award was contrary to law and evidence, and founded clearly upon a mistake and misapprehension of law, and upon a mistake in the mode of allowing payment to the plaintiff and making deductions therefrom.

The affidavits upon which the motion was made shewed that the contracts entered into between the plaintiff and defendants, which were not under seal, provided that payment was to be made for certain timber, thereby contracted to be supplied at so much per thousand feet, board measure; and the chief objection urged against the award was that the arbitrator received evidence of understandings and agreements qualifying or varying this provision, and had acted thereon in making his award.

The affidavits also shewed that after the award was made and delivered to the plaintiff, a solicitor went to the arbitrator on behalf of the defendants to ascertain the grounds upon which the arbitrator had acted in making his award; and that the arbitrator handed to him a draft award or memorandum not signed, shewing

how he arrived at his award, in which, amongst other things, was contained the following: "The last contention of the plaintiffs that I took up is, the question of measurements. I find that the plaintiff had three contracts and a supplementary contract with the defendants to build pile and trestle bridges on the Canadian Pacific Railway from Port Arthur to Peninsula Harbour. By the terms of these contracts, the timber was to be measured and paid for at so much per thousand feet, board measure. From Mr. Pratt's evidence I am satisfied that round and flatted timber was measured and returned to the plaintiff, as if each stick that made posts, sills, caps, and stringers, was of a sufficient size to make 12 x 12 timber. This system was carried out as far east on the railway as forty miles east of the Neepigon River. From thence east the system of measurement was changed, and I have no evidence before me of any of the engineers who measured the bridges to shew exactly what system they adopted; but from the evidence of Mr. John Ross, manager of construction, I am satisfied that Mr. E. G. Garden adopted a system of measurement which was approved of by Mr. Ross, on that portion of the work from Port Arthur to Neepigon; and Mr. Ross further says that he supposed this system was pursued throughout the whole length of the railway line. The only evidence that I have of measurements being taken other than those spoken of by Mr. Pratt, was the measurements made by the witnesses Beauvais and John W. Lemay. From the evidence I conclude that the understanding existing between plaintiff and defendants, that round and flatted timber, such as spoken of above, was to be measured and paid for the same as on No. 1 contract; therefore I find that on No. 2 division the correct measurement is 3,910,024 feet, board measure, and not as returned by defendants, 3,442,273 feet, board measure; and on No. 3 division it should be 1,843,946 feet, board measure, and not 1,781,360 feet, board measure, as returned by defendants.

In summarizing these amounts:

	Defendants' Measurement.	Plaintiff's Measurement.
No. 1 division	657,396	657,396
2 division	3,442,273	3,910,024
3 division	1,781,360	1,843,964
Total	5,881,029	6,411,384
		5,881,029
	Difference	530,355

But from the evidence I am satisfied that a large percentage of the timber measured as twelve inches diameter was not that size. In fact John W. Lemay says in his evidence that some of it was not more than nine inches in diameter at the small end. For me to arrive at the exact amount that should have been allowed, it would be necessary to have all the bridges measured: this is an impossibility, as many of the structures have already been filled in with earth by the railway company, and to do what I consider fair and right between the parties, a deduction of thirty per cent. should be made from the above figures in the measurements made by plaintiff's witnesses Beauvais and Lemay. This would make the difference between plaintiff and defendants 371,249 feet, board measure, which at $30 per thousand feet, board measure, gives $11,137.47. This amount being added to the defendants' credits to plaintiffs, $296,977.90, makes $308,115.37; then deducting $298,214.85, leaves $9,900.52."

The affidavits also shewed conversations by solicitors on behalf of the defendants, after the award was made, published, and delivered to the plaintiff, as to the grounds upon which he had based his award. The solicitors with whom the conversations were had, stated in their affidavits that they informed the arbitrator that the object they had in ascertaining the grounds of his decision was in order to enable them to move against the award.

The affidavits also shewed that the defendants had, since the award, discovered the evidence of one Busteed, and Busteed's affidavit went to shew that from the manner in

which Beauvais and John W. Lemay made their measurements, it was impossible that their measurements could be accurate.

It was further shewn by the affidavits that one Middleton, who was ill during the reference and unable to give his evidence, had recovered; and his affidavit stated that the method adopted by the arbitrator in arriving at the board measure of the timber was incorrect, and stated what was the true method.

The plaintiff in answer filed the affidavits of Beauvais and John W. Lemay, stating that Busteed did not see them making their measurements, and the certificate of the arbitrator stating that when he was being interviewed by Mr. Smellie, one of the solicitors for the defendants, he did not know it was for the purpose of obtaining material for an affidavit for use in appeal; that he merely consented to discuss the matter with him to shew that he had reasons for arriving at the decision he did; and that he had not acted arbitrarily or without sufficient evidence; that he refused to allow Mr. Smellie to question him, and to reduce the same to writing for further use; and that the statements made by him as to his reasons were in many respects incorrect and incomplete, and did not set forth either correctly or in full the grounds of his decision.

September 28, 1888, the motion was argued before ARMOUR, C.J., in Court.

Robinson, Q. C., for the defendants. When the arbitrator admitted a verbal agreement to control or vary the written contracts between the parties, he exceeded his powers, and decided what was never submitted to him. The arbitrator clearly erred, and though his mistake is not apparent on the face of the award, it is clearly shewn by the draft award. The decisions up to *East and West India Dock Co.* v. *Kirk*, 12 App. Cas. 738, are inconsistent and inconclusive, but it is clearly established in that case that the arbitrator will be restrained when he is going

wrong. There the submission was revoked. There is no difference in principle between revoking the submission and setting right what has been done, after the award. I also refer to *Dinn* v. *Blake*, L. R. 10 C. P. 388; *Re Dare Valley R. W. Co.*, L. R. 6 Eq. 429; *Jones* v. *Corry*, 7 Dowl. 299: *Price* v. *Jones*, 2 Y. & J. 114; *Kent* v. *Elstob*, 3 East 18; *Webster* v. *Haggart*, 9 O. R. 27; *Saulter* v. *Carruthers*, 20 U. C. R. 560.

A. Ferguson, on the same side, contended that the award should be set aside on the ground of the discovery of fresh evidence, citing *Burnard* v. *Wainwright*, 19 L. J. (N. S.) Q. B. 423.

W. R. Meredith, Q. C., for the plaintiffs. The principle of the decisions is that where the parties choose their own tribunal, they must be bound by the result. Unless the case against the award is put on the ground of misconduct, or something on the face of the award, or equivalent to that, shewing that the arbitrator has exceeded his powers, the Court cannot interfere: *Hodgkinson* v. *Fernie*, 3 C. B. N. S. 189; *Dinn* v. *Blake*, L. R. 10 C. P. 388; *Holgate* v. *Killick*, 7 H. & N. 418; *Tanner* v. *Sewery*, 27 C. P. 53; *Walker* v. *Beaver Ins. Co.*, 30 C. P. 211, 213, 214; *Webster* v. *Haggart*, 9 O. R. 27; *Hagger* v. *Baker*, 14 M. & W. 9.

East and West India Dock Co. v. *Kirk*, 12 App. Cas. 738, is wholly inapplicable. It is too late now to apply to revoke the submission: *Russell* on Awards, 6th ed., p. 161.

Even supposing the arbitrator to have erred, he has not exceeded his jurisdiction; but it is submitted that he was right on the merits.

Delamere, on the same side, referred to *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. C. 418; *Moseley* v. *Simpson*, L. R. 16 Eq. 226; *Forwood* v. *Watney*, 49 L. J. Q. B. D. 447.

Robinson, in reply. The arbitrator erred in taking a verbal arrangement in preference to a written contract: substantially this was an excess of jurisdiction; if one item can be varied by verbal evidence, another can, and the whole contract; it is a question of principle, not of degree.

October 12, 1888. ARMOUR, C. J.—Before this action was commenced the defendants were well aware of what the contention of the plaintiff was in respect of the timber Supplied to them by the plaintiff, and in respect of the mode in which it should be measured, and in respect of the understanding or agreement alleged to have been made as to such mode of measurement.

And the same contention the plaintiff was making against the defendants, the defendants were themselves making against the Canadian Pacific Railway Company in respect of the same timber which they had contracted to supply to that company under a similar provision as to measurement.

With this knowledge the defendants consented to the reference, without making any provision therein for an appeal from the award, and what they are seeking by this motion is really an appeal from the award.

In *Hodgkinson* v. *Fernie*, 3 C. B. N. S. 189, Williams, J., thus states the law, at p. 202: "The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. Many cases have fully established that position, where awards have been attempted to be set aside on the ground of the admission of an incompetent witness or the rejection of a competent one. The Court has invariably met those applications by saying, 'You have constituted your own tribunal; you are bound by its decision.' The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think, firmly established, viz., where the question of law arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established."

In *Dinn* v. *Blake*, L. R. 10 C. P. 388, while the judgment of Williams, J., above quoted, is approved of, another

exception is stated to exist where the arbitrator himself admits that there is a mistake, and, as it were, craves the assistance of the Court in setting it right.

To the last exception may be referred the case of *Jones* v. *Corry*, 5 Bing. N. C. 187; 7 Scott 106; 7 Dowl. 299; 3 Jur. 149, which was much relied on in argument, where the arbitrator assigned the ground of his judgment, for the purpose of enabling the defendant to apply to the Court to set aside the award. See also *Re Hall and Hinds*, 2 M. & G. 847; *Hutchinson* v. *Shepperton*, 13 Q. B. 955; *Gore* v. *Baker*, 4 E. & B. 470, as explained in *Dinn* v. *Blake*; *Miles* v. *Bowyers*, 3 K. & J. 66; *Flynn* v. *Robertson*, L. R. 4 C. P. 324.

In this case the arbitrator does not make any affidavit in support of the motion, nor does he admit that any mistake was made, nor does he intentionally do anything to aid the defendants in this application. See *Lockwood* v. *Smith*, 10 W. R. 628.

The award in this case is good on its face, and the draft award or memorandum, handed by the arbitrator to the defendants' solicitor, was not delivered with, nor did it accompany the award, nor did it form any part of the award, so as to bring the case within the exception stated in *Hodgkinson* v. *Fernie*. See *Kent* v. *Alstob*, 3 East 18; *Hogge* v. *Burgess*, 3 H. & N. 293; *Holgate* v. *Killick*, 7 H. & N. 418; *Re London Dock Co.*, 32 L. J. Q. B. 30.

Admissions made by the arbitrator of the grounds upon which his award was founded in conversations with the defendants' solicitors, as referred to by them, are not available for the purpose of setting aside the award, for it was upon like admissions that the award was ineffectually attempted to be set aside in *Dinn* v. *Blake*; nor can the draft award or memorandum be any more available for such purpose than the oral admissions of the arbitrator. See *Leggo* v. *Young*, 16 C. B. 626; *Phillips* v. *Evans*, 12 M. & W. 309; *Brown* v. *Nelson*, 13 M. & W. 397; *Holgate* v. *Killick*, 7 H. & N. 418; *Fuller* v. *Fenwick*, 16 L. J. C. P. 79.

The case *In re Dare Valley R. W. Co.*, L. R. 6 Eq. 429, is distinguishable, as pointed out in *Dinn* v. *Blake*, on the ground that the arbitrator awarded on matters not referred to him. In that case the arbitrator was subpœnaed to attend as a witness, and give evidence on the motion, and on being called as such witness objected to give evidence, but stated that he had drawn up a paper containing the reasons of his award, which was read, and from it it appeared that he had awarded on matters not referred to him. So in an action on the award in that case under the plea of "no award," the arbitrator would have been obliged to say whether he took into his consideration matters not included in the reference, and therefore not within the reference. But in an action on the award in this case it is quite clear that under the plea of no award the defendants could not set up that upon which they are relying to set aside this award: *Whitmore* v. *Smith*, 7 H. & N. 509; *Thorburn* v. *Barnes*, L. R. 2 C. P. 384; *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. C. 418; *Re An Arbitration*, 54 L. T. N. S. 596.

It was argued, however, that the decision in *East and West India Dock Co.* v. *Kirk*, 12 App. Cas. 138, where it was held that the Court had jurisdiction to revoke the submissions if there was reasonable ground for supposing that the arbitrator was going wrong in point of law, even in a matter within his jurisdiction, affected the law as laid down with regard to awards in *Dinn* v. *Blake*, and the other cases above referred to, but this is clearly not so; for the chief reason urged by counsel, for the Court revoking the submissions was that after the award was made there could be no relief against it. See *Kirk* v. *East and West India Dock Co.*, 55 L. T. N. S. at p. 252.

I do not think that I can yield to the motion to set aside this award upon the grounds upon which it is moved against, without going against the weight of all the authorities on the subject, and a step further than any decision I have met with will warrant; besides, the objection to interfering with the decision of a tribunal that the

parties themselves have chosen, is intensified by the fact that the parties might have provided, had they so desired, for an appeal from the award. See *Re London Dock Co.*, 32 L. J. Q. B. 30.

I express no opinion as to whether the arbitrator acted rightly or wrongly under the very wide terms of the reference, nor do I express any opinion on the merits. See *Faviell* v. *Eastern Counties R. W. Co.*, 2 Exch. 344.

No proper case is made for remitting the case to the arbitrator on the ground of the discovery of new evidence. The evidence of Middleton the defendants were aware of while the reference was being proceeded with, and no application was made to postpone the reference, or to have a commission issued, in order to procure the evidence; and it is not shewn that the evidence of Busteed could not have been obtained by reasonable diligence; besides, it is not such evidence as a new trial would be granted to obtain. See *Miller* v. *Confederation Life Ass.*, 11 O. R. at p. 133; *Eardley* v. *Otley*, 2 Chit. 42; *Burnard* v. *Wainwright*, 19 L. J. (N. S.) Q. B. 423.

In my opinion the motion must be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

RE WELLER.

Husband and wife—Devise to married woman—Restraint on alienation—R. S. O. ch. 132, sec. 8.

Certain lands were devised to a married woman with the proviso that she should not alienate or incumber them until her sister should arrive at at the age of forty years; and also that the devise should be for her separate use, independent of her husband's control.

She applied under R. S. O. ch. 132, sec. 8, for an order to bind her interest, for her own benefit, in these lands.

Held, that the restraint against alienation was valid, and would have been so even if the applicant had been a *feme sole*.

Earls v. *McAlpine*, 27 Gr. 164; 6 A. R. 145; *Pennyman* v. *McGregor*, 18 C. P. 132; *Smith* v. *Faught*, 45 U. C. R. 484; *Re Winstanley*, 6 O. R. 315, followed in preference to *Re Rosher*, *Rosher* v. *Rosher*, 26 Ch. D. 801.

Held, also, that the restraint on alienation was not a restraint on anticipation, within the meaning of the statute.

AN application by Maryetta A. Weller for an order to bind her interest in lands devised to her under a will containing a restraint on alienation, as set out in the judgment.

October 26, 1888. *R. S. Cassels* for the applicant. The application is made under the provisions of R. S. O. ch. 132, sec. 8. [ARMOUR, C. J.—But does this will contain a restraint from anticipation, within the meaning of the section? Is this not a valid condition against alienation?] No. The condition would be void if the devise were made to a man or *feme sole*: *Re Rosher*, *Rosher* v. *Rosher*, 26 Ch. D. 801; *Heddlestone* v. *Heddlestone*, 15 O. R. 280; *Theobald*, 3rd ed., p. 426. But the devise being in favour of a married woman, the equitable doctrine of restraint takes effect: 2 *Jarman* on Wills, 4th ed., p. 41. No particular form of words is necessary to effect a valid restraint from anticipation; and restraint from alienation and restraint from anticipation are one and the same thing. If this is a restraint from alienation, it still falls within the statute: *Lush*, Law of Husband and Wife, pp. 221, 234; *Thicknesse*, Law of Husband and Wife, p. 81; *Re Croughton's Trusts*, 8 Ch. D. 460, at p. 463; *Baggett* v. *Meux*, 1 Ph. 627. The

proposed arrangement is for the benefit of the married woman, and should be sanctioned by the Court: *Re Little's Will*, 36 Ch. D. 701; *Re C.'s Settlement*, 56 L. T. 299; *Re Segrave*, 17 L. R. Ir. 373; *Re Flood's Trusts*, 11 L. R. Ir. 355; *Hodges* v. *Hodges*, 20 Ch. D. 749; *Ex parte Thompson*, W. N. 1884, p. 28.

November 16, 1888. ARMOUR, C. J.—The applicant, Maryetta Asseneth Weller, the wife of Joseph B. Weller, is entitled to certain lands as the devisee of her mother under her last will and testament, by which she devised certain lands therein described unto her "daughters Maryetta Asseneth Weller and Emma Jane Campbell, their heirs and assigns forever," and by the said will provided that the rents accruing from said lands, after deducting insurance, repairs, and taxes, should be paid to her husband, George Taylor, so long as he remained unmarried and until he paid off the incumbrance on his estate, when the rents should go to said devisees, share and share alike, each contributing her share towards insurance, repairs, and taxes; and by the said will further provided that her said daughters should not alienate or incumber said lands until the said Emma Jane Campbell should arrive at the age of 40 years; and by the said will further provided that the devise thereinbefore made to her said daughters should be for their separate use, independently of their husbands' control.

Being so entitled to the said lands, and her husband being still alive, the applicant applies to the Court for an order to bind her interest in the said lands under R. S. O. (1887) ch. 132, sec. 8, which provides as follows: "Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property."

It is contended that the restraint against alienation in the will is void, or rather would be void if the applicant were a *feme sole*, but that being a *feme covert*, the Court

will treat it as a restraint against anticipation, and it is thus brought within the statute.

I do not think, however, that I can hold the restraint against alienation in the will to be void, even if the applicant were a *feme sole*; but I consider myself bound to hold it valid.

It is true that the decision of Pearson, J., in *Re Rosher*, *Rosher* v. *Rosher*, 26 Ch. D. 801, shews this restraint against alienation to be void, but this decision cannot bind me in preference to the decisions of our own Courts and of our Court of Appeal. See *Earls* v. *McAlpine*, 27 Gr. 161; *S. C.*, 6 A. R. 145; *Pennyman* v. *McGrogan*, 18 C. P. 132; *Smith* v. *Faught*, 45 U. C. R. 484; *Re Winstanley*, 6 O. R. 315.

It was contended, also, that if valid, there was no distinction between a restraint against alienation and a restraint against anticipation, and that the statute applied, therefore, equally to a restraint against alienation as to a restraint aginst anticipation.

It may be quite true that there is in some cases no distinction between a restraint against alienation and a restraint against anticipation, but the restraint against alienation in this will is wholly different from the restraint against anticipation referred to in the statute, for it is a restraint which has no reference to the status of the applicant as a married woman, and will be at an end upon Emma Jane Campbell arriving at the age of forty years, whether the applicant is then a *feme covert* or not.

I am of opinion that I have no power to make the order; that the restraint against alienation in the will, whether valid or not, is not a restraint against anticipation within the meaning of the statute; and that if I made any such order, it would be wholly void as being made without jurisdiction.

[CHANCERY DIVISION.]

MACLENNAN V. GRAY.

Mortgage—Bar of dower—Prior registration—Surety—Merger.

The owner of certain land, devised it to his two sons, charged with an annuity to his widow, and also with certain legacies. After his death, in March, 1879, the sons devisees mortgaged the land to one C. This mortgage was not registered till January, 1880, though the widow knew of it. They then raised money from the plaintiff in November, 1879, by a mortgage which was registered in the same month, the plaintiff having no knowledge of C.'s mortgage, and, therefore, gaining priority. In this mortgage to the plaintiff the widow joined, barring her dower and releasing her annuity for the benefit of the plaintiff. The plaintiff sold the land under his mortgage, and there was a considerable surplus, and the question was whether the widow as dowress and annuitant had priority over C.

Held, that she had, for the priority gained by the plaintiff over C. by means of his prior registration, enured to the widow's benefit as surety. The fund, so to speak, out of which C.'s mortgage was to be primarily paid, was increased by the act of the law based upon the default of the mortgagee, first in point of time.

Held, further, that the fact that the widow had accepted a conveyance of a moiety of the land from one of the sons did not cause her annuity to merge in whole or in part, the mortgage to C. intervening; and it not being to her interest to hold that a merger had taken place

The question of interest governs merger in the absence of express intention.

THIS was an appeal from the report of the Master in Ordinary, made pursuant to a special order of reference in an action for foreclosure, wherein John Maclennan and James Maclennan, executors of the last will of Donald Maclennan deceased, were plaintiffs, and Richard Gray, John Gray, Rosanna Gray, and Arthur Parsons, by writ; Cornelius Coughlin and John Allen made parties in the Master's office, were defendants.

The circumstances of the case were as follows:

Charles Gray being the owner of certain lands devised them by his will, dated June 10th, 1874, to his sons Richard and John Gray, charged with legacies to his several children, among whom were Charles Gray, Jr., and Thomas Gray, and with payment of $150 a year to his widow Rosanna Gray. On March 13th, 1876, Charles Gray mortgaged his legacy to John Allen, (made a defendant in the Master's Office) which mortgage was registered on January 21st, 1880.

On November 15th, 1877, Thomas Gray also mortgaged his legacy to John Allen, and this mortgage was also registered on January 21st, 1880. On October 16th, 1878, a notice of the assignments of the legacies was sent by registered letter to the executors of Charles Gray by the solicitors for John Allen,

On October 11th, 1879, a quit claim deed was made by all the legatees to Richard and John Gray, Rosanna Gray, the widow, not joining therein, this was registered on December 5th, 1879.

On March 1st, 1879, Richard and John mortgaged their interest in the said lands to Cornelius Coughlin, (made a party defendant in the Master's Office), which mortgage was not registered until January 2nd, 1880, Rosanna Gray the widow refusing to join in this mortgage, although asked to do so.

On November 1st, 1879, Richard and John Gray mortgaged the lands to the plaintiff's testator, the widow joining and mortgaging all her interest, which mortgage was registered on November 27th, 1879.

On August 4th, 1881, Richard Gray made a deed to Rosanna Gray, conveying his undivided share to her for an expressed consideration of $375.

The mortgage to the plaintiff's testator, fell into arrear, and he sold the property under the mortgage, realizing more than enough to satisfy his claim, and the surplus, some $1,600, was the object of the present litigation.

On September 22nd, 1887, the widow obtained an order of reference to ascertain if she was entitled to both dower and annuity and to settle her priority in regard thereto.

The defendants Allen and Coughlin contested her right in the Master's office without success, the Master in his report of May 15th, 1888, giving both dower and annuity in priority to Allen and Coughlin.

From this report, the defendants Allen and Coughlin now appealed.

The matter came up for argument on September 13th and 14th, 1888, before BOYD, C.

Scott, Q. C., for the appellant, C. Coughlin. I dispute Rosanna Gray's priority as to my client. As she became surety to Maclennan for Richard and John, we are entitled to have her share go first to pay Maclennan. She knew that Richard and John's share was subject to the Coughlin mortgage, and she must have dealt on the footing of contributing her share to pay Maclennan after Coughlin was satisfied. The Registry Act cannot enure to her benefit, because she had actual notice of the Coughlin mortgage, and she was not a subsequent purchaser, or mortgagee for for value. The principle as to marshalling securities applies. Maclennan has security on A., B., and C., we on A. and B. We say we should stand in his shoes as to C. The Master has erred in the amount allowed to Mrs. Gray. We say a merger happened both as to dower and annuity as to a moiety: *Preston* on Conveyancing, 3rd ed., vol. 3 p. 89; *Tyrwhitt* v. *Tyrwhitt*, 32 Beav. 244; *Johnson* v. *Webster*, 4 DeG. M. & G. 474. It should be reduced to $825. He has allowed arrears for six years before March 23rd, 1883, the date of Allen's action against Gray. That is erroneous as to Coughlin. He was not a party to it. It should be changed to six years before this action, or when we were made a party to it in the Master's office.

Middleton, for the appellant Allen. I adopt Mr. Scott's argument. As legatees we are in the same position as chargees as the mortgagee Coughlin. Mrs. Gray is not merely in the position of a surety. When she joined in the mortgage the land was charged with these legacies, and the money was used in paying these legacies in part. The effect of the merger of a moiety renders one half of the fund available to Allen and Coughlin. The Master held there was no merger as to the annuity, but he charges half her dower on the whole fund. It should be only on half of it, setting half free for Coughlin and Allen. She should only get six years from the time of computation, and not prior to the action of *Allen* v. *Gray*: R. S. O. ch. 111, sec. 16, 17. She is not entitled to dower under the statute, because she is barred: R. S. O. ch. 111, sec. 26. She was in possession of

this land, but it was her's under the terms of the will, and not as dowress. In *Allen* v. *Gray*, it was adjudicated that she could not have both dower and annuity, and judgment was given in May, 1884, giving her only one, namely, dower.

Boulton, for respondent, Rosanna Gray. Mrs. Gray did not join in the mortgage to Coughlin, but refused to do so. She joined in the second mortgage to Maclennan, but she got no part of that money, she is therefore only a surety. Coughlin's neglect to register should not affect the widow. She knew of the mortgage to Coughlin, but did not know that it was not registered There was no fraud on her part. The Master has held that there was a merger as to the dower but not as to the annuity. He held that she accepted Richard's conveyance. She never saw the deed, and paid nothing for it, and it was executed to her without her knowledge at a time when Richard was in trouble: *Watson's* Comp. of Equity, 2nd ed., p. 681; *Robson* v. *Jardine*, 22 Gr. 420; *Jones* v. *Davies*, 7 H. & N. 507; *Forbes* v. *Moffatt*, 18 Ves. 384. Allen has no claim against this fund—he is only assignee, and has no stronger claim than his assignor: *White and Tudor's L. Cas.* 6th ed., vol. 2, p. 879. It was open for Mrs. Gray to come in as annuitant in *Allen* v. *Gray*, and that saves the statute as to her for six years before. She was on the land as dowress as well as in her other character of part owner. She lived on the land from the death of her husband in 1874, till the sale of this land in this action. We dispute that she was in possession under the will as devisee and not as dowress.

September 21st, 1888. BOYD, C.—The main matter argued in the appeal was as to the respective priorities of the widow as dowress and annuitant, and the defendant Coughlin as mortgagee, and the other defendant Allan as assignee of certain charges on the land. The land has been sold under a mortgage of the plaintiffs' testator, and a surplus of $1,612 now in Court is that which is the object of contention. The Master has ranked the widow first in priority,

and I agree with his finding. The facts are a little complicated, and the question presented is of a puzzling and novel nature. Shortly stated these are the relative positions of the claimants. The original owner of the land (Gray) devised the land to his two sons Richard and John charged with an annuity of $150 a year to the widow, and with the payment of $450 to his son Thomas on demand, and $1,000 to his son Charles in six years after the father's death. After the father's death and in March, 1879, the sons devisees mortgaged the land to the defendant Coughlin. This mortgage was not registered till January 1880, though the widow knew of it. The sons devisees next raised money from the plaintiffs' testator in November, 1879, by a mortgage which was registered in the same month, whereby the plaintiffs' testator having no knowledge of Coughlin's mortgage obtained, by the Registry Act, priority. In this mortgage the widow joined releasing all her rights and interest in the land both as dowress and annuitant, for the benefit of the plaintiffs' testator, and for the better securing him in the repayment of his advance. The money so raised was applied to pay the other chargees, and the two who are the assignors of Allen were then actually paid. But it appears that prior to this, and in the year 1876, these two, Thomas and Charles, had transferred their charges on the land to Allen. This deed was not registered; it is not proved that the widow had any notice of the transfer, and the Master has found she had not, which result I adopt.

These sons however united in executing a quit claim deed discharging the land of their legacies, which was signed in October, and registered in December, 1879. This quit claim deed really formed a part of the transaction by which the widow was induced to pledge her interest in the land for the advantage of the plaintiff. She is thus a surety to answer the plaintiffs' testator's claim in case his mortgage is not paid by the mortgagors, her sons, the devisees, or out of the land thereby conveyed. By the Registry Act the mortgage gets priority over Coughlin's mortgage, and so the land when sold realizes enough to pay off the plaintiffs in full,

and leaves this surplus of $1,612. The creditor obtains an advantage by the Registry Act and because of Coughlin's neglect in not registering; that advantage I take it enures to the benefit of the surety. The fund (so to speak) out of which this mortgage was to be primarily paid was increased by the act of the law, based upon the default of the mortgagee first in point of time. His loss should not be visited upon the head of the surety, who contrariwise it appears to me is entitled to claim entire exoneration for her interest in the land. The mortgage made by the sons to the plaintiff's testator, is discharged by payment out of the land in priority to Coughlin's mortgage, and this frees the widow and satisfies the obligation she as surety undertook. She never pledged her interest to Coughlin and *quoad* her dower and annuity, she is first under the will as against the mortgagee of the devisees. I find no case at all like this, but *Re Kirkwood's Estate*, 1 L. R. Ir., (Ch. D.) 108, and *Campbell* v. *McDougall*, 26 Gr. 280, and 5 A. R. 503, and 6 S. C. R. 502, have some bearing, and may be consulted.

The next matter is, as to whether the Master rightly allowed the full amount of annuity, in view of the fact that the widow had conveyed to her a moiety of the land by one of the devisees, her sons, in August, 1881. This deed was made without her privity, and because the son was in difficulties, but the Master has found that by her dealing she accepted the conveyance. This it is argued wrought a merger of at least one-half the annuity. But between her claim as annuitant and the moiety of the equity of redemption, which she received, there was Coughlin's mortgage. In the absence of any evidence, the Court will regard what is most for the benefit of one holding both estates. The case of *Street* v. *The Commercial Bank*, decided by the Court of Appeal in this Province in 1844, 1 Gr. 169, cited in *Hart* v. *McQuesten*, 22 Gr. 133, 137, concludes the law in the respondent's favour. Sir. J. B. Robinson, in that case followed the doctrine enunciated in *Forbes* v. *Moffatt*, 18 Ves. 384, which he thus formulates: "The principle settled is that where one having a charge

acquires the legal estate, his charge sinks or not, according as it appears to be for his interest or otherwise that it should subsist. If he manifests an intention that it should sink, it does sink, if not, and he is indifferent, then it also sinks; if no intention is shewn, and it may be in his favour to prevent a prior mortgagee" (that is, prior to the acquisition of the legal estate) "from coming in it will not be treated as being sunk."

That language indicates the principle of equity which is now declared by statute to obtain even as a rule of law. See R. S. O. ch. 44, sec. 53, No. 3. In this case, therefore, there was no merger, and there should be no apportionment of the annuity.

It was next objected that the Master allowed for too long a period in view of the statute as to the limitation of actions relating to real property. R. S. O. ch. 111, sec. 17, provides that no arrears of rent, (which is defined to mean "annuity" by the interpretation clause, sec. 2, No. 3) shall be recovered by any distress or action, but within six years next after the same respectively, has become due. The Master has gone back to six years prior to March 23rd, 1883, that being the date of the writ of summons in a certain action of *Allan* v. *Gray*. That was a proceeding by one of the now appellants to recover these charges of which he is assignee, out of the land as against the widow and the other co-owners of the equity of redemption. There was a judgment by consent in it, but it was not further prosecuted, and Coughlin was not made a party in it, though he perhaps might have been if it had been carried on. The widow made a claim in her answer for the arrears of the annuity, but it was not then adjudicated on, and the sale of the land has not taken place in that suit, nor is that action consolidated or in any way united with this. I do not see how as against the incumbrancer, Coughlin more than six years can be recovered; *Crone* v. *Crone*, 27 Gr. 425: *Watson* v. *Birch*, 15 Sim. 523. And if so the *terminus a quo*, has been settled by the judgment of the Lord Chancellor in *Hunter* v. *Nockolds*, 1 McN.

& G. 654, where he says the six years must run from the time when the claim of the annuitant was made in the suit. That date in this case was in the affidavit of the widow sworn on October 12th, 1886, and I think the calculation should be limited to six years before that time. The Master has allowed for dower $388, and for annuity $1,650. This last should be reduced to $1,137 (as I make it out), which added to the dower will aggregate $1,525. This will leave a balance in Court not yet disposed of, of some $87, but this may be very well applied in paying the widow's costs of appeal, which should be given against both appellants. Some other contentions were made by one of the appellants, but they do not seem to me to possess weight, such as that the widow's right to dower was extinguished because she was not in possession as dowress, but in some other character, and had not brought her action or made her claim in time. But the Master may have very well held that she occupied in several characters, not excluding that of dowress. Saving this change I make in the figures as above, the appeals will be dismissed, with costs. Balance of money in Court may be applied in paying these costs.

A. H. F. L.

[CHANCERY DIVISION.]

THE LONDON AND CANADIAN LOAN AND AGENCY CO.

V.

GRAHAM.

London and Canadian L. and A. Co.—Forfeiture clause—Company—Right to hold land after period prescribed by Act of Incorporation—Abortive sale—Power to re-sell—Recital of facts in deed to subsequent purchaser.

The plaintiffs, a loan company, who, by the terms of their charter, were bound "to sell any real estate acquired in satisfaction of any debt within five years after it shall have fallen to them, otherwise it shall revert to the previous owner, or his heirs or assigns," acquired the equity of redemption in certain land from a mortgagor by deed, in which was contained a provision against the merger of the legal and equitable estates. By agreement made within the five years the plaintiffs sold to a purchaser, on whose default they resumed possession of the property. In an action for specific performance against a subsequent purchaser who objected to the title on the ground, among others, that the plaintiffs had not sold the land within five years from its acquisition: It was

Held, that the form of conveyancing by which the plaintiffs acquired the land did not give them greater rights of retention than if they had foreclosed, but

Held, that any *bonâ fide* agreement to sell was sufficient to prevent a forfeiture where the sale was not carried out through the default of the purchaser.

Held, also, that it was unnecessary to procure a release from the former purchaser whose contract and the determination thereof should, as a matter of conveyancing, be recited in the deed from the plaintiffs to defendant.

THIS was an appeal and cross-appeal from the ruling of an Official Referee.

The action was for specific performance of an agreement to purchase, brought by the London and Canadian Loan and Agency Company (limited) against A. R. Graham.

On the reference as to title under the judgment it appeared that the land in question had been mortgaged to the plaintiffs on June 30th, 1876: that default having been made on the mortgage the plaintiffs acquired the equity of redemption by virtue of a quit-claim deed, dated October 21st, 1878, from the mortgagor and his wife; which deed contained a provision that the debt should not merge in the estate acquired and a release by the company to Harper of his personal liability. On August 23rd, 1882, the com-

pany, by agreement in writing, agreed to sell to John Hewitt and Joseph Gooch, who went into possession, but having made default in observing the terms of the agreement, the company resumed possession of the lands. The defendant objected to the title on the ground that the land had not been sold within five years as provided by 27 Vic. ch. 50, s. 6.

The Referee certified as follows:

"The plaintiffs are prepared to prove that they do not hold real estate exceeding in yearly value the sum of $10,000, and an affidavit will be filed showing this: I am however of opinion that they did not hold the land in question under the first part of sec. 6 ch. 50 of 27 Vic., but that they held it under the second part of such section namely being mortgaged they acquired it for the protection of their investment, and that, having secured a quit-claim deed from their mortgagor on 21st October, 1878, and *bonâ fide* sold the property to Hewitt and Gooch on 23rd August, 1882, being within five years as required by their Act of incorporation, I hold that this agreement of sale to Hewitt and Gooch is a sufficient evidence of a sale to save plaintiffs from the Act: and that upon obtaining a release from the purchasers showing that they are not now interested in the land the plaintiffs will be in a position to shew a good title."

From this ruling the defendant appealed on the ground that the sale to Hewitt and Gooch was not sufficient to save the company from the forfeiture under 27 Vict. ch. 50, sec. 6: and the plaintiffs cross-appealed on the ground that they were not bound to procure and register a release from Hewitt and Gooch, or to register the agreement for sale to them, and that irrespective of the sale to Hewitt and Gooch, the plaintiffs had not acquired the lands in satisfaction of a debt, as the debt had never been paid.

The appeal and cross-appeal were argued on October 4th 1888, before Boyd, C.

Arnoldi, for the plaintiffs. The evidence shews that the company does not hold real estate exceeding in yearly value, $10,000, and they have properly conducted their business and acquired this land in the transaction of their business which they are entitled to do under the first part of section 6. Even if this land was acquired under the second part of the section, and it was held for more than five years so as to operate a forfeiture, all that would revert would be the equity of redemption subject to the mortgage debt, because the deed under which it was acquired provided that the debt should not be merged: *Hart* v. *McQuesten*, 22 Gr. 133; *The North of Scotland Mortgage Co.* v. *German*, 31 C. P. 349; *North of Scotland Mortgage Co.* v. *Udell*, 46 U. C. R. 511. The company did not take the land in satisfaction of their debt, but preserved their security by the terms of the deed. If they had taken it in satisfaction of their debt, there would be no forfeiture because there was a *bonâ fide* sale to Hewitt & Gooch within the five years. The company took possession on default in the agreement of sale, and can now re-sell. The defendant is not entitled to a release from Hewitt & Gooch, whose rights ended with the cessation of their possession. Plaintiffs are not bound to register the agreement or a release because these are not transactions under which they claim title, but facts shewing merely that they have not lost title: *Laird* v. *Paton*, 7 O. R. 137.

Hughson, for the defendant. The Referee has found that the land was acquired in satisfaction of the debt, and that finding is correct. The land was not held by the company for the purposes of their business. The contract as to the merger of the debt in the quit-claim deed was inserted to prevent subsequent incumbrancers and execution creditors acquiring any rights. It only affects those interested, and the defendant was not interested. The merger clause is void, as the company's statute charter only enables them to hold in a certain way, and they cannot contract themselves out of it. An *agreement* for sale is not a sufficient sale to prevent the forfeiture, otherwise

they could sell to a trustee who could hold and subsequently sell for them. The plaintiffs must obtain and register everything to get title in themselves. I refer to *Heney* v. *Lowe*, 9 Gr. 265; *Barker* v. *Eccles*, 18 Gr. 444; *Dart* on Vendors and Purchasers, 6th ed., 1041; *Brady* v. *Walls*, 17 Gr. 699.

Arnoldi, in reply. All the facts cannot be registered, and the proper way to evidence them is by recital in a conveyance.

October 16, 1888. BOYD, C.—The question arises as to whether the company can make title to the lands sold to the defendant, having regard to the provisions of section 6 of their charter, 27 Vic. ch. 50, as amended by other statutes of the Dominion. That section reads as follows:

"Sec. 6. The company may hold such real estate as may be necessary for the transaction of their business, not exceeding in yearly value the sum of one thousand pounds* in all, or as, being mortgaged or hypothecated to them, may be acquired by them for the protection of their investment, and may, from time to time, sell, mortgage, lease, or otherwise dispose of the same; Provided always, that it shall be incumbent upon the company to sell any real estate acquired in satisfaction of any debt within five years after it shall have fallen to them, otherwise it shall revert to the previous owner, or his heirs or assigns."

These provisions are in *pari materiâ*, with a like clause to be found in the Companies' Act, (R. S. C. ch. 119, sec. 94,) and one not very dissimilar to be found in the Bank Act, (R. S. C. ch. 120, sec. 50). † It is probable that the phraseology may have been suggested by some analogous American enactment, though I have not been able to trace the matter further than to the language used in section 5137 of the Revised Statutes relating to "National Banks," &c. See *Ball* on National Banks, p.p. 147, 148.

*Increased to $10,000 by 33 Vic. ch. 108, sec. 9, (D.)—REP.

†See *Becher* v. *Woods*, 16 C. P. 29.—REP.

So far as this company is concerned, the intention of the Legislature seems to have been to prevent the accumulation of real estate by the company, to be held indefinitely for investment or speculation. After providing for the holding of land to the extent of $10,000 necessary for their own accommodation in the transaction of business, the statute deals with other land held originally by them under mortgage, but afterwards acquired by them absolutely. That is, I think, the import of the section; it deals with two classes of land, namely, that necessary for the accommodation of the company in the transaction of business; and that acquired by the company as the fruit of investment in the prosecution of its business. Land acquired by them "for the protection of their investment," is to be read as synonymous with "land acquired in satisfaction of any debt." The investment is protected by taking the land (*i.e.*, acquiring the equity of redemption by release, conveyance, foreclosure, or otherwise); and the taking of the land operates satisfaction of the debt. Then the proviso is, that land thus acquired is to be sold within five years "after it has fallen to them," that is, as I understand, after its acquisition. The penalty of failing to sell within this limit is, that the land so acquired, reverts to the former owner.

In this case the company has acquired the land by means of a quit-claim deed, in October, 1878, from the mortgagor, by which they have the equity of redemption and thus control and own the land. The quit-claim deed is so drawn as to prevent merger of the legal and equitable estates, and the company in it covenants to release the mortgagor from his personal obligation to pay the moneys secured by the mortgage. But the form of the conveyancing cannot be used to give the company greater rights of retention than if they had proceeded to foreclose in the usual way. After foreclosing they would have a right to sue on the covenant for the mortgage money, and so open the foreclosure—but notwithstanding this the foreclosing would be a taking of the

land "in satisfaction of the debt" within the meaning of the statute.

Having thus acquired this property in the prosecution of their business, the next question is: Has it by force of the statute reverted to the former owner?

Giving the liberal construction against forfeiture, which is a principle of statutory construction in cases like the present, any *bonâ fide* sale is enough, though it falls short of conveyance. If there has been a *sale* which is not carried out by the default or abandonment of the purchaser, that is such a transaction as satisfies the statute.

The company has shewn that a real sale of the place took place in August, 1882, to one John Hewitt, who after making some payments has since made default. By the contract, any default left the company at liberty to determine the agreement. Though not in terms authorizing a re-sale, this, as I held in *Re Hornibrook*, 12 P. R. 591, is an implied term of any contract respecting the sale of lands.

This being so, it is competent for the company now to sell to the defendant, no right of reverter having arisen, and no necessity existing for obtaining any release from Hewitt. He is out of possession, and has been so for months, if not years. As a matter for conveyancing, and for purposes of registration, it is enough if, in the deed to the purchaser, these matters are set forth by way of recital, shewing the sale within the five years and the subsequent ending of the contract to sell for non-performance by the former purchaser.

The costs of these appeals should go the company.

G. A. B.

[CHANCERY DIVISION.]

REGINA V. LOGAN.

Justice of the Peace—Conviction—R. S. C. ch. 158, sec. 6—Distress for the penalty—R. S. C. ch. 178, secs. 87, 88.

A conviction under "An Act respecting Gaming Houses," R. S. C. ch. 158, sec. 6, provided, in addition to fine and imprisonment, for *distress* in default of payment of the fine.

Held, that the punishment being in excess of that warranted by the statute, the conviction must be quashed.

Held, also, that, as the maximum penalty prescribed for the offence was imposed, the defect in the conviction in the provision for distress was not cured under R. S. C. ch. 178, secs. 87 & 88.

Regina v. *Sparham*, 8 O. R. 570, approved of.

THIS was a motion to quash a conviction of the Police Magistrate of the city of Toronto, whereby one David Logan who was in charge of a broker's office where dealings in stocks, &c., on margin, were supposed to be carried on, was convicted for "unlawfully playing in a common gaming house," upon the grounds: 1. That there was no proof of any offence under R. S. C. ch. 158, for violating which the defendant was summoned, and therefore no jurisdiction. 2. The evidence did not warrant the conviction. 3. No sufficient circumstances were shewn to put defendant on his defence under R. S. C. ch. 158. 4. That the order under which the arrest was made was irregular in form. 5. That no evidence was given of the crime charged in the information under R. S. C. ch. 158, sec. 6, and the information having been laid under that Act cannot be supported by evidence given under another statute; and 6. On grounds disclosed in affidavits.

The motion was argued in the Divisional Court on September 8, 1888, before Boyd, C., and Proudfoot and Ferguson, JJ.

McMichael, Q.C., and *Osler*, Q.C., for the motion. The charge is, that the defendant was "unlawfully playing in a common gaming house," and he was convicted under sec. 6 of R. S. C. ch. 158. The evidence shews nothing

but the making of contracts in reference to the purchase and sale of stocks, &c., which contracts were made by telegraph in the United States. The defendant was entitled to be acquitted as the evidence did not justify any conviction under R. S. C. ch. 158, sec. 6, without the aid of the new statute 51 Vic. ch. 42 (D.) The defendant is not charged with any of the offences mentioned in the latter Act, and if he was, the conviction would not stand as there is no power to convict summarily. Tablets, blackboards, and such articles usually in any broker's office are not *primâ facie* instruments of gaming, and some offence must be proved under 51 Vic. ch. 42, (D.), before such articles could be destroyed under sec. 5 of the Gaming Act. There is no evidence of any contract. The evidence of contracts, if any, was for the purchase or sale of stocks, &c., by telegraph in the United States of America [PROUDFOOT, J.—The Act says, "Canada or *elsewhere*."] That applies to stocks elsewhere, not contracts elsewhere. The conviction is bad on its face for want of particularity; no game is set out: *Paley* on Convictions, 6th ed. 223. The conviction is under sec. 6 R. S. C. ch. 158, and is bad in ordering a levy of the fine by distress. The imprisonment is ordered not in default of the fine but in default of distress: *Regina* v. *Richardson*, 11 P. R. 95. [FERGUSON, J.—Doesn't the Summary Convictions Act provide a general clause as to distress?] Yes, but it is only applicable to cases where no mode of raising the penalty is provided by the special Act under which the conviction is made: R. S. C. ch. 178, sec. 62: as to imprisonment on default, see *Paley* 281. The contracts of sale, &c., aimed at in 51 Vic. ch. 42 (D.) are contracts made in Canada. We cannot make a crime in another country of an act which is lawful in that other country. [BOYD, C.—Is that so in the case of bigamy?] Yes, the crime there is not the marriage in the other country, but the leaving Canada *with the intent* to be married there. The evidence was that of transactions all previous to July 20th, and the information and conviction were for acts done on July 20th. As to presumption of

intention to deliver the stocks, see *Dos Passos* on Stock-brokers, 416, 419.

Shepley, and *Badgerow*, contra. Sec. 3 of 51 Vic. ch. 42, (D.), makes every place where "negotiating or bargaining," as defined by the Act, is carried on, a gaming house, and makes certain articles there found instruments of gaming. Thus the Act makes a new gaming house and new instruments of gaming, and adds them to the Gaming House Act R. S. C. ch. 158. The evidence shews the making of the described contracts when the bargaining was done with no intention of accepting a delivery of the stocks, &c., and this makes it a gaming house. The sufficiency of the evidence is for the magistrate to decide: *Paley*, 6th ed. 132. The distress was properly ordered by the conviction R. S. C. ch. 178, sec. 62; *Regina* v. *Dunning*, 14 O. R. 52. The evidence shews under the statute a gaming house, and gaming instruments, and the consequence is all persons found there can be convicted of "playing in a common gaming house."

McMichael, Q.C., in reply. All the offences mentioned in 51 Vic. ch. 42 (D.) are statutory offences. They were lawful at common law. The two statutes R. S. C. ch. 158, and 51 Vic. ch. 42 (D.) cannot be joined together. The parties can be witnesses in their own behalf under the one and not under the other.

September 22, 1888. BOYD, C.—The defendant is convicted under the provisions of sec. 6 of the Act respecting Gaming Houses, R. S. C. ch. 158, and the conviction purports to be drawn up under that Act as modified by the late statute respecting "bucket shops" (51 Vic. ch. 42, D.) The punishment prescribed by sec. 6 is on summary conviction a penalty not exceeding $100, and not less than $20, and, in default of payment, to imprisonment for a term not exceeding two months. This conviction is drawn so as to provide for distress in default of payment, and in default of sufficient distress, imprisonment. In cases of summary procedure the law requires the magistrate to draw up the conviction in such one of the forms of conviction given in

the Act (R. S. C. ch. 178, sec. 53), as is applicable to the case.

These forms J., 1, 2, 3, respectively provide for cases (1) where the conviction is for a penalty to be levied by distress, and in default of sufficient distress by imprisonment; (2) where the conviction is for a penalty and in default of payment, imprisonment, and (3) where the conviction provides for imprisonment in the first instance, and in addition for the payment of money to be levied by distress, and in default of distress by further imprisonment. The second form providing for the penalty, and in default of payment imprisonment is the one appropriate to this conviction.

No power is given under sec. 62 of the Summary Convictions Act (ch. 178), to introduce the distress clause because the provisions there are restricted to cases where by the Act or law in that behalf no mode of enforcing payment of the penalty is stated or provided.

The 6th sec. of the Gaming Act provides for the enforcement of the penalty by imprisonment, and by imprisonment only, which is to follow forthwith upon the failure to pay the fine imposed. The case of *Regina* v. *Sparham*, 8 O. R. 570, is in point to shew that the conviction is bad on its face, and in the correctness of this holding I agree.

It only remains to consider whether this defect is remedied by the curative provisions passed subsequently to that case, and now to be found in R. S. C. ch. 178, secs. 87 and 88. It is there enacted that no conviction shall be held invalid for any irregularity, informality, or insufficiency therein, provided that the Court is satisfied that the punishment imposed is not in excess of that which might have been lawfully imposed for the offence, and it is further specified that amongst the matters so to be validated is that of the punishment imposed being less than the punishment by law assigned to the offence stated in the conviction.

This punishment cannot be said to be less than that provided by sec. 6 of the Gaming Act; the limits of penal fine therein stated are a penalty not exceeding $100, and not less than $20, and in default of payment imprisonment

for a term not exceeding two months. Logan is ordered to pay $100, and to be imprisoned for sixty days, both being up to the maximum of prescribed punishment.

In addition to this his goods are liable to be distrained if he does not pay. This to my mind is not what the statute was intended to remedy. It is not a lessening of the punishment affixed by law to the offence, but adding to it something which is in excess of the statutory limit. It is adding a species of punishment which is different in kind, which on the one hand deprives the defendant of his right to save his property by accepting imprisonment, and on the other postpones the right of the public to have imprisonment enforced till the goods of the offender are exhausted. The hardship would be demonstrated in a case where the offender had only $50 worth of goods to be distrained; not paying the fine he would then lose all his goods, and would suffer imprisonment besides for the full period because of insufficient distress.

For this reason I think it is not needful to consider the larger questions argued for reasons very quaintly given by Lord Justice Bowen in *Cooke* v. *New River Co.*, 38 Ch. D. 70, 71, where he says: "I am extremely reluctant to decide anything except what is necessary for the special case, because I believe by long experience that judgments come with far more weight and gravity when they come upon points which the Judges are bound to decide, and I believe that *obiter dicta*, like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them, and are a great source of embarrassment in future cases."

My judgment is, to quash the conviction because the judgment pronounced and embodied in the conviction is in excess of that warranted by law.

The usual order for protection should be given under sec. 89, ch. 178.

I do not feel so far impressed in favour of the defendant upon the merits as to award costs.

PROUDFOOT, J.—I regret to say that in my opinion the conviction in this case is bad as imposing a punishment in excess of that authorized by the statute. The statute enacting that in default of payment of the fine, the defendant is to be imprisoned. The conviction gives an additional remedy, in default of fine, distress, and after that imprisonment.

The conviction may probably be bad also for not setting out the game the parties were playing at.

I do not wish to part with the case, however, without expressing my entire assent to the conclusion arrived at by the Police Magistrate. I think proceedings under the "Bucket Shop" Act may be taken before the Police Magistrate under the Act respecting Gaming Houses, R. S. C. ch. 158; and that the evidence of gaming in violation of the statute was amply sufficient to justify the infliction of the fine.

FERGUSON, J.—I agree that the conviction should be quashed on the ground, and for the reasons stated in the judgment of the Chancellor, namely, that the distress of the defendant's goods is wholly unauthorized, and not warranted.

I do not feel called on to make an effort to shew precisely what is the meaning of the two statutes, or to say what can and what cannot with impunity be done, notwithstanding their provisions, for the information of this defendant; or to say in cases of alleged transgressions, before what Court, or in what manner the prosecutions therefor should be conducted. To deal with this case seems at present enough.

I agree in the disposition of the costs made by the Chancellor, and think the usual order should be made for the protection of the magistrate.

G. A. B.

[CHANCERY DIVISION.]

BALDWIN V. KINGSTONE ET AL.

Will—Devise—Heir-at-Law—14 & 15 Vic. ch. 6, (C. S. U. C. ch. 82)—Moneys paid over six years—Moneys paid within six years under common mistake of law—Recovery of moneys which were the proceeds of lands vested by acts of the parties.

A. W. B. by his will, dated August 14th, 1850, after giving a life estate to his wife, provided as follows: "After the death of my said wife, I devise the lands * * known as 'Russell Hill' to my nephews, the Hon. R. B. & W. A. B., sons of my brother, the late Hon. W. W. B. deceased, their heirs and assigns forever, or in case of the death of them or either of them, in my own lifetime; then I devise the share of such deceased, to the heir-at-law or heirs-at-law of such deceased, his, her, or their heirs and assigns," and died January 15th, 1866, leaving W. A. B. and two sons and two daughters of the Hon. R. B. (who predeceased him) him surviving. One of the daughters died July 10th, 1866, unmarried and intestate, during the lifetime of the life-tenant, who was in possession until her death, which happened on April 19th, 1870. On her death the two sons and surviving daughter entered into possession, collected rents, sold parts thereof, dividing the proceeds in equal shares amongst themselves; and partitioned part of the unsold balance thereof by deed, dated January 31st, 1885, and in all respects dealt with the said lands and the proceeds thereof as if they were all equally interested therein; their father, the Hon. R. B., having by his will divided his estate equally between them.

In May, 1886, the plaintiff, the eldest son of the said Hon. R. B., was advised he was entitled to the whole as "heir-at-law" of his father. In an action for the construction of the said will and recovery back of the moneys paid over, and the partitioned lands remaining unsold, and the proceeds of those sold, and for a declaration that the plaintiff was solely entitled to the unpartitioned land. It was,

Held, following *Tylee* v. *Deal*, 19 Gr. 601, that the Act 14 & 15 ch. 6, (C. S. U. C. ch. 82, abolishing primogeniture) which came into force January 1st, 1852, does not apply except in cases of intestacy, and that the plaintiff was heir-at-law.

Held, also, that the several divisions of property and money did not come under the head of "Family arrangements." But,

Held, also, that the moneys paid over more than six years before action, could not be recovered; and following *Rogers* v. *Ingham*, 3 Ch. D. 351, that as to the moneys paid over within six years, an action for money had and received, would not lie for moneys paid by one party to another under a mistake of law common to both, when both had a full knowledge of all the facts.

Held, lastly, that moneys not paid over, being the proceeds of lately sold land, could not be recovered by the plaintiff, as the lands of which they were the proceeds had become vested in the different parties claiming them by possession as tenants in common and by the partition deed.

THIS was an action brought by William Willcocks Baldwin against Frederick William Kingstone and another, as executors of Robert Baldwin, deceased, and Augusta Elizabeth Ross, under the circumstances set out in the judgment.

The action was tried at the Autumn Sittings in Toronto on November 30th, and December 1st and 2nd, 1887.

Robinson, Q.C., *Jas. Maclennan*, Q.C., and *Morris*, Q.C., for the plaintiff. The will in question was made in 1850, primogeniture was abolished in 1852, and the testator died in 1866. Plaintiff's father died in 1858. The will speaks from its date. The plaintiff takes under the will the share his father would have taken if he had been alive. He takes as *persona designata*, the person answering the description of heir-at-law, and his rights are not affected by C. S. U. C. ch. 82, sec. 23. That statute only applies to cases of intestacy, and by sec. 41 any limitation *by will* is not to be affected. The case is similar to *Tylee* v. *Deal*, 19 Gr. at p. 604 *et seq.* The effect of changes in the law upon devises in wills made before the change, but where the testator did not die until after the change, has been decided in different ways: *Jones* v. *Ogle*, L. R. 8 Ch. pp. 195 and 196; *Capron* v. *Capron*, L. R. 17 Eq. at p. 295; *Hasluck* v. *Pedley*, L. R. 19 Eq. 271; *Constable* v. *Constable*, 11 Ch D. at p. 685. There was no acquiescence as the plaintiff was ignorant of his rights and there cannot be acquiescence when there is such ignorance. This is a case of mistake caused by ignorance, and the Court will grant relief: *Cooper* v. *Phibbs*, L. R. 2 H. L. at p. 170; *Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 234; *Kerr* on Fraud and Mistake, 2nd ed. 467, 469. See also *Lansdowne* v. *Lansdowne*, 2 J. & W. 205. As to the defendants having been misled into certain expenditure thinking they were entitled: see *Durrant* v. *The Ecclesiastical Commissioners, &c.*, 6 Q. B. D. 234; *Countess Dowager of Kintore* v. *Earl of Kintore*, 11 App. Cas. 394.

Irving, Q. C., *McCarthy*, Q. C., and *Geo. M. Evans*, for the defendants, the executors and trustees of Robert Baldwin, Jr. The will takes effect from the date of the death of the testator, or from the time the life estate fell in in 1870, and should be so construed: *Vaux* v. *Henderson*, 1 J. & W. 388. Robert Baldwin's interest vested in those enti-

tled under his will; *Theobald* on Wills, 3rd. ed., pp. 459, 465; *Ive* v. *King*, 16 Beav. 46; *Schouler* on Wills, sec. 563; *Sturge* v. *The Great Western R. W. Co.*, 19 Ch. D. 444; sec. 41 C. S. U. C. ch. 82, refers to tenancies by the curtesy and in dower, and could only affect those arising after the statute was passed; so in like manner it can only affect wills signed after the statute was passed.

The 41st sec. C. S. U. C. ch. 82 has no bearing on this case in so far as it enacts that the Act is not to affect any *limitations* of any estate by deed or will: the expression "limitation," as there used, is applicable in limiting the extent of the estate, whether for life, in fee or in tail, and cannot be applied to the words in the will, "heir-at-law or heirs-at-law," they being words of purchase denoting the person who is to take the estate.

In statutes relating to wills and descents when changes in the law are made, care is always taken not to affect wills previously made. See R. S. O. (1877), ch. 105, secs. 3 and 10, and ch. 106, secs. 2 and 7. The tenor of the whole will shows that it was the *families* and *children* that were intended to be benefited, not one member of such. All the parties believed they were equally entitled, and executed numerous conveyances as such and under such belief; *Pullen* v. *Ready*, 2 Atk. 587; *O'Kill* v. *Whittaker*, 1 DeG. & Sm. 83; *Cann* v. *Cann*, 1 P. W. 722; *Stapilton* v. *Stapilton*, 2 W. & T. L. C. 6th ed., 930; *Stockley* v. *Stockley*, 1 Ves. & B. 23; *Frank* v. *Frank*, Chy. Cas. 84; *Neale* v. *Neale*, 1 Keen 672, at p. 683; *Clifton* v. *Cockburn*, 3 M. & K. 76; *Brooksbank* v. *Smith*, 2 Y. & C. Ex. 58; *Denys* v. *Shuckburrow*, 4 Y. & C. 42; *Clare* v. *Lamb*, L. R. 10 C.P. 334, at p. 341; *Williams* v. *Williams*, 2 Dr. & Sm. 378; L.R. 2 Ch. 294. Robert Baldwin the younger who is dead now, made his will on the supposition that he was entitled and the property cannot now be disturbed in the hands of his executors after seventeen years acquiescence by plaintiff in Robert Baldwin's possession, and enjoyme nt. He might have made the provisions of his will very different. Con. Stat. U. C. ch. 82, does not affect the will; it only alters

its legal operation. Before the statute the plaintiff was his father's heir-at-law: after the statute all the family were heirs-at-law. As to all moneys paid over more than six years ago, the Statute of Limitations is a complete answer. As to moneys paid within six years even if paid under mistake, that mistake was a mistake of law, and they cannot be recovered back: *The Bank of the United States* v. *Daniel*, 12 Peters U. S. S. Ct., p. 32, and the defendants and those they represent have received and spent it and so altered their position: so the plaintiff is estopped. As to the lands: if the other brother and sister were tenants in common they held under the will; if not they were trespassers, and held adversely for more than ten years and cannot be dispossessed now.

Moss, Q C., and *W. Barwick*, for the defendant Ross. Con. Stat. U. C. ch. 82, makes all a man's children his heirs and is not confined to cases of intestacy, otherwise if a testator seised of Blackacre and Whiteacre made his will before the statute devising Blackacre only to his heir and died after the statute, then Blackacre would go to his eldest son and Whiteacre would be divided among all his children, thus making two different classes heirs-at-law at the same time. If a man made a will to-morrow surely it would not be construed as if the statute had never been passed. The plaintiff seeks to recover through the equity of the Court and the defendants are entitled to the benefit of everything in the way of countervailing equities, such as the plaintiffs acquiescence, his laches, and estoppel both by conduct and by deed. It is admitted by all parties there was no fraud, concealment, or want of good faith: *Rogers* v. *Ingham*, 3 Ch. D. at p. 357; *Great Western R. W. Co.* v. *Cripps*, 5 Ha. 91; *Bilbie* v. *Lumley*, 2 East. 469; *Platt* v. *Bromage*, 24 L. J. Ex. 63; *Good* v. *Herr*, 7 Watts. & Serg. (Pa.) 253; *Freeman* v. *Jeffries*, L. R. 4 Ex. 189; *Stafford* v. *Stafford*, 1 De G. & J. 193. The defendants had sixteen years possession, and in the partition deed under which they claim part of the lands, they released certain lands to the plaintiff and so gave a consideration. That deed also contained a recital

that all "were tenants in common in fee simple;" that recital by the deed refers to the lands therein embraced, and the plaintiff in his evidence admitted it referred to the whole "Russell Hill Property," the land in question.

Robinson, Q. C., and *Maclennan*, Q. C., in reply, as to the Con. Stat. U. C. ch. 82, applying, referred to *Maxwell* on the Interpretation of Statutes, p. 4, and *Kræmer* v. *Gless*, 10 C. P. at p. 475. Since the statute was construed in 1873, by the case of *Tylee* v. *Deal*, *supra*, it has been re-enacted in 1877, in the Revised Statutes of Ontario, and has been amended by Ont. Stat. 43 Vic. ch. 14, sec. 2. That approves of the construction put upon it; *Nicholls* v. *Cumming*, 1 S. C. R. at p. 418; *Crain* v. *The Trustees of the Collegiate Institute of the City of Ottawa*, 43 U. C. R. 498. The facts here will not support a "family arrangement," as there was no compromise; *Stapilton* v. *Stapilton*, 2 W. & T. L. C. 6th ed., pp. 932, 933. As to estoppel, see *The General Finance, &c., Co.* v. *Liberator, &c., Building Society*, 10 Ch. D. 15; *Doe d. Christmas* v. *Oliver*, 2 Sm. L. C. 775. Even a recital in a statute may be shewn to be wrong: *Hardcastle's* Construction and Effect of Statutory Law, p. 242. As to payments, &c., under mistake, see *Kelly* v. *Solarie*, in *Broom's* Legal Maxims, 6th ed., 253, and see p. 257. The plaintiff has been in possession always, and time does not run against him; *Foley* v. *Foley*, 26 Gr. 463; *McArthur* v. *McArthur*, 14 U. C. R. 544; *Orr* v. *Orr*, 31 U. C. R. 13; *Holmes* v. *Holmes*, 17 Gr. 610. The plaintiff's claim to the money is not barred by six years because he did not discover his mistake until May, 1886, and he could not recover at law, and had to come to equity and the statute, 21 James I., ch. 16, is no answer in equity; the answer there is laches, and there were no laches; *Brooksbank* v. *Smith*, 2 Y. & C. Ex. 58; *Kerr* on Fraud and Mistake, 2nd ed., 340; *Story's* Equity Jur. 1521 (*a*).

May 22, 1888. ROBERTSON, J.—This action is brought for the construction of the will of the late Admiral the Honorable Augustus Warren Baldwin, dated 14th August,

1850, and who died on 15th June, 1866; also for the recovery of money paid, as it is alleged, to defendants, &c. by mistake, all parties being at the time, as it is alleged, under the erroneous supposition and belief that they were equally entitled under said will; and for a declaration that a partition deed of 31st January, 1885, was made by plaintiff by mistake; and that defendants respectively may be declared to have become by said deed trustees for plaintiff of the lands thereby conveyed and released to defendants respectively; and also for an account by defendants to plaintiff, and for payment of moneys received by defendants for the sale of certain lands to plaintiff; and also that it may be declared that plaintiff is entitled to the proceeds of lands sold by the defendants Kingstone and Macdonald as trustees, and Mrs. Ross, respectively, to S. H. Janes, and now deposited in the Molsons Bank and the Ontario bank, respectively; and that the same may be transferred to plaintiff for his own use, and the mortgage held by the managers of said the Molsons Bank for part of the purchase money, may also be declared to belong to the plaintiff.

The devise in question is in these words:

"Firstly, I devise to my beloved wife that parcel of land with the messuages and buildings thereon, called and known as 'Russell Hill,' being lot No. 23, in the second concession from the bay, west of Yonge street, in the township of York, &c., for and during her natural life.

"Secondly. After the death of my said wife, I devise the lands, messuages and buildings aforesaid known as 'Russell Hill,' to my nephews, the Honorable Robert Baldwin, and William Augustus Baldwin, sons of my brother, the late Honorable William Warren Baldwin, deceased, their heirs and assigns for ever, or *in case of the death of them, or either of them, in my own lifetime; then I devise the share of such deceased, to the heir-at-law, or heirs-at-law of such decease, his, her, or their heirs and assigns.*"

The widow of the testator, (Augusta Melissa Baldwin) departed this life on or about the 19th April, 1870, and

the testator also left him surviving his nephew William Augustus Baldwin, but his other nephew, the said Honorable Robert Baldwin, predeceased him on 9th December, 1858, leaving him surviving, his oldest son the plaintiff, and Robert Baldwin and the defendant Augusta Elizabeth Ross and Phœbe Maria Baldwin, (two sons and two daughters) Phœbe Maria Baldwin died on 10th July, 1866, intestate and unmarried, leaving her surviving her aforesaid two brothers and sister.

After the death of the testator, his widow entered into possession of the lands as tenant for life under her deceased husband's will, and she enjoyed the same with the rents and profits thereof until her death. After which and until shortly before the commencement of this action, the said lands and the rents and the profits thereof were dealt with, upon the supposition and belief by all parties, that is, the plaintiff and his brother and two sisters, and the said William Augustus Baldwin, that the said plaintiff and his said brother and sisters were entitled to one undivided moiety thereof in fee simple as tenants in common in equal shares, and the said William Augustus Baldwin to the other moiety thereof in fee simple, and as such they dealt with the property and the rents and profits thereof.

On or about 14th June, 1883, the said William Augustus Baldwin died, having first duly made and published his last will and testament, whereby he devised his undivided share of the said lands to his widow and his son Henry St. George Baldwin, upon trust for the purposes therein mentioned. From time to time sales were made of different parcels of the said lands and the proceeds were divided, so far as the one moiety of the plaintiff and his brother and sister, Mrs. Ross, was concerned, in equal shares between them; and on 31st of January, 1885, the residue of the lands were partitioned, and by an indenture of that date, the plaintiff and his said brother and sister, Mrs. Ross, granted and released to the trustees of the estate of the said William Augustus Baldwin, certain parcels of the said land, to hold to the use of the said

trustees in severalty; and by the said partition deed the said trustees and the said Robert Baldwin and Mrs. Ross, conveyed and released to the plaintiff certain other parcels of said lands in severalty; and in like manner were thereby conveyed and released to the said Robert Baldwin and to Mrs. Ross respectively, by the other parties, including the plaintiff, certain other parcels of the said lands in fee simple in severalty.

Matters thus proceeded until, in the month of May, 1886, the plaintiff was advised that he was entitled solely, to the whole of the undivided moiety of the property, which would have gone to his father, the late Hon. Robert Baldwin, had he not predeceased the testator, and that his sister and brother were not entitled with him as tenants in common, and that all their dealings and transactions with the property, since the death of Mrs. Baldwin, the tenant for life, were erroneous; and having failed to come to a satisfactory settlement of the difficulties which have sprung up, in consequence of this new light, this action has been brought.

The defendants contend that the whole of the children of the late Hon. Robert Baldwin took as tenants in common, for two reasons. First, because the law of primogeniture was abolished after the making of the will, but several years before the death of the testator, and that it must be presumed that had he desired the eldest son only to have taken, he would have named him in his will, or he would have, in some way, made it clear that he did not intend that the whole family should inherit as heirs-at-law of their deceased father, the Hon. Robert Baldwin. Second, because the intention of the testator that they should so take is made manifest on reading the whole will.

The defendants also contend, that supposing it cannot be so held, the plaintiff is estopped from setting up this claim now, by reason of the family having arranged the division of the property among themselves, and executed deeds, releases, &c., and to have divided the rents, profits, and proceeds of sales according to these several arrangements and settlements and according to what they always

considered to be the law governing the case as above claimed by them.

And further, the Statutes of Limitations apply, and any claim, other than as being entitled to one-third of that moiety, which would have gone to his late father, had he not predeceased the testator, is barred.

Counsel for plaintiff, as to the first point, say, the case is *res judicata*, and cite *Tylee* v. *Deal*, 19 Gr. 601, as being expressly in point ; and that as to the second point, the so called arrangements do not come under the head of "family arrangements," as understood by Courts of Equity ; in fact that these were not "arrangments" at all ; but mere divisions of the property made from time to time under the erroneous supposition that each was entitled to an equal share.

And as to the Statutes of Limitations—first, there is the statute which relates to lands ; and second, the statute that relates to the recovery of money, neither of which applies to this case ; so that, take the whole case together, it is divided into two questions ; first, as to what is the true construction to be put upon the will, in reference to the devise of "Russell Hill," in remainder after the life estate has fallen in ; and secondly, the proceedings and dealings of the parties, and especially of the plaintiff after the death of the life tenant, in regard to the disposition of the moiety, which would have gone to their late father, the Honorable Robert Baldwin, had he not predeceased the testator ; and these are the two questions which are presented for my consideration.

First, as to the construction of the will, the case of *Tylee* v. *Deal*, 19 Gr. 601, is referred to by the plaintiff as governing me in this.

In that case the testator died in England in March, 1852, having, while domiciled there, made his last will and testament, bearing date the 28th November, 1851. The testator died seized for an estate in fee simple, in possession, of real estate in England and in Ontario ; and the will, after specifically devising certain lands in the county of Sussex,

in England, proceeded as follows: "I give and devise all and singular the remainder of my real estate, unto and to the use of my said dear wife Frances Ann By, for and during the term of her natural life, and from and after her decease, I give and devise the same unto my right heirs forever." The testator's widow died in 1862. In a suit instituted in the Court of Chancery in England, for the administration of the testator's estate, it was declared that Charles W. By, who is now represented by the above named plaintiffs, was, at the time of the testator's death, his right heir, so far as the English estates are concerned, which passed under the residuary clause above set forth. Charles W. By had a sister, Elizabeth By, now represented by defendants to this suit, and they claim that their ancestor took under the above devise, a share of the Canadian estate, to which, as representing her, they are now entitled. "Held, that the Act 14 & 15 Vic. ch. 6, (C. S. U. C. ch. 82,) abolishing primogeniture, under which the defendants claimed to share in the property, did not apply, and therefore the eldest son took the estates here as in England. Held, also, that, even if the Act did apply, the common law heir was the party to take the estates under the residuary devise."

The Act commonly known as the statute abolishing primogeniture in Ontario, came into force on 1st of January, 1852, before the death of the testator in that case, about two months, and after the date of his will a few days over one month, and in all probability was not known by the testator at the time of his death; and, therefore, the arguments urged by defendants in the case before me, as to the knowledge of the testator of the change in the law, apply with much more force than such arguments would have applied in *Tylee* v. *Deal*, but whether or not, I do not think it would make any difference, in so much as I am forced to the opinion that the statute in question was not intended, and in fact did not apply except in cases of intestacy.

Now, the case under consideration, was the case of a man having made his will and disposing of his real estate

thereby. The devise was to his widow for life with remainder over to his two nephews; but "in case of the death of them, or either of them, in my own lifetime, then I devise the share of such deceased, to the heir-at-law or heirs-at-law of such deceased, his, her, or their heirs and assigns." One of the nephews did predecease the testator, and therefore "*the heir-at-law of such deceased,*" in my judgment took under the devise. There is no doubt as to who "the heir-at-law" was at the time the estate vested.

Since then, however, the law has been changed, and now and since the 5th March, 1880, by 43 Vic. ch. 14, sec. 2, (O.), the word "heir" or "heirs," shall, where any real estate is devised by a testator dying after that date, be construed to mean the person or persons to whom such real estate would descend under the law of Ontario, in case of an intestacy, making it clear to my mind that up to the passing of this statute, the word "heir" or "heirs," meant "heir at common law."

I have referred to this case of *Tylee* v. *Deal*, and the circumstances attending the case now before me, more on account of the able arguments which were adduced by the defendants in support of their contention, that it was distinguishable from the case now under consideration.

The case of *Tylee* v. *Deal*, was properly decided, but even on the supposition that it was not, I would be bound by it, and would undoubtedly follow it.

All the cases therefore cited by the learned counsel for defendants, and which I have referred to, and which have been most ably supported by the learned gentleman who represent the defendants in the view that they are applicable, and should govern me in coming to a decision in this case, I am obliged to pass over, as not overruling *Tylee* v. *Deal*, but in doing so, it must not be understood, that in so far as I have thus expressed myself, there is no doubt in my mind as to the soundness of that opinion, there is much room for argument, and quite as much for difference of opinion: for instance Sir Geo. Jessel, M.R., says in *Hasluck* v. *Pedley*, L. R. 19 Eq. at p. 274: "A testator who knows

of an alteration in the law (as this testator must be presumed to have done), and does not choose to alter his will, must be taken to mean, that his will shall take effect according to the new law."

This was said in reference to the effect of the "Apportionment Act, 1870" on a devise in a will dated before the Act, to which a codicil was made after the Act; but as the will there in question took effect from the death of the testator, and not as in this case from the date of the will, the application of the words are only apt, as showing what the testator should be presumed to have meant, by leaving his will in the same state after the passing of the Act abolishing primogeniture which came into force nearly two years after he made his will, and over fourteen years before his death, and the inference being, as contended for by the defendants, that he intended the will to operate in the same way as if his nephew, the late Honorable Robert Baldwin, had died entitled and intestate.

In the same case, the same learned Judge says: "The Act does not affect the meaning of the will; it only alters its legal operation. A devise of Blackacre, before the Act, carried the accruing rents; now it does not, not because the meaning of Blackacre has been altered, but because the legal effect of the devise is different." And Mr. Justice Fry, in *Constable* v. *Constable*, 11 Ch. D. p. 686, adopts that conclusion and acts upon it.

Then there is the case of *In re March—Mander* v. *Harris*, 24 Ch. D. 222, in which it was held that, since the passing of the Married Woman's Act, 1882, the old rule of law that husband and wife were for most purposes one person, so that under a gift by will to a husband and wife and a third person, the husband and wife took only one moiety between them, the third person taking the other moiety, is no longer applicable to such a gift under a will that has come into operation since the commencement of the Act.

In that case the will was dated in 1880, and the bequest was of the testatrix's residuary personal estate

to C. J. H. and J. H. and E. his wife, to and for their own use and benefit absolutely. The testatrix died in 1883, after the commencement of the Act. J. H. and E. married in 1864; Held, that the residuary personal estate was divisible in thirds and not moieties, and that E., the wife, took a third for her separate use. And Chitty, J., in giving the judgment, refers to the passages extracted by me from the judgment of Sir Geo. Jessel, M. R., in *Hasluck* v. *Pedley*, with approval.

On the other hand there is the doubt expressed by Lord Chancellor Selborne, in *Jones* v. *Ogle*, L. R. 8 Ch. 192, as to whether the Act (the Apportionment Act, 1870) can affect the construction of a will previously made. And this doubt is also entertained by Sir R. Malins, V. C., in *Capron* v. *Capron*, L. R. 17 Eq., at p. 295. In fact both of these learned Judges express themselves in a way which goes to show that in their judgment the Act has no such effect.

The question, therefore, may be said to be in doubt, and although I do not see that these cases apply to the one before me, it is quite clear that the plaintiff and his legal advisers, for all these sixteen years, acted upon the assumption that the statute did apply, and affected the devise in the will, under which he and his brother and sister claimed as lineal descendants of their father, in equal parts; and in doing this they placed a meaning or construction on the will, which I am now treating as a misconstruction; and that they knew of none other, living and dying and making all their family arrangements on the footing of it, is undeniable; and in the light of this, it appears to me, I must consider the other question; but before doing so, in view of the able arguments pressed upon me, as to what was the real intention of the testator, and which is to be gathered from reading the whole will, I must consider that point.

And on reference to the will, I find that immediately after the devise in question, the will proceeds as follows: "My intention being, as this land together with

other adjacent lands formed a part of the property owned by the late Miss Elizabeth Russell, and was through the mediation of the said William Warren Baldwin, separated from the said adjacent lands and sold by her to me * * after a devise had been made by the said Miss Russell in favor of the said William Warren Baldwin of the same land, together with the said adjacent lands, *that it should now fall to the family of the said William Warren Baldwin*, together with the said adjacent lands which were devised to the said William Warren Baldwin by the said Miss Russell, and held by him until the time of his death, as I have now no children left to me to inherit it." Bearing in mind that the "family of the said William Warren Baldwin" consisted of the testator's two nephews, the Honorable Robert Baldwin and William Augustus Baldwin, it may be that this reference helps the defendants, inasmuch as the testator makes reference to the fact that he himself had then "no *children* left * * to inherit it," and from which it may be argued; and was with much force that the testator himself, thereby conveyed the idea that had he been blessed with children him surviving, the property in question would have been left to them in equal portions, and not to his eldest son and "heir-at-law," had he had one, as against his other "children." And in support of this view, the fact may be pointed out, that the testator did not by his will devise the whole property to one with a view of keeping it intact, and thus to be handed down from father to son in perpetuity; a condition of things which, about the time this will was made, was being much discussed by the public at large, and which through the instrumentality of one of the objects of the testator's bounty, culminated in changing the law so as to prevent or put a stop to the whole of a man's real estate descending, in case of his dying intestate, to his oldest son as heir at common law.

Another paragraph referred to is in these words: "Ninthly. After the death of my said wife I give to the *children* of the said Robert Baldwin and to the *children* of the said William Augustus Baldwin, and to the *children*

of R. B. S. my nephew; to the *child* of the late H. S. my nephew; to the *children* of A. B. S., my nephew; to the *child* of T. G. R. and Q., formerly his wife, now deceased, my niece, and to the *children* of L. H. and B. his wife, my niece; who may be living at the time of the death of my said wife, all my stock in the capital of the Bank of Upper Canada, &c., and also the proceeds of my household furniture, beds, &c., and every article of household use hereinbefore mentioned and bequeathed as aforesaid to my said wife during her life, *to be divided equally between them.*"

But the defendants contend that the evidence of the plaintiff himself clearly shows what he and his brothers and sisters understood to be the intention of the testator apart from what is stated in the will, and it is this, "I knew from my uncle's own words, he had promised my father during his lifetime to give the whole of 'Russell Hill' to himself and his brother William A. Baldwin * * he said he had no intention to sell to Mr. McMaster or any one, because he had promised my father not to part with an inch of the ground, but to leave it to my father and my uncle," &c.

This was objected to as not being admissible, and I so ruled at the hearing, but admitted it subject to the objection, because Mr. Irving and Mr. McCarthy urged that it affected the conduct of the parties afterwards in their manner of dealing with the property. I cannot, however, see that what was then stated helps the defendant's contention, because the statement made by the testator, according to this evidence, did not show any intention other than that expressed in the will, the property was to be and was left to the plaintiff's father and his brother William A. Baldwin. However, Mr. Irving contends that, taking the whole will together in connection with what took place between the testator and the plaintiff, and the further fact, that if the property had vested in the Honorable Robert Baldwin, as the parties supposed it had, it would have gone and been devised under his will, exactly as it has so far been divided among his children;

supposing, as they did, that it was under that will they took, created the impression in the mind of the plaintiff and his brother and sister, as also in the mind of his uncle the executor, that the testator intended that they should all take in equal shares that moiety of the property which would have gone to or was intended for their late father. And that, if nothing more, these things afford sufficient consideration for the arrangements which were afterwards made between them in dividing the property, that it was something the brother and sister not only believed, but claimed to be legally entitled to, which affords sufficient consideration for the arrangements, and which the plaintiff is now estopped from opening up. That a supposed right is a good consideration; it may be said that it was a doubtful point; but, whether doubtful or not, they all considered they were there as tenants in common or jointly interested in equal shares, and it is in just such cases and under such circumstances that "family arrangements" are made, and which Courts of Equity strive under almost all circumstances to uphold.

And in support of this contention, he cites *Pullen* v. *Ready*, 2 Atk. 587, in which the question was, whether one of the legatees under the testator's will had not forfeited her right by reason of her having married against the will of her father and mother; the legacy being left to her on the condition that she should marry with their consent; and after which marriage the arrangement was made, by which she was secured in the legacy, and which by the action was sought to be set aside.

The Lord Chancellor deals with this point at p. 590, in these words: "And as to the money not yet laid out in land, the articles of 9th July, 1737, have likewise barred any right that might have accrued from the forfeiture to the other two sisters upon Mrs. Ready's marrying without consent.

For, at the time of the execution of the articles, *it could not but be known* that Mr. and Mrs. Ready married without consent, because Mr. and Mrs. Edwards, Lord

and Lady Middleton, Mr. and Mrs. Pullen, were all parties, and *cannot possibly be supposed to be ignorant of this fact*, which happened some years ago.

It is said they might know the fact, and yet not know the consequence in law: but if parties are entering into an agreement, and the very will out of which the forfeiture arose is lying before them and their counsel, while the drafts are preparing, the parties shall be supposed to be acquainted with consequence of law as to this point, and shall not be relieved under a pretence of being surprised with such strong circumstances attending it. * *

So that with the knowledge *of the will*, and the clauses in it, *the condition annexed* and the *forfeiture*, the parties with their eyes open execute this deed.

It has been insisted * * that they executed * * under a mistake."

In considering this case it must be borne in mind that the action was really for the purpose of *declaring a forfeiture*, which a Court of Equity leans against and will not decree, if it can be avoided. And the Lord Chancellor says at the end of his judgment: "This Court is so far from assisting to set up the forfeiture again, that they would rejoice at the agreement, because it has absolutely tied up the hands of the Court from meddling in the question; and if I was to declare the forfeiture now, it would be making all the agreements vain and nugatory. The case that comes nearest to the present case is *Cann* v. *Cann*, before Lord Macclesfield 1 P. W. 727. And in that case His Lordship says: "Indeed, if the party releasing is ignorant of his right, or if his right is concealed from him by the person to whom the release is made, these will be good reasons for the setting aside of the release. But no such thing is pretended in this case, and solemn conveyances, releases, and agreements made by the parties are not slightly to be blown off and set aside."

Counsel for defendants also cited the leading case of *Stapilton* v. *Stapilton*, in White & Tudor's leading cases, 6th ed., vol. 2, 920; *Okill* v. *Whittaker*, 1 DeG. & S. 83;

Cann v. *Cann*, 1 P. W. 722; *Stockley* v. *Stockley*, 1 V. & B. 23, all of which I have considered, but have failed to satisfy myself that there is sufficient in them, to warrant me in coming to the conclusion, that the several divisions of property and money which have taken place between the parties in this action, can be looked at in the light of what comes under the designation of "family arrangements."

There was nothing in regard to which arrangements, in the true sense of the word, were necessary to be made; there was no dispute between the parties; there was no apparent family difficulty to settle or compromise; there was no arrangement, so to speak, of any pending difference of opinion as to their respective rights between the parties; there was simply a division of property, which the parties agreed among themselves, and with the advice of their solicitors, belonged as much to one as to the other, and in view of what they each believed, would have been done beyond question, had their own father, the disposition of the property, and in which I have no doubt in veneration to his memory, one and all would most religiously have felt themselves in duty bound to carry out; and this being the case, I have very grave doubts as to whether the plaintiff is not estopped from seeking at this late day after all the changes which sixteen years must have brought about, to set aside or disturb transactions which were entered into in the most solemn form known to the law, in good faith, and without the slightest concealment or fraud on the part of any or either of them; but in view of the conclusion that I have come to in regard to the other defences set up, I do not feel it necessary to come to a decided opinion on this, except in so far as it influences my mind in regard to that part of the claim which is for money had and received to the use of the plaintiff.

The defendants have pleaded the Statutes of Limitations in regard to both the real property and the money received by the defendants. By R. S. O. (1877), ch. 108, sec. 11, it is declared that the possession of one joint tenant or tenant in common shall not be deemed to have been the possession

of the other, &c. In this case, however, it is admitted that from and after the death of the tenant for life, the whole of the parties entitled to the remainder went into possession, and by common consent and assent the plaintiff and his late brother and Mrs. Ross, his sister, were in possession, or in receipt of the rents and profits of that moiety of the property which would have gone to their late father the Hon. Robert Baldwin had he survived the testator. Now the life estate fell in, in April, 1870, sixteen and a-half years before this action was commencced.

Since the argument, the report of the very late case of *In Re Hobbs, Hobbs* v. *Wade*, 36 Ch. D. 553, has reached here, and the facts in that case were as follows: The testator and his wife, Sarah, were entitled to the land called "The Salts" in equal undivided moieties, as tenants in common in fee. She died intestate on 9th May, 1870, leaving two sons surviving her, viz., Samuel and John. At the time of her death Samuel was more than 21 years of age, but John was an infant, he having been born on 11th October, 1856. By the custom of gavelkind the moiety to which the mother was entitled descended to her two sons, as tenants in common fee, in equal undivided moieties, subject to the right of her husband to receive a moiety * * of her moiety so long as he should remain a widower. Upon her death he entered into the receipt of the whole of the rents of her moiety, and continued in possession until 24th June, 1884, without accounting to either of his sons. On the 29th February, 1884, the testator married a second wife, and his right to receive a moiety of the rents of his first wife's moiety of the property thereupon ceased. In May, 1884, the son John died intestate, and his interest in the property descended to his brother Samuel, as the heir, according to the custom of gavelkind, of the mother. There was no question as to the title of Samuel, the son, to that moiety of his mother's moiety of the property, the rents of which the testator was entitled to receive until his second marriage. The question was, whether the title of Samuel, the son, to the

other moiety of his mother's moiety of the property, or any part thereof, was barred by the Statute of Limitations, by reason of his father's receipt of the rents, for more than twelve years after the death of the mother. The testator had never during that period given any acknowledgment in writing of the title of either of his sons, or accounted to either of them for his share of the rents. There was evidence that in 1879, the testator had made to a solicitor who had been instructed by the son John to claim from his father the share of the rents, to which he (John) was entitled since the death of his mother, verbal admissions of the right of his two sons respectively to one half of their mother's moiety of the land.

There was also evidence that in 1884, before his father's death, Samuel, the son, had given notice to the tenant of the property, not to pay any rent to any one but himself; and that, in consequence of this claim, the testator's solicitor by his direction had accounted to his son Samuel for the rent due in June, 1884, and had paid him a sum of £1 3s. 9d., as being his one-fourth of the residue of the rent, after payment of the interest on a mortgage affecting the whole property. The solicitor at the same time retained a similar sum of £1 3s. 9d., as representing the one-fourth of the rent belonging to John, in part satisfaction of a charge which he had executed in favor of the solicitor, *Held*, that as that one-eighth of the property to which John became entitled in possession on the death of his mother, the father must be taken to have entered into receipt of the rents as bailiff for his infant son, and that consequently, the title of John was not barred by sec. 12 of the Act 3 & 4 Wm. IV., ch. 27, (which is the same as the sec. 12 of R. S. O. (1887), ch. 103, since extracted), and that his brother Samuel was entitled to that one-eighth; but *Held*, that as to Samuel's own-eighth, the same presumption did not arise; and that, there being no evidence that the father had received the rents as agent for Samuel, or had before the expiration of the statutory period acknowledged his title in writing, or accounted to him for the

rents, the title of Samuel to that one-eighth was barred by the statute, consequently Samuel was entitled to three-eighths of the whole property, and the remaining five-eighths passed under the father's will.

Apart from this case, in my judgment, the argument advanced by Mr. McCarthy in favor of a person claiming to be a tenant in common holding adversely to his co-tenants in common, is unanswerable. Here, the parties were either tenants in common, or the late Robert Baldwin and Mrs. Ross were trespassers. The plaintiff says now they were not tenants in common. Of course if he was to admit they were, he would be out of Court; then they were trespassers, and holding adversely to him. This being so, the receipt by them of a share of the rents and profits, equal to the shares that they would be entitled to as tenants in common, on the authority of *In re Hobbs*, *Hobbs* v. *Wade*, is, in my judgment, a complete answer to the plaintiff's claim, that they, the defendants, are not entitled to hold the property and money which has been acquired by them in this way.

This is apart from the question also raised by the statute, as it applies to the recovery of money paid to or received by the defendants, more than six years before the action was commenced, which, I think, is also a bar to a recovery by the plaintiff.

Then there remains the money paid to or received by them within the period of six years, as well as the money now in the bank, the proceeds of the sale to James.

As to the former, the case of *Rogers* v. *Ingham*, 3 Ch. D. 351, is very much in point. There, only two years had elapsed between the payment and the bringing of the action; but the Court held, affirming the judgment of Hall, V. C., that the money could not be recovered back.

James, L. J., in giving judgment at p. 355, says: "* * * it is reduced, as it appears to me, to a mere action for money had and received; and it is the same as if A, through a third person, had paid money to B, thinking that B was entitled to it; B thinking also that he was

entitled to it; there having been, as it is now said, a mistake of law which was common to both parties.

No authority whatever has been cited to us in support of the proposition, that an action for money had and received, would lie against a person who has received money from another, with perfect knowledge of all the facts common to both, merely because it said that the claim to the money was not well founded in point of law. * * And really when it is treated as the common case of money paid to B. under a mistake, the law on the subject was exactly the same in the old Court of Chancery as in the old Courts of Common Law. There were no more equities affecting the conscience of the person receiving the money in the one Court than in the other Court, for the action for money had and received proceeded upon equitable considerations."

There are numerous other cases, to the same effect, which I need not refer to.

Then as to the moneys now in Molsons Bank and the Ontario Bank, respectively, and the mortgage held by the manager of said Molsons Bank, under the agreement under seal of 12th June, 1886, entered into between the plaintiff of the first part and the defendants Mrs. Ross and Kingstone and Macdonald, as trustees respectively of the second part, and referred to in the pleadings, with reference to the purchase moneys, of the lands sold to Janes, there appears to me to be a greater difficulty; but the best judgment I can come to, in regard thereto, is that the plaintiff is not, under the circumstances, entitled to any part thereof, and I have come to this conclusion, because the lands sold to Janes had become vested in the plaintiff and the late Robert Baldwin, his deceased brother, and his sister, Mrs. Ross, as tenants in common, by reason of the possession, which they took and have since held up to the time of his death, with their co-tenant the late William Augustus Baldwin, and since then, with the trustees under his last will and testament immediately after the death of the tenant for life, and since then conveyed to Mrs. Ross and said Kingstone and

Macdonald, as such trustees, by virtue of the grants, releases, covenants, recitals and agreements contained in the deed of partition, made between the several parties claiming to hold as tenants in common, bearing date the 31st January, 1885, and registered in the Registry Office for the County of York, in Book C. 2, for the township of York at 2.30 o'clock p.m. of the 16th March, A.D. 1885, No. 17689; whereby and by reason thereof, the defendants Kingstone and Macdonald, as such trustees, held the lands sold and conveyed by them to the said Janes, and Mrs. Ross held the land sold and conveyed by her also to said Janes, it must follow that the proceeds arising from such several sales must go to the respective parties according to the manner of holding said lands; and I therefore am of opinion that the sum of money now deposited to the joint credit of the plaintiff and the defendant, Mrs. Ross, in the Molsons Bank, and the mortgage given for the balance of the said purchase money, to be paid by the said Janes, now held by the manager of the said the Molsons Bank should respectively be paid and transferred and assigned over to and for the use and benefit of the said Mrs. Ross exclusively, and that the sum of money also deposited to the joint credit of the plaintiff and the defendants Kingstone and Macdonald, as trustees as aforesaid, in the Ontario Bank should be paid over to the said defendants, Kingstone and Macdonald, as trustees as aforesaid, and that they, the said Mrs. Ross and the said Kingstone and Macdonald, as trustees as aforesaid are respectively entitled to the said several sums respectively, and that the plaintiff is not entitled to the same or any part thereof.

I regret exceedingly that I have not before this found it possible to deliver judgment herein, but apart from the fact that my time has been so much taken up in the discharge of my other duties, which day by day devolve upon me, the case itself involves many very nice questions, which have required at my hands great research and much consideration, the authorities are not all in one direction, and

every case seems to have had peculiar circumstances attending it, which had to be reconciled with the circumstances surrounding this, and while there is a general current of authority, which in my judgment requires me to come to the conclusion, which I have felt bound to subscribe to, I am not so confident that I am right as to say that I may not possibly be in error. The parties, however, are entitled to my judgment in the premises, and after such consideration and some grave doubts, I have brought, what I consider a very much involved case, to a conclusion, so far as my judgment will permit.

As to costs, I make no order, thinking as I do, that it is just and equitable under my findings, that each party should pay his, her and their own costs respectively.

G. A. B

[CHANCERY DIVISION.]

McLEOD V. AVEY.

Mortgage—Cutting timber—Liability of second mortgagee to account to first mortgagee.

The remedy of a mortgagee against a mortgagor in possession or any one claiming under him who cuts standing timber on the mortgaged premises, where such cutting will render the security insufficient, is not limited to a mere prevention of the mischief by injunction. And where a second mortgagee in possession had cut down timber and sold it, and subsequently in an action on the first mortgage a sale of the property proved insufficient to satisfy the amount thereof. It was,

Held, that the second mortgagee was bound to account for the value of the timber cut and removed by him prior to the action.

THIS was a petition in an action brought by William Charles McLeod against Richard Avey and Ashton Fletcher.

The plaintiff was a first mortgagee, and the defendant Avey was a mortgagor, while the defendant Fletcher was a second mortgagee, who had taken possession of the mortgaged premises, and cut down timber thereon and sold it.

The plaintiff claimed that the lands had thus become depreciated in value and that in the event of there being insufficient to pay the amount due on his mortgage and his costs, that the defendant Fletcher should account for the value of the timber sold by him.

The action was tried at Woodstock on October 5th, 1888, before Boyd, C., when, upon its being conceded that some timber had been cut, a judgment for sale was given, with a reference to a Master to take account of what was due on both the mortgages.

Upon a sale being had in the Master's office it was found that the lands did not sell for enough to pay the plaintiff's claim by about $1,150, and on the action coming up on further directions the defendant Fletcher contended that the question of his liability to account could not now be considered as it had not been reserved in the judgment taken out.

This objection was held good by Ferguson, J., before whom the matter was argued on further directions, on June 20th, 1888, who granted defendant Fletcher his costs of the action, but reserved leave to plaintiff to file a petition to rectify the judgment.

This petition to rectify the judgment in that respect and make the said defendant Fletcher liable to account for the value of said timber was subsequently filed, and was argued on October 6th, 1888, before Boyd, C.

C. J. Holman, for the plaintiff. The judgment should be rectified and Fletcher ordered to account, as the removal of the timber has so depreciated the security that there is not sufficient after sale to pay the plaintiff: *McLean* v. *Burton*, 24 Gr. 134; *Brown* v. *Sage*, 11 Gr. 239. The interest was in arrear, and therefore the whole of the plaintiff's mortgage money was due before Fletcher took his mortgage: *Meyers* v. *Smith*, 15 Gr. 616; *Scott* v. *Vosburg*, 8 P. R. 336.

Moss, Q.C., for defendant Fletcher. If a second mortgagee takes timber, *and is not stopped*, he is not liable to be made to account afterwards for its value to a first mortgagee: *Wafer* v. *Taylor*, 9 U. C. R. 609; *Coote* on Mortgages, 5th ed. 760.

October 16, 1888. BOYD, C. — The Court will not restrain the mortgagor in possession, or any one claiming under him, at the suit of the mortgagee, from cutting standing timber unless it is proved that the acts complained of are likely to render the security scanty. That is, as defined by Wigram, V.C., in *King* v. *Smith*, 2 Ha. 239, whether the security is worth so much more than the money advanced that the act of cutting is not to be considered as substantially impairing the value, which was the basis of the contract between the parties, at the time it was entered into.

In this case the security has proved insufficient by actual sale, but there was no application to stay the

cutting while it was going on, and now the question arises whether the second mortgagee is to account for the value of the timber cut and removed by him prior to this action.

The title is a registered one, and the second mortgagee took therefore with notice of the first mortgage, and must also be taken to have known that the removal of the timber would render the security insufficient to satisfy the first mortgagee, though that is, perhaps, not an important element in the case. Substantially the very matter was held in favour of the liability to account in a case like the present by Mowat, V.C., in *Brown* v. *Sage*, 11 Gr. 239. He there said that as a mortgagee can recover against the assignees of a mortgagor for the value of fixtures removed by them from the property mortgaged (citing *Hitchman* v. *Walton*, 4 M. & W. 409), so can he for the value of timber removed before action.

The remedy is not limited to a mere prevention of the mischief by way of injunction, leaving the party subsequent in title to the first mortgagee to enjoy the portion of the security which he has been able to remove unmolested. On the contrary, if it appears that the security falls short of satisfying the first mortgagee's claim, he can pursue the other and make him account by way of damages, as at common law, for the injury done to the property. *McLean* v. *Burton*, 24 Gr. 134, goes in this direction, but not so far as *Brown* v. *Sage*.

The right to recover at law by the mortgagee as against one who takes timber so as to despoil the property and lessen the security, is very fully discussed in *Mann* v. *English*, 38 U. C. R. 240.

The inquiry now sought is a necessary incident of this action, and the right to it is demonstrated the moment it appears that the proceeds of the land fall short of paying what is due to the plaintiff. There will be a reference, as asked, the costs of which and of this application will be reserved till the hearing on further directions.

[CHANCERY DIVISION.]

Re Macdonald and The Noxon Brothers Manufacturing Company (Limited), and R. S. O. (1887), ch. 183.

Company—Winding-up proceedings—Fully paid-up shareholder—"Contributory"—R. S. O. (1887), ch. 183, sec. 5.

A shareholder who has fully paid up his shares in a company is a "contributory" within the meaning of section 5 of R. S. O. (1887), ch. 183, so as to entitle him to initiate winding-up proceedings.

This was an application for an order prohibiting the County Judge of the County of Oxford from taking any further proceedings on the petition to wind up a company under R. S. O. ch. 183, presented by a shareholder on the ground that he, as a paid-up shareholder, was not a "contributory" within the meaning of the 5th section of the statute, and so could not initiate winding-up proceedings.

The motion was argued on November 13, 1888, before Ferguson, J.

Hoyles, for the motion. The 5th section of the statute says the Court may make the order for the winding-up "on the application of a contributory." Section 3, sub-sec. 2, defines what a "contributory" is, and a paid-up shareholder does not come within the definition. The petitioner does not come within section 14, sub-sec. 2. R. S. O. ch. 157, sec. 62, shews the whole liability of a shareholder. The petitioner has no *locus standi*. The English cases may decide under secs. 38, 74, and 133 of the English Act 25 & 26 Vic. ch. 89, that where there will be a surplus to be distributed after the winding-up, that a winding-up order may be made on the application of a paid-up shareholder: *In re Anglesea Colliery Co.*, L. R. 1 Ch. 555; *In re National Savings Bank Association*, L. R. 1 Ch. 547, but there is no similar section to section 38 in our Act. Section 62 in our Joint Stock Companies' Act, makes the liability

very clear, and leaves no room for such a construction as was put upon section 38 of the English Act. *Healey's* Joint Stock Companies, 448, 449.

W. Nesbitt, contra. The power to issue a winding-up order is a special statutory jurisdiction to the County Judge, and if he errs the parties may go to the Court of Appeal, secs. 27 and 45. Even if the applicant was entitled to prohibition, this application is premature, as the only proceeding issued by the County Judge is a summons to shew cause why an order should not issue, and the objection taken here could be taken on the return of the summons. The authorities are all collected in *The Mayor, &c., of London* v. *Cox*, L. R. 2 H. L. 239. This Court will not take it for granted that the county Judge will assume jurisdiction. [FERGUSON, J.—Will prohibition lie after judgment?] There is no judgment, and if there was there would be an appeal, or proceedings on the judgment could be prohibited. The paragraph of the petition shewing assets brings McDonald within the authorities which shew a paid-up shareholder has a right to apply, but how the county Judge will deal with the matter on its merits cannot be said now. Section 48 provides for the distribution of these assets, and that section, and section 8, sub-sec 2, shew McDonald has the right to apply. What he is entitled to in the shape of surplus might be taken to pay winding-up expenses. I refer to *Healey's* Joint Stock Companies, 449. *Buckley* on the Companies Acts, 5th ed., 133. The granting of prohibition in any case is discretionary with the Court: *Chambers* v. *Green*, L. R. 20 Eq. 552.

Hoyles, in reply. The Judge should not even issue a summons to a hearing, because Macdonald has shewn he is not a contributory, and under no circumstances could he proceed with such an application. This application is not premature. The county Judge has taken a step in the case, and we dare not risk letting it go for fear of its being held that we had waived our right to prohibition: *Shortt's* Informations, &c., 481. The provisions of the statute must

be regarded, and they are only for the benefit of the creditors: *Re Union Ranch Co. of Canada*, 15 O. R. 307.

November 13, 1888. FERGUSON, J.—The petitioner shews, by his petition and by his affidavit, that he is a shareholder who has fully paid up his shares, and also that, in the event of the company being wound up, there will be a surplus after the payment of the debts, costs, &c., in which he will be entitled to share.

From what he says the indication is, that his share of this surplus would be what might fairly be called a tangible interest, though not a large one.

The objection, and the only one taken to the proceedings, is, that the petitioner being one who has fully paid up his shares, he cannot be a contributory, and therefore cannot present a petition on or in regard to which the County Court can have jurisdiction, and for this reason this application for prohibition is made.

The Ontario Act, R. S. O (1887), ch. 183, under which the petition is presented, and the English Act 25-26 Vic. ch. 89, are the same on the subject of who may present such a petition, namely "contributories."

The cases under the English Act shew that a person holding fully paid up shares may petition; but it is contended that our Act is different in other parts which makes a difference here.

The early part of section 38 of the English Act is relied upon, together with sec. 62 of ch. 157, R. S. O. (1887). This early part of section 38 is however expressly subject to a following sub-section (4) which is the same as the section 62 above, and I am unable to see that the contention for the distinction, though ingeniously argued, is made out.

Then the law seems to be plainly stated by the late Sir Geo. Jessel in *Re Rica Gold Washing Co.*, 11 Ch. D., pp. 42, 43, and according to this I am unable to say that it has been made to appear here that Mr. McDonald is not a contributory, and that for this reason the County Court,

which by the Act is the Court in which such proceedings are to be had has not jurisdiction, even if this were the test upon the question of jurisdiction or not under the circumstances that appear.

It may be that on the hearing of the petition a different state of facts will appear, for at present there is only the petition and the affidavit of the petitioner.

The application must, I think, be refused. I cannot see my way to granting a prohibition under such circumstances.

Application refused, with costs.

G. A. B.

[CHANCERY DIVISION.]

RE HARVEY AND PARKDALE.

Municipal corporation—Expropriation of land—Reservation of foot strip across street—Damages—Award—Notes of evidence—Appointment of corporation arbitrator—Seal.

In an arbitration under the Municipal Institutions Act between the owners of a foot-strip of land across a public street, reserved by them in laying out their property into lots, and which strip had been expropriated by a municipal corporation, the owners were awarded the sum of one dollar as the value thereof.

On a motion by the land-owners to set aside the award,

Held, that they were only entitled under R. S. O. ch. 183, sec. 483, to such damages as necessarily resulted to them from the expropriation: that the loss of profit which they might have obtained in selling their lots if the street had been opened through by them could not be so regarded; nor could the benefit that would result from the opening to the land owners in the locality, and that the actual value of the land to the owners irrespective of its possible speculative value, was the test of the extent of their loss; *Stebbing* v. *Metropolitan Board of Words*, L. R. 6 Q. B. 37, approved of

Held, also, that under the circumstances of this matter, the omission to file the evidence taken by the arbitrators, was not irremediable.

Re Muskoka and Gravenhurst, 6 O. R. at p. 357, approved of.

The appointment of the arbitrator by the corporation was not under seal, but the Court declined to set aside the award on that ground, as the objection, if valid, could be taken in any proceeding to enforce the award.

Re Eldon and Ferguson, 6 U. C. L. J. 207, followed.

THIS was a motion to set aside an award made in the matter of an arbitration between Arthur Harvey and Alexander Mitchell and the corporation of the town of Parkdale.

The arbitration was as to the value of a foot strip of land reserved by the appellants in laying out a street in Parkdale, and which the corporation of that place were seeking to expropriate. Two of the three arbitrators joined in an award fixing such value at one dollar.

Harvey and Mitchell moved to set aside this award, on the grounds: (1) That the appointment of the arbitrator for the corporation was not made under seal under R. S. O. (1887), ch. 184, sec. 385; (2) that the arbitrators did not file their notes of evidence with the clerk of the corporation under sec. 401; and (3) that the said award was unjust and contrary to law, and not in accordance with the evidence given.

The motion was argued on October 3rd, 1888, before Boyd, C.

James Maclennan, Q.C., for the appellants. The question as to value is: Are the appellants entitled to substantial damages or nominal damages only? The award is liable to review on the evidence: R. S. O. (1887) ch. 184, sec. 403. The evidence shews the value at $2,000. The adjoining owners would have been willing to have subscribed that amount in order to get the one foot. The lots were sold at much lower prices, because the street did not continue through, and the appellant's should get the benefit of that now. [BOYD, C.—If the corporation had opened the street, what would the value have been?] The value of the land with the enhanced value of the neighbouring property of the owner as a set-off; but if the street had been first opened all the way through, the appellants would have got much more for their lots. As to evidence of value, see *Mills* on Eminent Domain, sec. 173; *Boom Company* v. *Patterson*, 98 U. S. S. C. R., at p. 408; *The Queen* v. *Brown*, L. R. 2 Q. B., at p. 631; *Ripley* v. *The Great Northern R. W. Co.* L. R. 10 Ch. 435. The corporation's arbitrator should have been appointed by by-law or under the corporate seal; all the powers of the council should be exercised by by-law, R. S. O. (1887), ch. 184, secs. 282, 385. There was nothing but a resolution here: *Re Smith* v. *Plympton*, 12 O. R. at pp. 31, 38; *Re Gifford and the Bury Town Council*, 20 Q. B. D. 368. The arbitrator's notes of evidence, should have been filed with the clerk of the council, sec. 401. They should be accessible to the parties in the proper custody; *Re Albemarle and Eastnor*, 46 U. C. R. 133.

James H. MacDonald, Q.C., contra. The arbitrators should only allow "due *compensation* for the lands taken," sec. 483. That is only the value of the land to the owner, not to any other person; *Stebbing* v. *The Metropolitan Board of Works*, L. R. 6 Q. B. 37; *Lloyd's* Law of Compensation, 5th ed., 69; *Cripp's* Law of Compensation, 2nd ed., 93;

Wolfe and Middleton's Law of Compensation, 109. [BOYD, C.—Is there any difference in the principle of value where there is only a local demand for the expropriation as distinguished from the public interest?] The corporation have no power to pass a by-law to create a highway in a private interest merely, but here it is a public benefit, and the corporation will have to put the place in repair and keep it so in future. It is not necessary to file the notes of evidence; *Re Northumberland and Durham and Cobourg*, 20 U. C. R. 283. Even if no notes were taken, the award will not be set aside unless it is shown that the absence of notes was material; *Re Muskoka and Gravenhurst*, 6 O. R. 352. In *Re Albemarle and Eastnor*, 46 U. C. R. at p. 190, it was held that notes should be taken, but there the validity of the award could not be determined without them. Here there was no weighing of evidence, and no notes were necessary. As to the appointment of arbitrator, in *Smith* v. *Plympton* the judgment was based on the withdrawal of authority. The applicants are estopped from denying a by-law under seal: *Wilson* v. *Port Hope*, 10 U. C. R. 405. Technicalities cannot be taken advantage of: *Russell* on Awards, 3rd ed. 199; *Slack* v. *McEathron*, 3 U. C. R. 184. If there is no appointment of an arbitrator there is no arbitration under the Act, and there is no jurisdiction for the motion: R. S. O. (1887) ch. 184 sec. 404; *In re Point Edward and Sarnia*, 44 U. C. R. 462, 467.

Maclennan, Q.C., in reply. All that the last cited case decided was that the affidavits and papers should shew that the arbitration was under the Act, and that has been done here. Full compensation must be given, and the public have no further rights in lessening the amount than private parties: *Lloyd* 68. The party from whom the property is taken is entitled to a *solatium* above the value for the compulsory taking: *Re Wilke's Estate*, 16 Ch. D. 599; *Re Mette's Estate*, L. R. 7 Eq. 75.

October 16, 1888. BOYD, C.—In 1881 a tract of land between Roncesvalles avenue and Sorauren avenue was

owned by the appellants and one Wright, Wright owning that half which adjoined Roncesvalles avenue and the appellants the half which adjoined Sorauren avenue. In that year the appellants laid out their part into building lots, and to facilitate the sale proposed to open a street through their land, and wished Wright to do the same through his, so as to connect the two avenues and form a thoroughfare. Wright objecting, the appellants opened the street (now called Duncan street) through their land to within one foot of Wright's boundary, and this strip was retained by the appellants, as stated in their affidavit, "to prevent unfair advantage being taken of us whenever Mr. Wright might wish to extend the street through his property." The appellants sold all their land in lots, and have retained only this one foot strip. Early in 1887 Wright laid out his land in lots, and opened a street to within one foot of his boundary, this strip lying alongside of the strip retained by the plaintiffs.

The corporation of Parkdale, in October, 1887, passed a by-law, at the instance of owners to be benefited, to expropriate these two feet reserved in the middle of the street, and to open up the whole at the expense of the land fronting or abutting on Duncan street. An arbitration has been had with the appellants and a majority of the arbitrators have awarded $1. The dissentient arbitrator thought that $2,000 should have been awarded. The appeal was mainly discussed in order to settle the principle whether nominal or substantial damages should be assessed.

The appellants' affidavit indicates the grounds on which they complain. Paragraph 5 states "said lots were sold for much less than they would have sold for had said street dedicated by us been continued through to Roncesvalles avenue."

And again paragraph 17 states it was proved "that our property was sold for a large sum less by reason of the said street not having been opened through from Sorauren avenue to Roncesvalles avenue, and that the said strip of land was and is worth a substantial sum to the property own-

ers upon the said street, to be taken for the purpose of opening and completing the same from avenue to avenue."

The dissentient arbitrator reports that "he considers the land to have a special value; that what the owners of the land along the street would be reasonably willing to pay to have made it a thoroughfare is the true way to find the value of the land in question."

It was stated in argument that $2,000 had been offered for this purpose, but I see no evidence of this or indeed of any sum being offered by the persons to be benefited or by anyone else. It would be erroneous, in my opinion, to base any estimate of damages on the increased amount which the appellants might have obtained on selling their lots if the street had been opened through from avenue to avenue. That is a thing of the past, and the failure to get this increased price arose from the refusal or unwillingness of Mr. Wright to have the street go through his land. This loss of profit cannot in any sense be regarded as necessarily resulting from the exercise of the power of expropriation. It is only damages that so result that can be taken into account under the Municipal Act, R. S. O. (1887), ch. 184, sec. 483.

The other element of value is derived from a consideration of the benefits that will result to the landowners in that locality by opening the street. This benefit would have resulted to the appellants if they had chosen to retain the land through which the street passes, but for their own reasons all was sold some years ago, and only this foot strip retained, which is intrinsically of no use, and of no value more than the $1 awarded.

This benefit to others is not, however, the proper way of considering the measure of compensation. The true rule was laid down in *Stebbing* v. *Metropolitan Board of Works*, L. R. 6 Q. B. 37, Cockburn, C. J., saying: "When Parliament gives compulsory possession, and provides that compensation shall be made to the person from whom the property is taken for the loss that he sustains, it is intended that he shall be compensated to the extent of his loss;

and that his loss shall be tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it:" p. 42. The question under the statute here is what damages will *necessarily* result to the appellants from the expropriation of this strip of land. The whole of the land they have there is being taken, and the question is narrowed down to the value of that which is so required and taken. To deal with this question I propose to refer to some expositions of the law.

"If the whole of a man's estate be taken * * he ought to have the whole market value of his premises, and he cannot reasonably demand more. The question is reduced to one of market value, to be determined upon the testimony of those who have knowledge upon that subject, or whose business or experience entitles their opinions to weight. It may be that * * the market value may not seem to the owner an adequate compensation; for he may have reasons peculiar to himself, springing from association, or other cause, which makes him unwilling to part with his property on the estimate of his neighbours; but such reasons are incapable of being taken into account in legal proceedings * * inasmuch as it it impossible to measure them by any standard of pecuniary value. The worth of property is to be measured by its value as an article of sale or as a means of producing pecuniary returns": pp. 705, 706, *Cooley's* Constitutional Limitations, 4th ed. "The value of the land is to be assessed with reference to what it is worth for sale, in view of the uses to which it may be applied, and not simply in reference to its productiveness to the owner in the condition in which he has seen fit to leave it:" *ib.* p. 709.

"If the owner is paid his actual damages he has no occasion to complain because his neighbours are fortunate enough to receive a benefit:" *ib.* 711 note.

These extracts from a very accurate institutional writer on American law are in harmony with the English law on the same subject. The essence of many authorities is compressed by Mathew, J., in *Wadham* v. *North-Eastern R. W. Co.*, 14 Q. B. D. 752, in these words: "You are not,

in calculating the damage for injuriously affecting the premises, to take into account any special and exceptional value which the premises may have in the possession of the then proprietor, but you are to see whether or not the value of the property as a marketable article to be employed for any purpose to which it may legitimately and reasonably be put has been interfered with or not." This case was affirmed in appeal: 16 Q. B. D. 227. The damages claimed must be the natural result of the act of the expropriating body, and though future damage flowing from past injury may be allowed, yet all must be the legal and necessary re-result of the act complained of: *Regina* v. *Poulter*, 20 Q. B. D. 132.

Mr. Maclennan argued in the manner suggested by the words of James, L. J., in *Ripley* v. *The Great Northern R. W. Co.*, L. R. 10 Ch. 538. If the corporation had left the appellants alone, they should have made so much profit: but they have interfered and the appellants will suffer so much loss—they should therefore pay the difference." That was a case dealing with the probable uses to which the land taken and injuriously affected might be put. And it was held that profits which might have been derived from the storage of water in a reservoir for the supply of mills, &c., which might be built on the rest of the land owned by the plaintiff, were to be estimated in fixing compensation. Many other cases were referred to, all going to show that in estimating damages, the prospective capabilities or the potential value of the land might be investigated and allowed for: *Mayor, &c., of Montreal* v. *Brown*, 2 App. Cas. 185. Here, however, the element of value does not arise from anything within the power of the owner or subsequent owners of the property; nor does it arise from any prospective increase of value or capability in the land, but from the fact that this strip is so placed that adjoining proprietors might be induced to buy it at a large price. The land has no real market value, but the barrier it forms might, at some time, prove so obnoxious that people would be willing to pay handsomely for its

removal. This is entirely a matter of speculation as to whether it would or would not happen. It is not to be assumed that any one would buy it at a large figure in order to throw it open to the public. It may be that a number of the property owners might combine in order to acquire it, or they might be content to continue to use the place as a *cul de sac*. It cannot be urged that it is a way of necessity which must be obtained at all hazards. Having regard to all these considerations, can it be said the damage suggested, results *necessarily* from the exercise of the corporate powers? Besides, the value of the appellant's foot of land would be *nil*, if the foot of land reserved by Wright was not secured at the same time. Thus another element of uncertainty is introduced; Wright might refuse to sell on any terms, and then of what value would be the appellant's reservation? In another point of view, why should the appellants be in a better position than if a roadway were now for the first time being forced through their land and that of Wright? Then they would get no more compensation than the value of what was taken fixed in the usual way at the market price, and no super-imposed damages would be given on the theory that adjoining owners would be willing to pay so much to have a road opened up. The contention of the appellants appears to me to rest on uncertain contingencies, based upon the conjectural action of others, by which a speculative value might be added to this strip of land. The whole claim falls within the matters excepted by Matthew, J., from being estimated as of too exceptional and problematical a character to be measured as value or damages.

The objection that notes were not taken by the arbitrators and filed as directed by the Act, sec. 401, is not one that should be held irremediable in the present case. There are two sets of notes taken, one by the arbitrators who joined in the award and the other by the dissentient now before me. The omission to file has wrought no prejudice, and the questions turn not so much on the details

of the evidence as on the principle involved in assessing the damages. The latest expression of opinion on this point, that of Cameron, C. J., in *Re Muskoka and Gravenhurst*, 6 O. R. at p. 357, I agree with.

It is objected that the arbitrator for Parkdale was appointed by resolution and not under the corporate seal as required by sec. 385 of the Act (R. S. O. (1887), ch. 184.) This provision was in force in the Municipal Act of 1858, 22 Vict. ch. 99, sec. 336 sub-sec. 8 at the time when *Re Eldon and Ferguson*, 6 U. C. L. J. 207, was decided by Richards, J. The objection there was that there was no authority in the Reeve to put the corporate seal to the submission. But the Judge was averse to setting the award aside on that ground as there was a resolution of the corporation to refer, and the council had named an arbitrator. Then he proceeds, at p. 209, thus: "I apprehend if the corporation were not bound by the submission, that would be as good a ground for the treasurer (who was the appellant) to take, on any proceeding to enforce the the award, as it is on this application—the objection would be that the submission is void for want of mutuality. I am not, therefore, disposed to interfere with the award on this ground, as it will be open for the parties to raise it hereafter, if so advised."

The decision of *Re Gifford and Bury Town Council*, 20 Q. B. D. 368, is no doubt a very strong case that the failure to observe the terms of the statute in appointing arbitrators is fatal. But it is not applicable to the point of practice now before me. The defect there was that the party who should appoint his arbitrator in writing, did so only verbally, and the application being to make the submission a rule of Court, it was held there was no submission which could be made a rule of Court, and the Court simply stayed its hand and declined to order anything.

I follow the analogy of this decision and adopt the course sanctioned by Richards, J., by saying I do not interfere with the award on the ground of this objection, but leave it open in case litigation ensues. The other case cited of

In re Smith and the Corporation of the Township of Plympton, 12 O. R. at p. 31, does not apply, as there it appears (p. 21) that the arbitrator was appointed by by-law.

This was in some sense a test case. The question of damages is one not covered by any previous decision, and while I dismiss the appeal, I do not think it is a case for costs.

G. A. B.

[CHANCERY DIVISION.]

HORTON v. THE PROVINCIAL PROVIDENT INSTITUTION.

Insurance, life—Provident institutions—Default in payment of dues—Forfeiture clauses in policies—Waiver—Estoppel.

The plaintiff's husband was the holder of two certificates of the defendants, a Provident Institution, whereby on his paying $1.50 and $2.50 respectively, semi-annually on May 15th, and November 15th, together with assessments, and conforming to the conditions thereof, the defendants promised to pay the plaintiff a certain amount on his death. Among the conditions were, that 30 days default in payment would suspend him from membership and void the certificates, and that he should then be reinstated on furnishing satisfactory proof of good health within 90 days from such suspension and paying arrears, and in the meanwhile the certificates should be void and of no effect.

Plaintiff's husband was in his ordinary good health on August 27th, 1886, but died on September 2nd, 1886, having paid all dues and assessments regularly up to May 15th, 1886. It appeared that on August 14th, plaintiff's husband received a letter from the defendants' secretary requesting payment of the dues due on May 15th, 1886, and of a certain assessment, and the same day remitted the money, and on August 21st, 1886, the defendants sent written receipts therefor, marked across their face: "Conditional that you are now in good health;" and also wrote demanding payment of a certain other assessment as due from the plaintiff's husband as a member, which communications, however, never actually reached him. On August 23rd, 1886, the plaintiff wrote to the defendants offering to pay the assessment; and on the same day the defendants replied that they had received the money, and forwarded the receipts to the plaintiff's husband, and added that they trusted that this would be satisfactory. The plaintiff's husband was retained in the defendants' books as a member all the while, and the certificates were never cancelled. It also appeared that it had not been the general practice of the defendants to hold members to the strict terms of payment. The plaintiff now brought this action against the defendants to recover upon the certificates.

Held, that she was entitled to judgment, for the evidence shewed that there was no intention up to her husband's death and for some time thereafter to take advantage of his default in payment, and the receipt of the money in August by the defendants and their crediting him on the books therewith, clearly revived the certificate, and the defendants could not be allowed to fall back on the default in order to destroy the plaintiff's right.

THIS was an action brought by the widow of one Peter Horton, deceased, against the Provincial Provident Institution, to recover the amount of two certificates held by her late husband, under the circumstances fully set out in the judgment.

The action was tried at the May Sittings of this Division, at St. Thomas, before Robertson, J.

W. R. Meredith, Q. C., and *W. Horton*, for the plaintiff.
McDougall, Q. C., and *J. S. Robertson*, for the defendants.

July 24th, 1888. ROBERTSON, J.—This action was tried before me at the Sittings, at St. Thomas in May last, and is brought by the plaintiff, who is the widow of the late Peter Horton, and a beneficiary under two certificates issued by the defendants, numbered 613 and 614 respectively, and dated on the 19th April, 1884. The head office and business of the defendants is carried on in St. Thomas. The certificates in question are in two classes. No. 613, is in class A., Benefit Fund No. 2. No. 614, is in class A., Benefit Fund No. 3, and it is witnessed thereby, that on payment of $1.50 and $2.50, respectively, semi-annually, on 15th May and 15th November, "together with the assessments for death losses, life benefits, and annuities claims according to the tables printed hereon," the Provincial Provident Institution "doth hereby issue this certificate of membership to Peter Horton, &c., upon the following agreements: That upon the death of the said member, while this certificate is in force, he having conformed to all the conditions thereof, the Provident Provincial Institution, will within 30 days after due notice and proof of said death pay to his wife, Emily L. Horton, or to her legal representatives, &c., the amount of one assessment made upon the surviving members of class A. and B. Benefit Fund No. 2 in the case of No. 613, and of class A. and B. Benefit Fund No. 3 in the case of No. 614, of the Institution in accordance with the tables above mentioned; provided however, that such payments shall not exceed $2,000," in case of No. 613, and $3,000 in case of No. 614. The certificates are moreover declared to be issued and accepted by the said member, on the following (among other) conditions: "7. Semi-annual dues being payable on May 15th, and November 15th, no regular notices thereof will be sent. Thirty days default in payment will also suspend said member and void this certificate. 8. The member so suspended shall be reinstated only by furnishing a fresh medical

examiner's report, or *other proof of good health* satisfactory to the institution, within 90 days from date of suspension and paying all arrearages; and during the period from the expiration of the 30 days from date of notice of assessment, or maturity of the dues, until the date said member is recorded and reinstated upon the books of the Institution, this certificate shall be void and of no effect."

The defence relied on was the non-compliance by Peter Horton of these two conditions. In reply the plaintiff alleges a waiver by the defendants, by the receipt of the semi-annual dues by the defendants after the lapse of 30 days, as well as an assessment after the time had elapsed for payment, the dues being payable on May 15th, '86, and the assessment, on account of the death of one Samuel Park, a late member, $2.06, in all $4.56.

I find the following facts:

1. When Peter Horton became a member on April 19th, 1884, he resided in the city of London, Ontario.

2. In November, 1885, he left his home and went to Mobile, in the State of Alabama, and was there engaged getting out timber.

3. He left Mobile a few days prior to August 27th, 1886, on which day he returned to his home at London, Ontario, where his wife, the plaintiff, had remained during his absence.

4. All dues and assessments were regularly paid by him up to May 15th, 1886.

5. During Horton's absence in Mobile, the notices of dues and assessments, as well as circular letters, sent out by the defendants from their head office, were addressed to him, properly, at Mobile, but there was no satisfactory evidence of when they were mailed in St. Thomas.

6. On the August 14th, 1886, a card and letter from Mr. John Baird, the secretary of the defendants, sent from the head office, were received at Mobile, by Horton, requesting payment of his semi-annual dues, due on May 15th, '86; $1.50 on No. 613, and $1.00 on No. 614, and an assessment made on account of the death of the said late member, S. Park, $2.06, in all $4.56.

7. On the said 14th day of August, Horton remitted in a letter, directed to the secretary, the sum of $5.00. In this letter, Horton said: "Your card and letter just reached me, and enclose you at once, $5.00, as I can't make exact change." This letter with its enclosure was received at the head office of the defendants' in due course, and two receipts on postal cards, bearing date respectively on August 21st, '86, were issued by the defendant's secretary, directed to Horton at Mobile, and posted on that day at St. Thomas. One was in these words:

"The Provincial Provident Institution,

Semi-annual dues on certificate No. 613.....	$1.50
" " " " " 614.....	1.00
To 15th November, 1886.....	$2.50

Received payment, John Baird, Secretary."

The other was in these words: "The Provincial Provident Institution receipt for fourth mortuary assessment. This assessment was made on account of the death of Samuel Park of Heathcote, Ontario. Received from Peter Horton, assessment on certificate No. 613, Fund No. 2, $2.06. John Baird, secretary."

Across each of these receipts and written in red ink, are the words: "*Conditional that you are now in good health.*"

On the same day (August 21st, '86), another post card was sent from the head office, and posted on the same day, and directed as above, notifying Horton that "an assessment to Reserve Fund, is now due from you on certificate No. 613, $2.06," in terms of the following: "To create a Reserve Fund, each member shall contribute an amount equal to one assessment within two months from date of his certificate, and five per cent. of all assessments shall be added to this Fund."

"Please remit the amount by post office order to John Baird, secretary."

To this card a postscript is added by the secretary, in writing. "The 44 cents you can apply on this, and pay when you come home."

8. On August 23rd, '86, the plaintiff wrote a letter, which was duly received by the defendants' secretary, in these words:

"LONDON, August 23rd, 1886.

"JOHN BAIRD Esq.,

"SIR,—I am sorry to trouble you again, but I forwarded your letter to Alabama, to Mr. Horton, but he has not received it, so if you will kindly send me the amount due, and your pamphlet, I will attend to it myself, and not risk it getting lost again, and oblige, respectfully, &c.

"MRS. P. HORTON."

On August 24th, '86, the secretary wrote to Mrs. Horton, in the following words:

"MRS. P. HORTON,

London.

"DEAR MADAM,—Yours of the 23rd inst., to hand, and in reply would say, we received the money from Mr. Horton, on Saturday last, all right, and forwarded the receipts to him at Mobile, Alabama. Trusting this may be satisfactory, I remain yours, &c.,

"JOHN BAIRD,

"*Sec. Prov. Prov. Ins.*"

9. That the said Peter Horton, never was suspended by the Institution, but on the contrary that he was retained and kept on the books of the Institution, as a member in good standing.

10. That the plaintiff, being the beneficiary under both said certificates, was induced by the secretary of the defendants to believe, and did believe, up to the time and after making her declaration on September 27th, 1886, as to the death of the said Peter Horton, which declaration was prepared for the plaintiff in the head office of the defendants, by one of their officials, that the said Peter Horton, was at the time of his death, a member of the said Institution in good standing.

11. I find also that the said Peter Horton, on the 27th day of August, 1886, being the day on which he returned to Canada, was in his ordinary good health, and that he so

continued until the 2nd September, when he was stricken with the disease of which he afterwards died, on the 6th day of that month, being *cerebral meningitis*, caused by exposure to the heat of the sun.

12. I also find that the three postal cards of 21st August, never reached Peter Horton, but after his death came to the hands of the plaintiff, having been forwarded from Mobile, so that Horton never knew that the receipts were "conditional," nor did the plaintiff until after his death.

On these findings I am of opinion that the plaintiff is entitled to recover. In my judgment, it never was the intention of the defendants' Institution to treat Peter Horton as a suspended member. The secretary himself swore that nothing was done or recorded in the books to indicate that he was suspended, and the certificates were not cancelled. He also said on his examination before the examiner after issue joined that he was "reinstated." Taking the whole conduct of the defendants into consideration, I am satisfied that there was no intention up to the time of Horton's death, and for some time thereafter to take advantage of the non-payment of the dues and assessment, which should have been paid within 30 days after the 15th May, and the receipt of the money in August, by the defendants, and crediting him in the books therewith clearly revived the the certificates; and the defendants should not now be allowed to fall back on the default in order to destroy the plaintiff's rights. It will be observed that the person most interested in keeping these certificates in force was the present plaintiff; it was to her individually, in case of her husband's death, that the amounts called for by them were to be paid; and it was manifest that she so regarded it, and notified the Institution to that effect, when she wrote to secretary Baird the letter of 23rd August, and it is clear that the defendants so treated her as being the most interested party. And what do we find the secretary doing? In reply to that letter he writes to the plaintiff, and tells her that the money had been received from her husband "on Saturday last, all right," "and the receipts forwarded to

him at Mobile," and wound up his note by expressing himself in these words "trusting this may be satisfactory, I remain yours, &c., John Baird, Secty. the Prov. Prov. Inst." Now how could it be "satisfactory" or how could he have the "trust" that it was "satisfactory" unless it was that he meant then to convey the idea that these certificates were in full force, and that so far as the payment of the dues and assessment about which she had been writing were concerned, all was "satisfactory"; and if "satisfactory," then *per consequence*, the certificates were in full force and effect and her husband was a member in good standing. I find that the evidence establishes that it has not been the practice of these defendants, to hold their members to such payment within the times mentioned and prescribed by the by-laws, regulations and the conditions, &c. On the contrary they are exceedingly anxious to retain all their members, and they only exercise the rights which they have when it suits them to do so; and the evidence of secretary Baird is positive as to this, and it so appears in one of their circulars, one of which was sent to Horton, some time in July 1886. It has these words in it: "We do not wish to take any undue advantage of such an oversight and cancel the certificate, as we might through payment of dues being behind a few days."

It is clear law, and there are authorities without number in the English, Canadian and American law reports in support thereof, that an insurance company may waive any ground of forfeiture or defence, and such waiver may be by express words, or by acts, and such waiver, too, may be by its immediate officers, as it was in this case, or by its agents; and when a waiver is once expressed, it obliterates the past so far as anything has occurred to forfeit the policy; for it is universally held that provisions declaring policies void on certain contingencies, are intended for the benefit of the insurers, and though the language in such cases usually is, that the policy "shall be void" not "shall be voidable," yet it is a provision inserted for the benefit of the insurers and may be waived by them. See *North*

Berwick Company v. *New England F. and M. Insurance Company*, 52 Me. 336; *Smith* v. *Gugerty*, 4 Barb. 614; *Buckbee* v. *United States Insurance Annuity and Trust Company*, 18 Barb. 541; *Viall* v. *Genesee Mutual Insurance Company*, 19 Barb. 440, and numerous other cases cited therein. I find another very important American case, the facts in which are very like those in the case now before me. In giving judgment in that case, the learned Justices said: "We are of the opinion that as the policy provides that in case the annual premium required by it should not be paid in advance, as therein mentioned, the defendants should not be liable for the payment of the sum insured, or any part thereof, and the policy should cease and determine, it was optional with the defendants, on such non-payment, to consider and treat the policy as being at an end to all intents and purposes, in which case they would be absolved from all claim or liability thereon; but as that provision was inserted for the sole benefit of the defendants, it was only voidable at their election, and it was therefore competent for them to waive a strict compliance with it, after the time stipulated for the payment of such premium, and that in case of such waiver the policy would be revived and continue obligatory on the defendants on its original terms; and further, that the reception by them or their authorized agent of the premium, for that purpose, after that time, would have the effect of reviving and continuing the contract evidenced by the policy, as though it had been strictly complied with by the assured:" *Boulton* v. *the American Mutual Life Insurance Company*, 25 Conn. 542. If it had been the intention of these defendants to take advantage of the non-payment in this case, it was their duty to have notified the assured that he was a suspended member and that they would not receive the premium, &c., until he brought himself within the provision of condition No. 8, which they now invoke, and to have put him or his wife, the beneficiary, on notice as to their rights, but instead of doing this, the secretary writes to say, the money was

received from Mr. Horton on "Saturday last, all right," and the receipts forwarded and trusting that this (to her, the beneficiary), might be considered satisfactory; and moreover the fact of the assessment notice to the "Reserve Fund," also sent on 21st August, 66 days after the 30 days after the payment of the semi-annual dues, on 15th May, had expired, is cogent evidence that on that 21st day of August, he was dealt with and treated by the defendants, as a member in good standing, and was so treated and considered by them. See also on this point, *Wing* v. *Harvey*, 5 DeG. M. and G. 265; *Sapple* v. *Cann*, 9 Ir. C. L. R. 1 and 4 Ir. Jur. N. S. 72; *Acey* v. *Fernie*, 7 M. & W. 151; *Edge* v *Duke*, 18 L. J. Ch. 183; *Smith* v *Mutual Insurance Company of Clinton*, 27 C. P. 441, 448; *Cornish* v. *Abington*, 4 H. & N. 549.

On the whole, therefore, I enter a verdict for the plaintiff, for the amount admitted at the trial, to be due, should the plaintiff be entitled to recover, viz: $2,443 being $2,000 on certificate No. 613, and $443 on certificate No. 614, together with interest thereon from October 7th, '86, which, I make up at $263: total $2,706. And I order judgment to be entered for the plaintiff for the latter sum with full costs of suit.

There were several objections taken by plaintiff's counsel, at the trial, as to the legality of the by-laws, &c., which would be worth considering, had I not come to the conclusion above stated, which makes it unnecessary for me to pass an opinion upon them.

A. H. F. L.

This case has been carried to the Divisional Court, and was argued on December 19th, 1888, and stands for judgment.—REP.

[CHANCERY DIVISION.]

RE MARA.

Vendor and Purchaser Act—R. S. O. (1887) ch. 112—Memorial of assignment of mortgage endorsed on mortgage—Discharge by assignee—Recital of assignment.

In an application under the Vendor and Purchaser Act, R. S. O. (1887) ch. 112, it appeared that a registered memorial of a deed poll or indorsement executed by the party assigning made on the back of a mortgage (describing it) *habendum* "to have and to hold the said mortgaged premises unto (assignee) his heirs and assigns, &c., * * subject to the provisioes and conditions in said mortgage, which said deed poll or indorsement by way of assignment, is witnessed," &c., was offered as evidence of the assignment.

Held, sufficient.

A discharge of mortgage executed by an assignee thereof contained these words, "and that such mortgage has been assigned to me," without giving the particulars of the dates of and parties to the assignment, was also

Held, sufficient.

THIS was an application under the Vendor and Purchaser Act R. S. O. (1887) ch. 112.

It appeared that the vendor was making title through a mortgage dated October 10th, 1847, made by one Thomas Gladwin Hurd to one Richard Hull Thornhill.

This mortgage had been assigned to one Wellesley Richey, and the evidence offered to prove the assignment was a registered memorial in these words: "A memorial to be registered of a deed poll or indorsement made the day of July, 1848, made by Richard Hull Thornhill, of * * on the back of a mortgage deed dated 23rd October, 1847, between (describing the above mentioned mortgage) to have and to hold the said mortgaged premises unto Wellesley Richey, of * * his heirs and assigns, to and for his and their sole and only use forever, subject to the provisoes and conditions in said mortgage, which said deed poll or indorsement by way of assignment is witnessed &c., * * and this memorial thereof is required to be registered by me the said Richard Hull Thornhill, in the indorsement mentioned. Witness, &c."

It also appeared that a certain other mortgage registered on the land had been discharged by an assignee, and the discharge instead of reciting the assignment with the usual particulars of names of parties and dates, merely had these words as to same after particularizing the mortgage: "and that such mortgage has been assigned to me," followed by the usual words as to being entitled to receive the money and that the mortgage was discharged.

The application was argued on November 28th, before Ferguson, J.

Frank Denton, for the petitioner. The assignment of the Thornhill mortgage was sufficient, and is proved by the memorial: C. S. U. C. ch. 89, sec. 19; *Armour*, on Titles, 84, 85. The discharge of the mortgage is sufficient as complying with R. S. O. (1887) ch. 114, sec. 69, as being in the form of Schedule J, *or to the like effect*. A liberal construction should be given in this matter: *Carrick* v. *Smith*, 35 U. C. R. 348; *Sayles* v. *Brown*, 28 Gr. 10.

Coatsworth, contra. The memorial does not contain sufficient evidence to shew that the mortgage *was assigned*. The discharge does not set out the day and date of the registration of the assignment, and the names of the parties as provided in the statutory memorandum of instructions in Schedule J.

November 28, 1888. FERGUSON, J.—I think that the wording of the memorial sufficiently proves that the mortgage was assigned, and that Wellesley Richey was the person to whom it was assigned. I also consider the wording of the discharge sufficient to comply with the statute directing the form or Schedule J to be used, and that the words used are *to the like effect* with that form. My opinion is in favour of the petitioner on both points; and I decide that, as far as they are concerned, he can make a good title.

Petition allowed.

G. A. B.

[QUEEN'S BENCH DIVISION.]

FINCH V. GILRAY.

Landlord and tenant—Payment of taxes by tenant—Rent—Real property Limitation Act.

Where there is no contract between landlord and tenant as to payment of taxes on the demised premises, the landlord must pay them; and therefore a contract for payment of the taxes by the tenant must be regarded as part of the compensation which the landlord receives for the use of the land.

And where the tenant agreed to pay the taxes and six dollars monthly in addition as rent, and did pay the taxes during the whole period of his possession, but did not pay anything else for about eighteen years:

Held, STREET, J., dissenting, that the payment of taxes was equivalent to payment of part of the rent, and prevented the running of the statutory period of limitation prescribed by the Real Property Limitation Act.

Per STREET, J. The tax collector could not be treated as the agent of the landlord, and the payment of taxes was not sufficient to take the case out of the statute.

THIS was an issue directed by the Court of Appeal, and the question to be tried was whether at the time of the levying by the sheriff of York of the money levied by him upon an execution against the property of John Finch, and remaining in his hands in pursuance of the Creditors' Relief Act, there was a debt to any and what amount overdue from the said John Finch to Jane Finch, the plaintiff, as executrix of the last will and testament of Richard Finch, deceased, for the rent mentioned in her affidavit filed in accordance with the Creditors' Relief Act, on or about the 2nd day of October, 1886.

The defendant Gilray was a judgment creditor of John Finch, mentioned in the issue. Jane Finch, the plaintiff, as executrix of Richard Finch, deceased, claimed to be a creditor of John Finch to the amount of $2,244:

For rent of house and premises, No. 59 University Street, at $96 per year, from 24th December, 1867, to 24th December, 1872	$480 00
Rent from 24th December, 1872, to 24th December, 1878, at $120 per year	720 00
Rent from 24th December, 1878, to 24th March, 1886, at $144 per year	1044 00
	$2244 00.

Certain property of John Finch had been sold, and the money being in the sheriff's hands, the claim of the defendant came into conflict with that of the plaintiff in the apportionment under the Creditors' Relief Act. The matter came for decision before the learned Judge of the County Court of the county of York, who did not direct an issue, but disposed of the question himself in a summary manner, and reduced the plaintiff's claim to $153. She appealed to the Court of Appeal from this decision, and that Court, being of opinion that an issue should have been directed to one of the Divisions of the High Court of Justice, themselves directed the issue to be tried by the Queen's Bench Division, and it came on for trial at the Toronto Winter Assizes, 1888, and was tried without a jury by Street, J.

The only witnesses were the plaintiff, Jane Finch, and her daughter-in-law, Kate Finch, the wife of John Finch.

It appeared from the evidence of Jane Finch that her husband had always left his business matters in her hands, and that she had always looked after his rents and managed the property in question. In 1867 she let it to her son John Finch as tenant, at a monthly rental of $6 and the taxes. He remained in possession from that time until March, 1886. He paid his rent up to Christmas, 1867, but never paid any for any period later than that. He was always assessed as tenant of the place, and his father as owner. The plaintiff, acting as agent of her husband, frequently went to the house in which John Finch lived, upon the premises, and asked him to pay the rent. Upon these occasions he always promised to pay up the arrears as soon as he was able to do so, and to pay his rent punctually for the future. These demands were made frequently in the the earlier part of the tenancy, but not so frequently afterwards. There was never at any time, however, she thinks, a period exceeding three years between any two occasions. She did not push her son for the rent because he had a good deal of trouble, and she hoped from time to time he would do better and would pay. At the

request of her husband she consulted a lawyer, about six years ago, who wrote her son a letter to endeavour to bring about a settlement, but without success.

Kate Finch, the wife of John Finch, stated that her husband always occupied as tenant to his father, and not in any other capacity. She had often heard Mrs. Finch ask John Finch for the rent at the house, and always heard him promise to pay it. Mrs. Finch lived upon the rear of the same lot as that upon which John Finch lived. A yard was common to both houses, and was used by both families.

Probate of the will of Richard Finch, dated 12th April, 1886, was produced. He died on the 15th April, 1886, and the probate was granted to his widow, the plaintiff. By his will he devised the property in question to his widow for life, with remainder in fee to John Finch. He appointed his wife executrix, and two other persons trustees, and directed that it should not "be incumbent upon them to exact or collect any rent from my son John Finch for the dwelling house he now occupies, being lot No. 59, University Street."

On 13th September, 1886, the son, John Finch, gave to his mother, as executrix of his father, a written acknowledgment of his indebtedness to her as such executrix in the sum of $2,244, made up as above mentioned. With regard to this the plaintiff said in her evidence that she did not ask John to give it to her; that he was willing to give it to her, being willing that she should have a share of the rent that was due, if he should lose the property.

January 19, 1888. STREET, J.—The actual understanding of the parties that the son, John Finch, was really during this whole period holding the land merely as tenant, is evidenced by the manner in which he was assessed, by the application to him through the medium of a solicitor, and by the terms of the will of the father, all of which corroborate in some important respects the statements of the witnesses upon other points, and I think that was the actual understanding between them.

The plaintiff, as her husband's agent, entered upon the land at periods never exceeding three years for the purpose of demanding payment of the rent. Her son never disputed her right to do so, but promised payment of the past rent and of the rent to become due in the future, and was from time to time allowed to continue in possession. This is the strongest way in which the facts can be put in favor of the plaintiff's rights, and I cannot come to the conclusion that they are sufficient to prevent the running of the Statute of Limitations.

The tenancy here was not a tenancy at will, but was either a tenancy from year to year or a monthly tenancy. The visits of the plaintiff to her son, the tenant, were not intended by her to assert any dominion over the land of which her son was in possession, nor to terminate his existing tenancy and create a new one, and neither she nor the tenant ever supposed that any new tenancy was being created. All she went for was to try and get her son to pay the rent. Treating him as a yearly tenant, which the fact of his tenancy obliging him to pay the taxes, and the form in which his acknowledgment of indebtedness is made, would appear rather to indicate, the statute began to run in the autumn of 1868.

"When the statute has once begun to run it would seem on principle that it could not cease to run unless the real owner, whom the statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so restored either by entering on the actual possession of the property, or by receiving rent from the person in the occupation, or by making a new lease to such person, which is accepted by him; and it is not material whether it is a lease for a term of years, from year to year, or at will:" *Day* v. *Day*, L. R. 3 P. C. 751, 761.

I do not think that the original tenancy in the present case was ever terminated, or that any new one was ever created, and, therefore, I think that the right of the father, Richard Finch, was extinguished in the autumn of 1878, say at 1st November in that year. See *Keffer* v. *Keffer*, 27 C. P. 257.

The tenancy in the case of *Cooper* v. *Hamilton*, 45 U. C. R. 502, was held to be a tenancy at will, and was held to have been determined by what took place there, and a fresh tenancy at will was considered to have begun, which broke the running of the statute to that date.

In *Hooker* v. *Morrison*, 28 Gr. 369, there were indisputable acts of ownership done upon the land, which were held to give a new commencement to the operation of the statute.

John Finch then, after the autumn of 1878, having possession of the property, and the title of the only person who could turn him out of it having been extinguished, continued to cause himself to be assessed as a tenant only, and continued his periodical promises to his mother to pay the rent which he owed.

I think these promises should be treated as having been made under a mutual mistake of fact, and that the payment of the rent claimed for the period after the autumn of 1878, which the son promised to pay, could not have been at any time enforced against him, and that in fact no debt really existed in respect of it.

The fact that the son continued to pay the taxes throughout is urged as being an annual payment of a part of the rent, sufficient to prevent the statute from running; but no case was cited in support of this contention, and unless the tax collector could be treated as the agent of the landlord, which I cannot hold, the payment cannot be treated as one sufficient to take the case out of the statute.

I think, therefore, that at the time the acknowledgment was given by John Finch to his mother on 13th September, 1886, all that was really due her was rent from Christmas, 1867, to, say, 1st November, 1878, when his father's title was extinguished.

The word "rent" in the 4th sec. of ch. 108, R. S. O., and in the 15th sec. of the same statute, means "rent charge," and not the rent payable under an ordinary tenancy, and the right to recover the latter is not, therefore, affected by the latter clause, which extinguishes the right and not the

remedy only. There was, therefore, a debt payable in respect of this rent by John Finch to his mother as executrix of his father on 13th September, 1886, for the period from Christmas, 1867, to 1st November, 1878, the remedy by action for which only was barred, and that remedy was revived by the acknowledgment in writing then given. After the 1st November, 1878, this debt was never increased because the son was in possession of land to which the right of every other person was extinguished, and his promises to pay rent, made under a mistaken belief that his father still remained owner, did not create a debt which the father could have enforced.

I therefore find upon the issue directed that there was a debt to the amount of $786 due from John Finch to the plaintiff as executrix of the last will and testament of Richard Finch, deceased, for the rent mentioned in her affidavit filed. I allow rent only at the rate of $6 a month throughout, because no proof was given of any contract by the son to pay an increased rent. I allow eleven years rent, less one month.

In Easter Sittings, 23rd May, 1888, *Wallace Nesbitt*, for the plaintiff, moved that the verdict or judgment given in this action should be increased to the full amount claimed by the plaintiff, and that such judgment should be varied in so far as it holds the plaintiff's rights as owner are barred of the property, and should direct that the interest of the said John Finch in the said property is and was under the will of the said late Richard Finch, deceased, and that he is not owner by force of the Statute of Limitations.

J. B. Clarke, for the defendants, shewed cause.

November 9, 1888. ARMOUR, C. J.—The facts are fully stated in the judgment appealed from except in this, that John Finch, besides entering into possession of the land in question as tenant of Richard Finch, upon a contract to pay as compensation for the use thereof a monthly rental of $6 and the taxes, and being always thereafter assessed as ten-

ant thereof, and Richard Finch being assessed as owner, always thereafter paid the annual taxes assessed in respect thereof.

If there had been no contract as to the payment of the taxes, Richard Finch would have had to pay them. See *Dove* v. *Dove*, 18 C. P. 424; R. S. O., (1887), ch. 193, sec. 24; so that the payment of the taxes must be regarded as part of the compensation which he received for the use of the land.

If the contract between John Finch and Richard Finch had been, instead of the contract which was made, a contract that John Finch should pay as compensation for the use of the land the taxes only, this would have constituted John Finch a tenant from year to year, according to the decision of this Court in *Davis* v. *McKinnon*, 31 U. C. R. 564, and as long as John Finch paid the taxes, his payment of them would be ascribed to his contract, and the statutory period of limitation would not begin to run.

It has been frequently held at *nisi prius*, and once in this Court since I have sat here, that the payment of the taxes under such a contract prevented the running of the statutory period, and was equivalent to the payment of rent. And in *Davis* v. *McKinnon* the Court say (p. 568): "If the parol agreement had been to pay Mrs. Davis every year an amount equal to the amount of taxes assessed against the two lots, that would certainly be a rent, and create a tenancy from year to year. We cannot see any difference when it is agreed that the amount should be payable direct to the collector. It is a payment for the benefit of the owner and landlord, and the stipulated compensation of the latter for the occupation of the premises. The compensation has all the attributes of rent; an annual payment, which could be reduced to a certainty, and payable on account of the enjoyment of the land."

If such would have been the effect of the payment by John Finch of the taxes upon a contract that he should pay as compensation for the use of the land the taxes only, the same effect would follow the payment by John Finch

of the taxes upon a contract by him to pay as compensation for the use of the land the taxes and $6 monthly in addition thereto.

I say nothing as to the effect of the frequent entries upon the land of the agent of Richard Finch, and the frequent promises there made by John Finch to pay the rent, as in effect acknowledgments of a then existing tenancy, or as the creation of a new one, but simply refer to such authorities as *Ryan* v. *Ryan*, 4 A. R. at p. 581; *S. C.*, 5 S. C. R., per Gwynne, J., at p. 405; *Workman* v. *Robb*, 7 A. R. 389; *Cooper* v. *Hamilton*, 45 U. C. R. 502; and *Bennett* v. *Turner*, 9 M. & W. 643, in which latter case it appeared that in the year 1829 the defendant, being one of the assessors for the land tax in the parish, signed an assessment in which he was named as occupier of the farm in question, and the lessor of the plaintiff was named as the proprietor, and the Court there said (p. 646): "But we find that in 1829 the defendant signs an assessment in a form which can hardly be reconciled to any state of things except a rightful tenancy of some sort, and none other appearing, and no rent being paid, there must be a tenancy at will. At all events, that document was evidence to go to a jury as to the creation of a new tenancy, which is sufficient to shew that the learned Judge was right in so leaving it to them."

I place my judgment simply upon this ground; that the payment of the taxes by John Finch as part of the compensation which he by virtue of his contract with Richard Finch had agreed to pay for the use of the land in question must, under the circumstances, be regarded as a payment of rent within the meaning of the Real Property Limitation Act, so as to prevent the running of the statutory period thereby provided.

The judgment of my brother Street should, therefore, be varied by increasing the amount found by him to the sum of $1,290, as in all other respects I agree with his judgment.

FALCONBRIDGE, J.—I agree with the judgment just delivered, for the reasons therein stated.

STREET, J.—I retain my former opinion.

Order accordingly.

[CHANCERY DIVISION.]

MCDONALD V. MCDOUGALL.

Evidence—Registered memorial of will twenty years old—Possession consistent with.

A registered memorial twenty years old of a will executed by a devisee when possession of the land has been consistent with the registered title, is good evidence of the devise therein contained. *Gough* v. *McBride*, 10 C. P. 166, specially referred to.

THIS was an action brought by D. A. McDonald against Ann McDougall to recover possession of certain land under the circumstances set out in the judgment.

The action was tried at Cornwall on October 23rd, 1888, before Rose, J.

The evidence showed that the plaintiff claimed title under a deed dated March 27, 1872, from one John McDougall, and by possession in himself and the said John McDougall under the statute of limitations. John McDougall died September 27th, 1881.

The defendant claimed under a deed from one James McDougall, who was a son of the said John McDougall, and also under the will of James McDougall's grandfather, dated September 10, 1831; and a memorial thereof dated December 10, 1832, and registered the following day, containing the following statement: "He did also bequeath and give to James

McDougall, his grandson (describing the land), so as not to deprive his father during his lifetime," was offered as evidence to prove the will.

D. B. McLennan, Q.C., and *J. W. Liddell*, for the plaintiff. The memorial is not admissible as proof of a devise by John McDougall, the grandfather, because the devise is not shewn tohave been followed by possession in John, the son: *VanVelsor* v. *Hughson*, 9 A. R. 390; *Mulholland* v. *Harman*, 6 O. R. 546. There is no evidence to shew who was in possession from the testator's death in 1832 to about 1846. The possession which the statute requires is actual occupation. Constructive possession is not sufficient. There is no privity between the plaintiff and Donald McDougall, the devisee who executed the memorial. The defendant is limited to the statutory right to use the memorial as evidence, and must comply strictly with the terms of the statute. According to the true construction of the will, a life estate is not given to John. Where the fee simple is devised to one, the Courts will not carve out of it an estate for life to another, except where there are words of positive gift. A liberal construction is only given to the words where it is necessary to do so to prevent intestacy.

James Leitch, and *R. A. Pringle*, for the defendant. The land is devised to James McDougall in fee simple, but his estate in fee is cut down by the devise to his father during his lifetime. The defendant claims title by deed from James McDougall, dated 7th January, 1887. John McDougall, son of John McDougall, and father of James McDougall, died on 27th September, 1881. James's right did not accrue until his father's death. John McDougall, the father of James, was in possession many years before the plaintiff obtained from him his deed of 27th March, 1872. This shews that John was occupying the land in question as for his life estate, and that his possession was consistent with the will which was registered. The memorial is good evidence. Prior to the Vendor and Purchaser Act, R. S. O. (1887), ch. 112, sec. 1, memorials

were at best secondary evidence. Since the passing of that Act registered memorials of all discharged mortgages and registered memorials twenty years old and other instruments are primary evidence. Sub-sec. 3 of sec. 1 includes memorials of wills. That sub-section speaks of "other instruments" without any reservation, and memorials of these instruments, if executed by the grantor, or "in other cases," if possession has been consistent with the registered title, shall be sufficient evidence without the production of the instruments to which the memorials relate. Of course the memorial of a will could not be executed by the grantor or devisor, but that is provided for by the expression "in other cases," if possession has been consistent with the registered title. The possession of John was consistent with the registered title; that is, the registered will of John McDougall, the father of John McDougall, and therefore the memorial is primary evidence of the will. The memorial of the will was executed as the law requires. The plaintiff, when he purchased the land from John McDougall, was aware of the contents of the will, but he says he thought that John McDougall was so long in possession that the plaintiff had a title. Apart from the notice he had under the Registry Act, he had actual knowledge of the title to the land he was buying.

The learned Judge reserved his decision, and subsequently gave the following judgment:

November 13, 1888. ROSE, J.—This was an action to recover possession of land.

The plaintiff claimed under a deed from one John McDougall, dated 27th March, 1872. John McDougall had been in possession for many years prior to that date, so long, indeed, that no witness spoke of a time when he was not in possession, at least, I so recollect the evidence.

The defendant claimed title under a deed from one James McDougall, son of John. James' title rests upon a will of John McDougall, father of John, the plaintiff's grantor.

The evidence of the will tendered was a memorial dated

the 10th of December, 1832, registered on the 11th of December, 1832, by Donald McDougall, one of the devisees named in the will. The affidavit of execution was sworn on the 10th of December, 1832, by one of the subscribing witnesses to the will. The will is stated by the memorial to have been dated on the 10th of September, 1831.

So far as it affects the land in question the memorial is as follows: "He did also bequeath and give to James McDougall, his grandson, the rear half of the west half of said lot *so as not to deprive his father during his life-time.*"

Admittedly the will has been lost.

The plaintiff objects to the reception of this memorial as evidence on the grounds: 1. that the possession had not been consistent with the registered title—and there being no privity between the plaintiff and the defendant that the defendant must be held to strict proof of title.

2. That if admissible the contents did not shew an estate for life given to the testator's son John, the plaintiff's grantor, and therefore John, the grantor, had a title by possession, and James, his son, having been out of possession more than the prescribed period had no right to possession, or to transfer to the defendant.

The defendant relied upon the Vendor and Purchaser Act, R. S. O. (1887), ch. 112, sec. 1, and claimed that as John, the plaintiff's grantor, and father of James, died on the 27th September, 1881, James' right of action did not accrue until then, and so the plaintiff was not entitled to possession.

The plaintiff's counsel referred to *Van Velsor* v. *Hughson*, 9 A. R. 390, at p. 400.

It seems to me that the authorities referred to, and the observations of Hagarty, J., in *Gough* v. *McBride*, 10 C. P. 166, referred to in *Van Velsor* v. *Hughson*, afford an answer to the plaintiff's objection to the reception of the memorial as evidence.

Here James leaves his father in undisturbed possession of the land until his death; and if the words of the will, as

evidenced by the memorial, are to be construed as giving a life estate to John, then I must hold that the possession has been consistent with the registered title, and that the memorial is good evidence of the devise, and it probably would have been so held, apart from the Vendor and Purchaser Act. See observations of Lord St. Leonards, cited in *Gough* v. *McBride*, *supra*, at pp. 169-70.

And I think the fact of possession shews that the parties construed the will as giving John, the father of James, an estate for life; and, therefore, I should hold that when the testator gave the farm to his grandson, but "so as not to disturb his father during his lifetime," he intended to state what all parties then understood, that during his lifetime he, the father, should not be disturbed in the possession of the land.

If such was the testator's intention, and if he has expressed it by using the above words, James could not have brought an action for possession during his father's lifetime, and so the plaintiff's grantor acquired a title not under the statute, but under the will: *McPhail* v. *McIntosh*, 14 O. R. 312.

In my opinion the plaintiff, by the conveyance, only obtained the life estate, and that having ended on the 27th September, 1881, he is not entitled to possession.

The action must be dismissed, with costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

GRANT v. CORNOCK.

Husband and wife—Breach of promise of marriage—Statute of Limitations—Successive promises—Independent contracts—Justification of breach—Use of obscene language by the plaintiff—Mitigation of damages—General reputation.

In an action for breach of promise of marriage the jury found that there was at first a mutual promise to marry in six months, and a subsequent mutual promise to marry on the death of the defendant's father. The jury were also asked (Q. 3.): "After the father's death in April, 1879, did the defendant, in response to a question by the plaintiff, say that all was left to his brother to share, and that until his brother shared with him he could not marry her?" To which they answered, "yes." The division of the father's estate did not take place till December, 1887.

Held (FALCONBRIDGE, J., dissenting), that the answer to the third question was a finding of a mutual promise to marry upon a division of the defendant's father's estate, and, as a breach of that promise did not take place until December, 1887, the cause of action arising thereupon was not barred by the Statute of Limitations at the time the action was brought, in 1888. The several mutual promises were all independent contracts the promise of the one party being the consideration for the promise by the other, so that each successive mutual promise became a new and independent contract, from the breach of which only the statute would begin to run.

Costello v. *Hunter*, 12 O. R. 333, distinguished.

Per FALCONBRIDGE, J., that the answer of the jury to the third question did not shew a new or substituted agreement, but an excuse for delay or a continuance of the original promise, and the case was therefore governed by *Costello* v. *Hunter*.

Held, also, FALCONBRIDGE, J., dissenting, that want of bodily chastity is the only misconduct which affords a justification in law for a breach of a promise to marry. It is no justification to shew that the woman had been heard to use obscene language; nor is such evidence admissible in mitigation of damages, although general evidence of reputation may perhaps be admissible.

THIS was an action for breach of promise of marriage, in which the plaintiff alleged: (1) that between the 1st of October, 1878, and the 10th of March, 1888, the defendant frequently promised to marry the plaintiff, who on her part then promised to marry the defendant; (2) that the engagement to marry one another continued from the date of such promises to the 10th of March, 1888, when the defendant married another woman; (3) and that the plaintiff until the defendant so married another woman was always willing to marry the defendant.

The defendant (1) denied the allegations contained in the second and third paragraphs of the statement of claim; and said (2) that the alleged cause of action did not accrue within six years; (3) that any engagement between the plaintiff and defendant terminated during the month of May, 1881, by the defendant refusing to marry the plaintiff, or to continue such engagement, and that since said date the defendant had never promised to marry the plaintiff, nor had there been any engagement whatever between the plaintiff and defendant; (4) that he was justified in terminating such engagement and in refusing to marry the plaintiff by reason of the conduct of the plaintiff, who on several occasions fell into violent fits of rage with the defendant, and used coarse, obscene, and profane language to other persons, in private houses and in public places, particularly to one Annie Dodds and to one John H. Collier, and the plaintiff became and was addicted to the habit of profane swearing, and indulged in such habit on the public streets, whereupon the defendant upon discovering the same broke off such engagement, and refused to marry the plaintiff; (5) that the defendant was justified in refusing to marry the plaintiff by reason of the plaintiff's improper conduct in resorting to houses of improper character, in associating publicly with other men, in swearing profanely both in public and in private, in singing when in company with men obscene songs, and in using when in such company obscene and indecent language; (6) that any engagement between the plaintiff and defendant was terminated before any breach thereof, by the plaintiff and defendant mutually exonerating each other from the performance thereof.

Issue thereon.

The cause was tried at the Spring sittings of this Court at Guelph, in 1888, before Rose, J., and a jury.

Evidence was given on the part of the plaintiff from which the jury might have found that on the 28th October, 1878, mutual promises to marry were made, no time being fixed, or six months being fixed for the marriage; that subsequently mutual promises were made to marry upon

the death of defendant's father, which event happened in 1879; that subsequently from time to time till March, 1887, mutual promises were made to marry, no time being fixed, and the time fixed being upon a division of the defendant's father's estate taking place between the defendant and his brother, which event happened in December, 1887.

The defendant's deposition was put in and read in part, in which he admitted that he and the plaintiff were originally engaged to be married in six months; that his father objected to the marriage taking place at the time fixed, and on that account the marriage was put off. He said, "the marriage was put off indefinitely, on account of my father's objection. I may have told the plaintiff that my father's estate was not wound up, with the object of putting the marriage off. She acceded to my explanation. My father's affairs were not settled for a while. My brother and I were in partnership until lately. It may be true that I asked the plaintiff to delay the marriage until I settled with my brother. I settled with my brother before my marriage. I suppose that I told the plaintiff that I hadn't settled with my brother, to account to her for the delay in carrying out my contract with her."

The defendant gave evidence that they were engaged till 24th May, 1881, when he said they quarrelled, and that he then refused to marry her, and never promised to marry her afterwards, but admitted that he continued to visit her till March, 1884, when he went to British Columbia and remained till January, 1885, when he returned, but never visited her after that. Evidence was, however, given by and on behalf of the plaintiff to shew that he continued to visit her till March, 1887.

The learned Judge refused to receive evidence of any facts in support of the justification pleaded in the fourth and fifth paragraphs of the statement of defence, which were not known to the defendant at the time of the breach.

The learned Judge submitted certain questions to the jury, which with their findings were as follow:

1. When the agreement to marry was made, was it to marry within six months? A. Yes.

2. Was it agreed that the marriage should not be until his father's death? A. Yes, by request of the defendant.

3. After the father's death in April, 1879, did the defendant, in response to a question by her, say that all was left to his brother William to share, and until his brother William shared with him he could not marry her? A. Yes.

4. Did the plaintiff exonorate or free the defendant from his promise? A. No.

5. What damages do you allow? A. $1,100.

6. Was there in 1881 a refusal by the defendant to marry, and was his refusal for good and sufficient reasons? A. We believe there was a refusal, but not on good and sufficient reasons. Neither was the engagement broken.

His Lordship—With regard to the first and second questions, do you mean the contract was in the first place to marry within the six months, and then after that it was agreed that it should not be until after the father's death? A. Yes.

His Lordship—And with reference to the last question your answer is: "We believe there was a refusal, but not on good and sufficient reasons. Neither was the engagement broken." What do you mean by that? A. There might have been refusal in the heat of passion, but his conduct showed that the engagement was carried on.

His Lordship—You don't believe there was a refusal for the purpose of putting an end to the engagement? A. No.

The learned Judge, upon these findings, gave judgment, dismissing this action with costs.

On 25th May, 1888, *Shepley*, for the defendant, moved for an order *nisi* to set aside the answers of the jury to the 4th, 5th, and 6th questions submitted to them, and for a new trial with costs, on the following among other grounds: 1. The answer to the fourth question is against evidence and the weight of evidence. 2. The damages are grossly excessive. 3. The answer to the sixth question is against evidence and the weight of evidence. 4. The evidence shewed that the defendant was justified

in refusing to carry out his contract to marry the plaintiff. 5. The learned Judge at the trial improperly rejected evidence tendered by the defendant in support of his plea of justification, inasmuch as the learned Judge ruled out all evidence as to the character and conduct of the plaintiff, which was not known to and acted upon by defendant when he refused to marry the plaintiff. 6. Such evidence was not only admissible in justification but also in mitigation of damages.

On the 7th June, 1888, *Wallace Nesbitt* and *W. M. Douglas*, for the plaintiff, moved to set aside the said judgment and to enter judgment for the plaintiff for the damages assessed with costs; they also shewed cause to the motion for an order *nisi*, and *Shepley*, for the defendant, shewed cause to the plaintiff's motion, and supported his motion for an order *nisi*.

November 19, 1888. ARMOUR, C. J.—The plaintiff was, in my opinion, entitled, upon the findings of the jury, to have had the judgment entered for her for the damages assessed, and there was no finding by the jury which entitled the defendant to have the action dismissed.

The learned Judge, we are told, dismissed the action upon the ground that the plaintiff's cause of action was barred by the Statute of Limitations, and upon the supposed authority of *Costello* v. *Hunter*, 12 O. R. 333, but there was no finding of the jury that the cause of action relied on arose more than six years before this suit, and the facts proved did not warrant the learned Judge in taking upon himself to so find, nor did *Costello* v. *Hunter* furnish authority for the dismissal of this action, the facts there proved being widely different from the facts proved in this case.

In this case there was evidence to prove a mutual promise to marry in six months; there was also evidence to prove a subsequent mutual promise to marry upon the death of the defendant's father, and the jury found both these; there was also evidence which would have warranted

the jury in finding subsequent mutual promises to marry from time to time up to March, 1887, and in finding, as it appears to me they did by their answer to the third question, a mutual promise to marry upon a division of the defendant's father's estate between the defendant and his brother.

These several mutual promises were all independent contracts, the consideration for each existing in the mutual promise, the promise of the one party being the consideration for the promise by the other; so that each successive mutual promise to marry became a new and independent contract, from the breach of which only the statute would begin to run.

The plaintiff was entitled to rely upon any mutual promise, the breach of which had not occurred more than six years before suit, and as I take the effect of the finding of the jury to be in their answer to the third question, a finding of a mutual promise to marry upon a division of the defendant's father's estate between the defendant and his brother, a breach of that promise did not take place until December, 1887, and so the cause of action arising thereupon was not barred by the statute.

I say I take the effect of the finding of the jury to be in their answer to the third question a finding of a mutual promise to marry upon such division, because I cannot surmise any other ground for asking that question except to elicit a finding whether there was such mutual promise; and there was ample ground for finding such mutual promise, not only in the evidence of the plaintiff, but in that of the defendant, from which the only reasonable inference to be drawn was that the plaintiff assented to their marriage being postponed until such division.

In *Costello* v. *Hunter* there was no mutual promise to marry proved but one, the breach of which had occurred more than six years before suit, and there were no new promises, nor, according to the view of the Chief Justice, any evidence to support such new promises, and herein that case differs from this.

I refer for opinions bearing upon the view I have taken to *Northcote* v. *Doughty*, 4 C. P. D. 385; *Ditcham* v. *Worrall*, 5 C. P. D. 410; *Holmes* v. *Brierley*, 4 Times L. R. 571 and 647; *Blackburn* v. *Mann*, 85 Ill. 222.

As to the motion for an order *nisi* for a new trial, I cannot say that the answers of the jury to the fourth and sixth questions were against the weight of evidence, nor that the evidence justified the defendant in refusing to carry out his contract to marry the plaintiff, nor do I see any principle upon which we could determine that the damages awarded by the jury were excessive. The engagement admittedly continued for a long time, and the jury were entitled to take this circumstance as well as the other conduct of the defendant into their consideration, and in a matter so much within the province of the jury as the damages in an action such as this, we could not interfere unless we could clearly see that the jury had been influenced by some improper motive in awarding them.

It is unnecessary for us to determine whether the ground upon which the learned Judge rejected the evidence tendered in support of the justification pleaded in the fourth and fifth paragraphs of the statement of defence was a good ground of defence or not, because I am of opinion that these paragraphs do not set up any justification in law for the breach by the defendant of his promise to marry the plaintiff, and that, therefore, the evidence tendered in support of them was rightly rejected.

The discussions and decisions in *Hall* v. *Wright*, E. B. & E. 746; *Beachey* v. *Brown*, E. B. & E. 796; and in *Baker* v. *Cartwright*, 10 C. B. N. S. 124, shew that the misconduct in the woman which will alone justify the breach of his promise by the man, must amount to want of chastity, that is, of bodily chastity; and no such want of chastity is set up in these paragraphs.

It was contended, however, that the evidence tendered was evidence that was properly receivable in mitigation of damages, and that, therefore, the learned Judge improperly rejected it.

It may be that general evidence of reputation is admissible in actions of breach of promise of marriage in mitigation of damages, but the authorities which go to shew this are extremely unsatisfactory, and it is difficult to understand from them upon what principle it is admissible for that purpose. See *Foulkes* v. *Sellway*, 3 Esp. 236; *Leeds* v. *Cook*, 4 Esp. 256; *Baddeley* v. *Mortlock*, 1 Holt 151; *Irving* v. *Greenwood*, 1 C. & P. 350; *Bench* v. *Merrick*, 1 C. & K. 463; *McGregor* v. *McArthur*, 5 U. P. 493.

But the evidence tendered was not general evidence of reputation but evidence of particular facts, and was not, in my opinion, admissible in mitigation of damages. See *Scott* v. *Sampson*, 8 Q. B. D. 491; *Edgar* v. *Newell*, 24 U. C. R. 215; *Myers* v. *Currie*, 22 U. C. R. 470.

The judgment will, therefore, be entered for the plaintiff for the sum of eleven hundred dollars, the damages assessed, with full costs of suit; and the motion for an order *nisi* for a new trial wil be refused with costs.

STREET, J.—It appears from the discussion between the learned Judge and the counsel, reported at p. 107 of the evidence,* that the third question submitted to the jury was submitted for the purpose of obtaining their opinion as to whether the defendant had in April, 1879, promised the plaintiff to marry her when he and his brother William should settle up their father's estate, and the jury have, I

* MR. SHEPLEY.—Your Lordship asked the jury to find whether there was a refusal to marry in 1881 for just and sufficient cause. I suggest to your Lordship that it should be a finding whether there was a refusal to marry then.

HIS LORDSHIP.—I put it double, was there, say in 1881, a refusal by the defendant to marry, and was his refusal for good and sufficient reason?

MR. NESBITT.—I would ask in addition to that that the question be asked whether even supposing that to be true the parties hadn't formed a new engagement after that.

HIS LORDSHIP.—There is no evidence of that.

MR. NESBITT.—Evidence of the sister, the mother, and herself.

HIS LORDSHIP.—No promise stated except on the three occasions.

MR. NESBITT.—That he would marry her when the affairs were settled.

HIS LORDSHIP.—That was in 1879; I have left that specific question.

think, in effect, found that such a promise was then made. Upon the authority of *Northcote* v. *Doughty*, 4 C. P. D. 385; and *Holmes* v. *Brierley*, 4 Times L. R. 571 and 647, distinguishing *Coxhead* v. *Mullis*, 3 C. P. D. 439, this must be treated as evidence of a new promise, and not of a mere ratification of the former promise; and it being shewn by the defendant's evidence that the settlement of the affairs of the father did not take place until 1887, the promise, I think, is taken out of the Statute of Limitations.

This renders it necessary to examine the grounds taken in the cross-motion of the defendant.

I do not see any reason for interfering with the findings of the jury upon any matter of fact, nor upon the question of damages; it is sufficient to say that there was contradictory evidence as to the facts found by them, and that there was sufficient evidence given on the part of the plaintiff to justify the findings, if it was believed, and the jury have apparently given credit to it. As to the damages, I cannot say that, considering the length of the engagement of marriage between the parties, and the course of the defendant at the trial, they were by any means excessive. The next ground is that "the defendant was justified in refusing to carry out his contract to marry the plaintiff." This ground shortly raises the question of law as to what misconduct on the part of the woman will justify the man in breaking off a contract to marry her. I have looked carefully into the authorities cited to us, and many others, both English and American, and it appears to me to be the plain result of them that the only conduct on the part of the woman occurring after the engagement which will justify the man in refusing to carry it out is a breach of the implied condition that she will preserve her bodily chastity.

The defence set up under which the defendant justifies his refusal to marry the plaintiff, falls short of alleging any breach of this condition, and the evidence certainly did not go beyond the statement of defence. No proof was given, or attempted to be given, of any improper

intimacy with anyone, and I am of opinion, therefore, that the justification attempted to be set up was insufficient, even had it been fully proved, to entitle the defendant to refuse to carry out his promise. See *Beachey* v. *Brown*, E. B. & E. 796; *Hall* v. *Wright*, E. B. & E. 746; *Baker* v. *Cartwright*, 10 C. B. N. S. 124; *Berry* v. *Bakeman*, 44 Maine 164; *Kniffen* v. *McConnell*, 30 N. Y. 285.

The remaining ground in the rule raises the question as to whether the evidence tendered by the defendant and refused by the learned Judge, even if not admissible as a matter of justification, was not at all events admissible in mitigation of damages.

The general rule, as stated in *Stephen's* Digest of the Law of Evidence, in the first four editions, was as follows:

"In civil cases the fact that the character of any party to the action is such as to affect the amount of damages which he ought to receive is generally irrelevant."

But in the 5th edition (1887), this statement of the rule is struck out and the following inserted in its place:

"In civil cases the fact that a person's general reputation is bad may, it seems, be given in reduction of damages, but evidence of rumours that his reputation was bad and evidence of particular facts shewing that his disposition was bad cannot be given in evidence."

The change in the former statement of the law was no doubt owing to the judgment in *Scott* v. *Sampson*, 8 Q. B. D. 491, in which the cases are carefully examined and discussed. That was an action for a libel, and it may be that the reasons for allowing evidence of the general reputation of a plaintiff in actions of that character, may not be found to apply with equal force to actions for breach of promise. But it is not necessary here to enter upon the inquiry whether such evidence is admissible in actions for breach of promise, because it appears beyond question that the evidence which was tendered by the defendant here, being evidence of particular acts and not of general reputation, was inadmissible in any view.

I am of opinion, therefore, that the judgment should be entered for the plaintiff for the damages found by the jury, with costs; that the plaintiff's motion should be allowed with costs; and the defendant's motion for an order *nisi* should be refused with costs.

FALCONBRIDGE, J.—I agree that if the effect of the jury's answer to the third question were that there was a fresh absolute mutual promise to marry when the defendant's brother shared the estate with him, the defence of the Statute of Limitations would fail. But I do not so read that question and the answer thereto.

There was very little conflict of evidence as to this. My learned brother Rose's charge on this point is as follows (after stating the question): "That is her recollection of what then took place, and the defendant does not really contradict that, because what he says is, in substance, very much the same thing. He says he may have told her that his father's estate was not wound up, with the object of putting the marriage off; that she acceded to his explanation that his father's affairs were not settled for a while; that his brother and he were in partnership until lately. He also says: 'It may be true that I asked the plaintiff to delay the marriage until I settled with my brother. I settled with my brother before my marriage.' So that there was not much dispute about that."

Nor was there much dispute about it. It seems to me to have been an excuse for delay or a continuance of the original promise, and not a new or substituted agreement, and under the authority of *Costello* v. *Hunter*, 12 O. R. 333, the learned Judge was right in entering the verdict as he did.

In *Northcote* v. *Doughty*, 4 C. P. D. 385, it was left to the jury to say whether there was a fresh absolute promise, or merely a ratification of the original promise.

In *Ditcham* v. *Worrall*, 5 C. P. D. 410, the damages were assessed subject to the opinion of the Court as to whether a fresh promise to marry ought to be inferred. Two learned

Judges thought such fresh promise ought to be inferred, and one that it ought not.

Neither these cases nor *Holmes* v. *Brierley*, 4 Times L. R. 571 and 647, in my opinion, furnish authority for us to enter a verdict for plaintiff. The most favorable result for the plaintiff would be to grant a new trial in order to get a specific finding on this point, but I am of opinion that the plaintiff's motion should be discharged.

As to the defendant's motion, I am unable to say that the findings on the 4th and 6th questions were not warranted by the evidence as presented to the jury.

The decisions of my lord the Chief Justice and my brother Street, on both branches of this case, render it superfluous for me to discuss the other points taken in defendant's order *nisi*, but I desire to guard myself against being understood to concur in the opinion that the 4th and 5th paragraphs of the statements of defence are bad in law.

I do not find it unequivocally laid down in the English cases that want of sexual purity is the only cause which will justify a breach of promise of marriage. I do not regard the discussions in *Hall* v. *Wright*, E. B. & E. 746, and *Beachey* v. *Brown*, E. B. & E. 796, as amounting to that, although I am free to confess that Erle, C.J., in *Baker* v. *Wright*, 10 C. B. N. S. at p. 125, seems to assume that they do.

I prefer to think that the "chastity" referred to is not merely freedom from unlawful sexual commerce, but freedom from obscenity or impurity in language or conversation.

[QUEEN'S BENCH DIVISION.]

ISBISTER V. SULLIVAN.

Courts—Interpleader—Jurisdiction of District Court of Thunder Bay—Jurisdiction of High Court of Justice—R. S. O. ch. 91, sec. 56.

The District Court of the Provisional Judicial District of Thunder Bay has jurisdiction in interpleader under R. S. O. ch. 91, sec. 56; for it has "the jurisdiction possessed by County Courts," which is by R. S. O. (1877) ch. 45, sec. 19, sub-sec. 6, "in interpleader matters as provided by the Interpleader Act"; and such jurisdiction is determinable in a sheriff's interpleader by the fact whether the process under which the goods were seized has issued out of the District Court, and not by the amount for which the recovery was had or the process issued.

The High Court of Justice has no jurisdiction, by virtue of R. S. O. ch. 91, sec. 56, sub-sec. 2, or otherwise, to entertain a motion against a verdict or judgment obtained in the District Court in an interpleader issue.

The defendant recovered judgment in the District Court of the Provisional Judicial District of Thunder Bay, against one Daniel McPhee, for the sum of $423.37, debt, and $32.87, costs, and execution was thereupon issued, directed, and delivered to the sheriff of the district of Thunder Bay, who thereupon seized thereunder certain goods as and for the goods of the said Daniel McPhee, which goods being claimed by the plaintiff, this interpleader issue was directed by the Judge of the said District Court to try whether the goods so seized were the goods of the plaintiff as against the defendant, the execution creditor.

This issue was tried at the sittings of the District Court on the 12th day of June, 1888, before His Honour the Judge of that Court and a jury.

The plaintiff claimed the goods seized under a chattel mortgage dated the 19th January, 1888, and the question of fact to be tried was, whether Daniel McPhee was at the time of the making of this chattel mortgage in insolvent circumstances, or unable to pay his debts in full, or knew himself to be on the eve of insolvency.

The learned Judge left three questions to the jury: 1st. Was D. McPhee, on the 19th January, 1888, when he executed the chattel mortgage, in insolvent circumstances? 2. Was he unable to pay his debts in full? and 3. Did he know he was on the eve of insolvency?

The jury answered the first and third questions in the negative, but could not agree on an answer to the second question. The learned Judge thereupon entered the following verdict: "On the findings of the jury herein, I enter the following verdict, viz., that at the time of the seizure the goods seized were not the property of Daniel McPhee, and not liable to seizure under the writ of *fi. fa.*, as against him, issued by the execution creditor."

On the 5th September, 1888, *Aylesworth*, for the defendant, moved before the Divisional Court to set aside the findings and the verdict and judgment thereon, and to enter judgment for the defendant, or for a new trial, on the ground that the chattel mortgage relied on by the plaintiff was void as against the defendant by reason of its not being accompanied by any affidavit of the mortgagee, as required by the statute; that the mortgagor is justly and truly indebted to the mortgagees in the sum mentioned in the mortgage; and upon the ground that on the facts proven in evidence at the trial of the issue, Daniel McPhee was shewn to have been in insolvent circumstances, and unable to pay his debts in full, or on the eve of insolvency at the time when the chattel mortgage was made; and that the mortgage was given to the plaintiff with intent to defeat, delay, or prejudice the defendant or other creditors of McPhee, or to give to the plaintiff a preference over other creditors, and that it had that effect; and on the ground that the jury on the said trial did not find and reported themselves to be unable to agree in finding that McPhee at the time of the time of the giving of the mortgage was able to pay his debts in full; and on the ground that the learned Judge of the District Court refused to allow the jury to be polled, though requested to do so by counsel for the defendant; and upon the ground that the findings and judgment were contrary to law, evidence, and the weight of evidence; and that upon the facts proven at the trial the defendant was entitled to judgment in his favour upon the issue.

Thereupon this case stood adjourned until 21st November, 1888, when *Delamere*, for the plaintiff, shewed cause, and thereupon it again stood adjourned, with a direction that the notice of motion should be amended by asking for a writ of prohibition, prohibiting the said District Court from further action upon the issue, on the ground that that Court and the Judge thereof had no jurisdiction to try such issue, or to order such issue to be tried, and that such amended notice should be served upon the Judge; and this having been done, *Aylesworth*, on the 28th November 1888, moved accordingly, and *Delamere* shewed cause.

On the 22nd December, 1888, the judgment of the Court was delivered by

ARMOUR, C. J.—Two questions are submitted for our determination: 1st. Whether the District Court of the Provisional Judicial District of Thunder Bay has jurisdiction in interpleader when the amount recovered, and for which execution issued in the original action in that Court, is beyond the amount that could have been recovered in a County Court? and 2nd. Whether this Court has any jurisdiction, where an interpleader issue has been ordered in such a case by and has been tried in such District Court, to entertain any motion against the verdict or judgment upon such interpleader issue obtained in such District Court?

The District Court of the Provisional Judicial District of Thunder Bay has clearly jurisdiction in interpleader, for by the Act constituting that Court, 47 Vic. ch. 14 (O.), it was declared to have, subject to certain exceptions therein contained, in addition to the jurisdiction possessed by County Courts, jurisdiction in certain actions therein set forth; and part of the jurisdiction at that time possessed by County Courts was "in interpleader matters as provided by the Interpleader Act." See R. S. O. (1877), ch. 43, sec. 19, sub-sec. 6.

Now what determined the jurisdiction of the County Courts in interpleader as to the right to goods seized under process, was the fact that the process had issued out of those Courts; for it was only in such case that they had jurisdiction to direct an interpleader to try the right to such goods: R. S. O. (1877), ch. 54, sec. 22.

The jurisdiction of the District Court of the Provisional Judicial District of Thunder Bay in interpleader as to the right to goods seized under process is, therefore, determinable in the same way—by the fact whether the process under which the goods were seized has issued out of that Court, and not by the amount for which the recovery was had or the process issued.

In this case the process under which the goods were seized was issued out of the said District Court, and that Court had therefore jurisdiction to direct and try this interpleader issue.

By 47 Vic. ch. 14, sec. 4, sub-sec. 5, R. S. O. (1887), ch. 91, sec. 56, sub-sec. 2, it is provided that after a trial in ejectment or in replevin, where the value of the goods claimed exceeds $200, or in any other case where the cause of action is beyond the jurisdiction possessed by County Courts, and a verdict or judgment exceeding $200 is obtained, any party entitled to move to set aside or vary the verdict or judgment, or to enter a nonsuit, may, if he so desires, instead of moving in the District Court, and without removing the cause into the High Court by *certiorari* or otherwise, move in the High Court for such rule or order as he claims to be entitled to.

This is the only provision which is made by law authorizing the High Court to entertain motions against verdicts or judgments obtained in the said District Court, and a verdict or judgment in an interpleader issue is clearly not within this provision, and we have therefore no jurisdiction to entertain this motion.

The motion will be dismissed, but without costs.

[CHANCERY DIVISION.]

RUDD v. HARPER ET AL.

Will—Construction—Specific bequest—Charge of debts—Devise of rents and profits between two to be equally divided between them, share and share alike—Tenants in common—Dower—Election—Devolution of Estates Act—R. S. O. ch. 108, sec. 4, sub-sec. 2.

By the first clause in his will, a testator directed that his executrix should pay his debts out of his personal estate, and then proceeded to leave to his wife, whom he named as his executrix, certain lands subject to incumbrances, and all his stock, cattle, &c., upon the said lands, and then devised the residue of his real and personal estate (after payment of his just debts and funeral expenses) and all the rents and issues thereof to a brother and sister for their lives, to be equally divided between them, share and share alike, and after their death, to their children, their heirs and assigns for ever, share and share alike. The brother pre-deceased the testator. The widow now brought this action for the construction of the will.

Held that the bequest of the stock, cattle, &c., to the testator's wife was a specific legacy, and was not subject to the testator's debts, notwithstanding the first clause of the will.

Held, also, that the widow was not put to her election as to dower, there being no such intention to be gathered from the will.

Held, also, that the gift of the residue to the brother and sister was a gift to them as tenants in common, but that the brother having pre-deceased the testator, there was an intestacy as to his share.

Held, lastly, that it was too late now for the widow to elect to take her interest in her husband's undisposed of real estate under the Devolution of Estates Act, R. S. O. ch. 108, sec. 4, sub-sec. 2. By bringing this action she had made her election.

THIS was an action for the construction of the will of one Charles B. Rudd, the terms of which, with the other circumstances of the case, are stated in the judgment.

The action came on for trial before MacMahon J., at the sittings of this Court, at London, on May 14th, 1888.

Macmillan and *Cameron* for the plaintiff.

Meredith, Q.C., Fitzgerald, Essery, and *Cryer* for the defendants.

September 10th, 1888. MACMAHON, J.—This action is brought by the plaintiff, the widow and sole executrix of Charles B. Rudd deceased, for the construction and interpretation of the last will and testament of the said Charles B. Rudd.

The testator died on the 2nd November, 1886, having on the 15th of October, 1878, executed a will which, after revoking all former wills and testamentary dispositions, declares as follows:

"*First.*—I will, order, and direct that so soon as conveniently may be after my decease my executrix herein-named pay, or cause to be paid, all my just debts and funeral expenses, and any and every all charges and disbursements connected with or in any manner or form incidental to the proving, procuring, or carrying into force and effect the object and intentions of this my said last will, from and out of my personal estate.

Second.—I will, grant, and bequeath unto my wife, Jane Maria Rudd, all my right, title, and interest in or out of lot No. 16, in the 3rd concession of the township of Westminster, in the county of Middlesex, containing 133½ acres, * * subject, however, to any incumbrance thereon which may exist at my decease.

Third.—I give and bequeath unto my said wife, Jane Maria Rudd, all the stock, cattle, goods, chattels, and effects of every description, upon or belonging to the above-mentioned land and premises to and for her own use and benefit.

Fourth.—I will, give, grant, and bequeath (after payment of my just debts and funeral expenses) the residue of my real and personal estate which I may die possessed of or entitled to, unto my sister Jane Rudd and my brother William Rudd, at present residing at Yorkshire, England, to and for their and each of their use and benefit, and all the benefits, rents, and issues thereof, for and during their natural lives, to be equally divided between them, share and share alike, and after the death of them, the said Jane Rudd and William Rudd, I will, give, and grant the same unto the children of them, the said Jane Rudd and William Rudd, their heirs and assigns forever, share and share alike.

And lastly.—I do hereby nominate, ordain, empower, and appoint my wife, Jane Maria Rudd, executrix. * *"

Probate of the will was granted to the plaintiff on the 15th day of January, 1887.

The testator died without issue, and his brothers and sisters were William and Jane, the devisees mentioned in the fourth paragraph of the will, and John, Elizabeth, Sarah, and Ellen; of these William died without issue before the testator. The defendant, Jane Harper, is the Jane mentioned in the fourth paragraph of the will, who still survives at the age of 72, without issue. John died before the testator, leaving issue the defendants Eleanor H. Walker, Elizabeth Rudd, Charles W. Rudd, Maria Ada Rudd, Smith R. Rudd, and Matilda Rudd, the last-named being an infant under the age of twenty-one years.

The testator's sisters, Elizabeth, Sarah, and Ellen, all died without issue.

The defendants, George Thornton and Esther Thornton are a brother and sister of the half-blood of the testator, George B. Rudd, being the issue of the second marriage of the mother of the testator.

The first question to be considered is, whether the bequest to the plaintiff in the third paragraph of the will is specific, or whether she takes subject to the payment of the testator's debts.

The defendants by the pleadings and during the argument set up that the bequest made in the first paragraph of the will is made to the executrix therein in her official capacity as executrix, for the purpose of paying debts, &c., and that said bequest takes priority over the subsequent bequests in the will, and that all the personal estate of the testator is to be applied in payment of debts, funeral and testamentary expenses.

I do not think the will can bear the construction contended for by the defendants.

The bequest by the testator, in the third paragraph, to his wife of all the stock, cattle, &c., upon the land devised to her, is, without reference to any other clauses of the will, a specific legacy to the plaintiff of the property therein referred to.

In *Fontaine* v. *Tyler*, 9 Price, at p. 98, Chief Baron Richard said, that "a gift of all the horses which I may have in my stable at the time of my death, would be specific." And in *Stephenson* v. *Davison*, 3 Beav., at p. 349, Lord Langdale, M.R., referred to *Fontaine* v. *Tyler*, with approval, and gives a number of illustrations showing what would constitute a specific bequest. And at p. 350 he says: "The particular quality which constitutes their specific nature being this, that they are things which the testator has clearly distinguished and separated from the rest of his estate at the time of his death."

The will makes provision for payment of the debts, funeral expenses, &c., out of the personal estate of the testator; then if the cattle and goods mentioned in the third paragraph of the will "are things which the testator has clearly designated and separated from the rest of his estate," they form a specific bequest to the plaintiff, and cannot constitute any portion of the general personal estate of the testator out of which the debts are payable.

The wording of the fourth paragraph of itself, I think, precludes the construction which the defendants urge as being the correct one.

By the third paragraph certain goods and chattels are bequeathed to the plaintiff; and the fourth paragraph reads as follows: "I will, give, grant, and bequeath (after payment of my just debts and funeral expenses) the residue of my real and personal estate which I may die possessed of or entitled to, to my sister Jane Rudd, and my brother William Rudd."

The testator had already by the second paragraph of the will devised lot 16 in the third concession of Westminster, to the plaintiff, and by the third paragraph had bequeathed certain cattle, &c., on that land to her. Then the residue of the "real and personal estate" under paragraph four of the will must be the residue of the real estate, after excluding that lot 16 from the real estate devised under the second clause of the will; and the residue of the personal estate, after excluding the cattle, &c., bequeathed to the

plaintiff under the third clause; because the testator speaks of the two kinds of estate conjointly, and as if he had already made a disposition of a part of each.

To read the fourth clause, and put the construction upon it contended for by the defendants, would make the testator's debts payable out of the real and personal estate; whereas under the first paragraph of the will provision is made for the payment of the debts, funeral expenses, &c., solely out of the personalty.

I think the cattle, goods, and chattels, mentioned in the third paragraph of the will, pass to the plaintiff without being subject to the debts, funeral or testamentary expenses of the testator's will.

The second question is, as to whether the widow is entitled to dower in the residue of the testator's real estate, or whether she is called upon to elect between the devise in her favour and dower out of the whole of the real estate of the testator.

There is nothing in the will as to dower, nor is there any intention expressed by the testator that his widow should elect, and it is said that unless that intention can be gathered from the will, the rule is that the widow is not forced to an election. And in the case of *Wilson* v. *Wilson*, 7 O. R. at p. 180, a passage from the judgment of Vice-Chancellor Kindersley in *Gibson* v. *Gibson*, 1 Drew 42, is quoted as being the true principle upon which the Courts will act, in dealing with this question, which is as follows: "It must be clear, and beyond all reasonable doubt, that there is a positive intention to exclude her from dower, either expressed or clearly implied, before the widow can be put to her election." See also *Laidlaw* v. *Jackes*, 25 Gr. 293, and *In re Biggar*, *Biggar* v. *Stinson*, 8 O. R. at p. 379. And see full note of the case of *Lawrence* v. *Lawrence*, 2 Vern. 365, in *Scribner* on Dower (2nd ed.) pp. 444-5.

The will itself affords no evidence shewing the value of the residuary estate as compared with the devises made by the testator in favour of the widow. I cannot say,

therefore, what implication might have been drawn had I been able to say, as was said by Lord Chancellor Sugden in *Hall* v. *Hill*, 1 Dr. & W., at page 108, that the widow acquired under the will a much greater provision than she would have been entitled to as dower in the ordinary way.

I do not say that where a testator's widow is entitled under his will to what would exceed her dower, that she is thereby put to her election. That is not a test, as was pointed out in *Bending* v. *Bending*, 3 K. & J. 257, but it would be a fact which a Judge would take into consideration in endeavouring to reach the implied intention of a testator where he has failed to express it in his will.

Where a testator makes no reference whatever to dower in his will, the question as to whether the widow must elect between a devise and dower, must frequently prove most perplexing to a Judge. In this case I can reach no other conclusion than that the testator's widow is not compelled to elect, and is therefore, in addition to the devise to her contained in the second paragraph of her late husband's will, entitled to dower out of the testator's residuary real estate.

The devise in the fourth paragraph of the will to the testator's sister Jane, and his brother William of the residue of the testator's real and personal estate, * * "to be equally divided between them, share and share alike," was a gift to them as tenants in common: the cases all going to shew that where there is a devise or bequest to several persons to be divided "equally," or "share and share alike," or "in equal shares," or similar expressions, that the objects of the gift take as tenants in common: *Heathe* v. *Heathe*, 2 Atk. 122; *Brown* v. *Oakshot*, 24 Beav. 254; *Hodges* v. *Grant*, L. R. 4 Eq. 140; *Heaseman* v. *Pearce*, L. R. 11 Eq. 522; *Attorney-General* v. *Fletcher*, L. R. 13 Eq. 128; *Keating* v. *Cassels*, 24 U. C. R. 314; *Shaw* v. *Thomas*, 19 Gr. 489; and see cases cited in *Jarman* on Wills, 4th ed., Vol. 2, p. 257.

Had Jane and William both survived the testator they would have been entitled as tenants in common to a life interest in the residue of his personal estate subject to the payment of the testator's debts, funeral and testamentary expenses, and to the residue of the real estate subject to the dower of the testator's widow thereout.

William Rudd having died during the testator's lifetime, the share devised to him lapsed—so as to the share devised by the will to William Rudd there is an intestacy.

The plaintiff cannot now elect to take her interest in her husband's undisposed-of real estate under "The Devolution of Estates Act," R. S. O. ch. 108, sec. 4, as her election must be by deed attested as provided by sec. 4, subsec. 2; and as such election was not made it is now too late. As urged by Mr. W. R. Meredith, the widow has, by bringing the action, made her election.

Subject to the right of dower out of the residue of the real estate, and to a payment of a proportion of the debts, funeral and testamentary expenses, the defendant Jane Harper is entitled to a life-interest in a moiety of the residue of the real and personal estate of the testator.

There being an intestacy as to the share devised to William Rudd; that share subject to the dower of the widow in the real estate, and as to the personalty subject to the payment of a ratable proportion of the testator's debts, funeral and testamentary expenses, and to the one-third interest of the widow in such share of the personalty—the residue of such lapsed share of the real and personal estate devised to William Rudd shall be equally divided between Jane Harper, George Thornton, Esther Thornton, and the children of the testator's brother John Rudd, who take between them the share to which the said John Rudd would have been entitled had he survived the testator.

The costs to be paid out of the general residuary estate of the testator including the costs of the petition.

A. H. F. L.

[CHANCERY DIVISION.]

IN THE MATTER OF BOOTH'S TRUSTS.

"Devolution of Estates Act"—Necessity of guardian's consent to sale of lands "devolving" on executors or administrators—R. S. O, 1887, ch. 108, sec. 8.

Where a will devised lands to the executors on trust to sell the same.

Held, that the case was not within sec. 8 of the Devolution of Estates Acts, and the approval of the official guardian or an order of the Court was not necessary to a sale.

The word "devolve" in this section, is not used in its strict and accepted meaning of falling upon by way of succession, but in the sense merely of "passing," and what is meant is, that where infants are concerned, no real estate which, but for the preceding sections, would not come to the executors or administrators by a devise, gift, or conveyance, can be validly sold without the written consent of the official guardian.

THIS was a petition by the executors under the will of J. H. Booth, deceased, for the advice and opinion of the Court as to their ability to convey the testator's real estate, and for an order allowing them to carry out and complete a sale they had made of the same, and to make a good, sufficient, and valid conveyance to the purchaser.

The petition set out the will of J. H. Booth, whereby all his real estate was devised to the executors in trust to sell and dispose of the same and convert the same into cash, the proceeds to be invested and dealt with as therein specified, the ultimate trust being in favour of some infant children of the testator, and stated that the petitioners had agreed to sell a portion of the testator's real estate to one Urry, but the said purchaser and the petitioners doubted the validity of any conveyance of the testator's real estate made by the petitioners without the consent of the official guardian for Ontario, or an order of the Court pursuant to sec. 8 of the "Devolution of Estates Act," R. S. O. 1887, ch. 108.

The petition was argued on September 24th, 1888, before Ferguson, J.

Carson, for the petitioners.
J. Hoskin, Q.C., official guardian.
J. R. Miller, for the purchaser.

September 26th, 1888. FERGUSON, J.—The testator, I assume, died after the first day of July, 1886. The land in question is an estate of inheritance in fee simple, such as mentioned in sec. 3, paragraph (*a*) of the Act. This was vested in the testator at the time of his death, and it is within the meaning of the words, "All such property as aforesaid which is vested in any person," comprising the first and part of the second line of sec. 4 of the Act. The next following words of sec. 4, namely, "or is comprised in any such disposition as aforesaid," have reference to the last clause or provision of sec. 3 of the Act.

Then by sec. 4 of the Act it is declared that property such as and in the position of the property in question shall, on the death of the person in whom it is vested, notwithstanding any testamentary disposition, devolve upon and become vested in his legal personal representative from time to time and subject to the payment of his debts, and so far as it is not disposed of by deed, will, contract, or other effectual disposition, that it shall be distributed as personal property not so disposed of, is, after the passing of the Act, to be distributed.

The will in the present case gives the land to the executors, and gives them the power to sell it, and it would seem to me strange that the effect of the Act should be to diminish this power of sale or disposition. The 4th section says that notwithstanding any testamentary disposition it shall devolve upon and become vested in the legal personal representatives, and I think it did so devolve by force of the Act, and notwithstanding the will. The words "not withstanding any testamentary disposition" are very general, and have, I think, as they are used in the Act, a meaning the most comprehensive; and I think the estate or interest in these lands that came to the executors they have under the provisions of the Act by devolution, that is

a passing to or falling upon them as successors, and not by force of or under the provisions of the will, although in the distribution of the property the provisions and directions contained in the will must be followed so far as they extend.

Then the 8th section of the Act says that where infants are concerned in real estate which but for the preceding sections of the Act would not "devolve" upon executors or administrators, no sale or conveyance shall be valid under the Act without the written consent or approval of the official guardian of infants appointed under the Judicature Act, or in the absence of such consent or approval, without an order of the High Court. The difficulty I have is in respect to the words in this section, "which but for the preceding sections of this Act would not devolve on executors or administrators." By these words it seems to have been assumed that there are cases or instances in which, apart from the preceding sections referred to, the estate might or would "devolve on" executors or administrators, which, according to the strict meaning of the word "devolve" could not, I think, leaving some peculiar estates out of consideration, be the case unless the executor or administrator happened to be heir-at-law (and even in such case he would not take as executor or administrator), because the executor or administrator as such before the Act took, and now, apart from the provisions of the Act, takes no estate or interest in the lands of the testator or intestate. As to the lands, nothing fell upon him by succession. As to these, he could not in his capacity of executor or administrator be a successor or take by succession. Hence the estate could not devolve upon him according to the strict meaning of the word "devolve." By these considerations I am led to the conviction that the Legislature did not use or intend to use this word "devolve" in the second line of the 8th section according to its strict and accepted meaning, but according to a meaning that is found in some of the authorities, namely "to pass to another," and that what is really meant by this part of the 8th sec-

tion is, that where infants are concerned in real estate which but for the preceding sections referred to would not come to the executor or administrator by a devise, gift, or otherwise, no sale or conveyance should be valid under the Act without the written consent, &c., and that this 8th section has no application to a case such as the present one in which the estate but for the provisions of the Act would be vested in the executors by the will, which also gives them the power to sell the same; and for these reasons I am of the opinion that the consent in writing of the guardian mentioned in the 8th section is not, in the present case, necessary to validate a sale and conveyance of the lands by the executors.

The application is refused, with costs to the guardian, to be paid by the petitioners if the guardian insist upon them. No costs as between the other parties.

A. H. F. L.

[CHANCERY DIVISION.]

TRICE V. ROBINSON.

Executors and administrators—Action by administrator—Grant of letters after action brought—Relation back to death—R. S. O. ch. 194, sec. 122.

Since the Ontario Judicature Act, the rule in equity prevails as opposed to that at law, that letters of administration when obtained relate back to the death, and it is sufficient if a plaintiff suing as administrator qualifies before the trial.

R. S. O. ch. 194, sec. 122, which imposes a liability in certain eventualities on inn-keepers who give liquor to persons who thereby become intoxicated, is a remedial measure, and should receive a liberal construction.

THIS was an action brought under R. S. O. (1887), ch. 194, sec. 122, by Alice Trice, as administratrix of her husband Henry Trice, deceased, against Robert Robinson, for damages for the death of her husband, who was killed near Copetown, on the Great Western Division of the Grand Trunk Railway, while in a state of intoxication caused by liquor alleged to have been procured and drunk at the defendant's tavern.

The action was tried at Hamilton on January 16, 1888, before MacMahon, J., and a jury.

At the trial *H. Carscallen* appeared for the plaintiff, and *T. H. A. Begue*, for the defendant.

It appeared that the accident from which the cause of action arose, happened on June 1st, 1887: that the plaintiff issued her writ on August 31st, but that letters of administration to the husband's estate were not granted to her until September 3rd, 1887.

The jury brought in a verdict for $100 damages in favour of the plaintiff, and the Judge certified for full costs.

Against this verdict the defendant moved by way of appeal to the Divisional Court, on the grounds: (1) That the plaintiff was not the administratrix or "legal representative" of the deceased Henry Trice at the time of the bringing of the action. (2) That the action which exists

only by virtue of R. S. O. (1887), ch. 194, sec. 122, was not properly brought within three months by the "legal representative," and that therefore the provisions of the statute were not complied with. (3) That there was no evidence to shew that the deceased became intoxicated through liquor drunk in the defendant's inn or tavern. (4) That there was no evidence to shew that the accident was caused by the deceased being in a state of intoxication from "drinking to excess" of liquor in the defendant's inn or tavern, or therein furnished to him. (5) That the evidence shewed that if the said deceased had drunk to excess of intoxicating liquor it was not furnished to him in the said inn or tavern, and was not drunk by the said deceased therein; or for a new trial, on the ground that the verdict was contrary to the weight of evidence.

The appeal was argued on September 6th, 1888, before Boyd, C., and Ferguson, J., by:

T. H. A. Begue, for the appeal. The cause of action arises by virtue of the statute, and two things must be proved, *i.e.*, the drinking to excess in defendant's tavern of liquor therein supplied to him, and death caused by the intoxication. There must also be a "legal representative" within three months, the time limited by the statute for the bringing of the action. If the defendant had wished after the issue of the writ, and before the issue of the letters of administration to tender the amount sued for there was no "legal representative" to tender to, and the plaintiff could not then have given a valid discharge, there being at that time no legal representative because the administratrix was not yet appointed, or had no legal authority until the letters were granted. An administrator derives authority only from an order of Court appointing him, and not as an executor by virtue of the will. An administrator has no right of action at law until appointed: *Williams* on Executors, 8th ed. 411. This was what would formerly have been an

action at law under the statute, and not as if an action had existed independent of the statute, and some relief, formerly within the exclusive jurisdiction of a Court of Equity, sought. The action was not properly brought within three months, and this being virtually a penal action the statute must be strictly complied with: *The Edinburgh Life Assurance Company* v. *Allan*, 19 Gr. at p. 595. As to the meaning of the term "legal representatives" being executors or administrators, see *Price* v. *Strange*, 6 Mad. 159; *Holloway* v. *Holloway*, 5 Ves. 402. The evidence shews some of the liquor was supplied by others. Whoever contributes to the habit of intoxication is liable only for the damages caused by his own acts: *Huggins* v. *Kavanagh*, 52 Iowa 368; *Richmond* v. *Shickler*, 57 Iowa 486.

Moss, Q.C., for the plaintiff, was not called on.

September 7, 1888. BOYD, C.—I see no reason for disturbing the verdict for the plaintiff. The objections urged are two-fold, on the law and on the facts. The first rests on the contention that letters of administration were not issued to the plaintiff till more than three months from the death had elapsed, and that the action, though begun within the three months, was not rightly constituted because the plaintiff was not then the legal representative of the deceased person.

The statute which gives this action, R. S. O. (1887) ch. 194, sec. 122, reads thus, or to this effect: "That an action lies against the inn-keeper offending as for personal wrong, by the legal representatives of the deceased, provided such an action be brought within three months, but not otherwise." It does not say that the legal representative must obtain letters of administration or take out probate before suing out the writ. Nor is this essential according to the practice.

There are two answers to the objection. 1st. That the defendant has not specifically denied the representative capacity of the plaintiff under rule 140, (O. J. A.) and therefore, by the operation of that rule, has admitted

it for all purposes of this litigation. 2nd. That the title of the plaintiff as administratrix was perfected before the trial, and, indeed, three days after the writ had issued. Now the rule in Chancery proceedings, as opposed to that at law, was, that it was not needful for a plaintiff, if he were the person to take out letters of administration, to clothe himself with the character of administrator before he could file a bill. It was sufficient for all purposes that he should obtain the letters before the case was heard, as they, when obtained, related back to the death. The cases are all collected in *The Edinburgh Life Ass. Co.* v. *Allen*, 19 Gr. 593.

This being the equitable doctrine, as opposed to that at law, the Judicature Act directs the former to be preferred: R. S. O. (1887) ch. 44, sec. 53, sub-sec. 12. So that now the rule in equity prevails for the benefit of this plaintiff.

Upon the facts there was sufficient evidence to justify the finding. The damages are the smallest that could be given, and the jury was the tribunal asked by the defendant.

The charge was most favourable to him, but, notwithstanding, the verdict passed against him: it was for the jury to say whether the defendant had supplied liquor to be drunk, and which was drunk by the deceased to excess in the defendant's tavern. The defendant was aware that this man was of drinking habits. He was with a companion who was also a hard drinker. Before visiting the defendant's place they had been drinking to such an extent that liquor had been refused them by another tavern-keeper. The defendant admits giving them one glass of whiskey. One of his witnesses proves that two glasses were given, and one of the plaintiff's witnesses testifies to three, with a belief that four were supplied. You are not to regard merely the absolute quantity given by any one person to determine whether a deceased person has drunk to excess in a given place. A much less amount would produce excess in the case of a man already saturated with recent libations, and the jury must have thought, and with rea-

son, that to the eye of an expert (such as the defendant) it was evident that the deceased had been drinking before reaching the defendant's place of entertainment.

I do not feel called upon to give a strict construction to this enactment, viewing it as of a penal character, according to the argument for the defendant. It is a remedial measure, and to be read in conjunction with that clause of the Interpretation Act (R.S.O., (1887,) ch. 1, sec. 8, sub-sec. 39), which seeks to ensure the attainment of the object of the Legislature by giving a fair, large, and even liberal reading to such provisions.

Judgment should be entered upon the verdict, and the appeal dismissed, with costs.

FERGUSON, J.—I agree with the judgment just delivered by the Chancellor. It is not necessary that the administrator or administratrix should have letters of administration issued at the time the action was commenced.

The action was brought within the time limited by the statute, and the plaintiff qualified in her representative capacity before the trial. The evidence was sufficient to justify the verdict of the jury, and the appeal should be dismissed, with costs.

G. A. B.

[CHANCERY DIVISION.]

GOODERHAM v. THE TRADERS BANK.

Mortgage—Banks and banking—Redemption of prior mortgage—Assignment in place of discharge—Form of assignment—Schedule of securities—Rights of sureties—R. S. O. ch. 102, sec. 2.

A bank held a mortgage on certain lands of a customer to secure a current discount account, some of the paper of which consisted of notes made merely for the customer's accommodation. The plaintiff had a second mortgage on the lands, and tendered the bank, (who were threatening to sell under their power of sale) together with the amount they claimed as due, a simple assignment to the plaintiff of the mortgage debt and lands containing a covenant that the amount claimed was due. The bank refused to accept the tender as made. The plaintiff then brought this action to compel the execution of the assignment as tendered, or any valid assignment with a covenant that the mortgage moneys were unpaid, and the mortgage a subsisting security for the amount tendered or for an account.

On a motion to restrain the bank from dealing with the securities until the trial.

Held, that the plaintiff could not insist on the execution of the assignment as tendered, nor was he entitled to any covenant save the usual trustee covenant against incumbrances.

Held, also, that the bank was entitled to have the assignment shew the exact position of the parties, and also to have the collateral notes specified therein.

Although perhaps not essential, it was not unreasonable that the transfer should also shew the nature of the collateral securities held by the bank.

Held, lastly, in settling the minutes of judgment, that the plaintiff might pay the amount claimed into Court, but there was no reason why it should remain there pending the taking of the account, and the judgment should provide that it might at once be paid out to the bank.

THIS was a motion to continue an interim injunction until the trial of this action. The writ of summons was endorsed as follows:

The plaintiff's claim is for an order directing that the defendants do execute a certain assignment of mortgage tendered by the plaintiff to the defendants on the 15th day of October, A.D. 1888, together with a marked cheque for $11 220. The mortgage mentioned in the said assignment bears date the 16th day of September, 1887, and was made by one Harry Webb to the defendants, and purports to secure the indebtedness of the mortgagor upon certain paper to the extent of $11,000, as in the said mortgage mentioned, and which said assignment contained the following covenants: "The said assignors for themselves, their successors and assigns, covenant with the said assignee, his heirs, executors, administrators, and assigns, that they the said assignors have done no act whereby the said mortgage has been in anywise released, discharged, or encumbered,

or whereby the lands thereby mortgaged have been in anywise encumbered, and that there is now unpaid and secured by the said mortgage the sum of $11,020." And the plaintiff claims that the defendants be directed to execute such assignment, or any valid assignment, of the said mortgage containing a covenant on behalf of the defendants that the moneys claimed by them to be secured by the said mortgage, are unpaid and secured thereby, and that the said mortgage is a subsisting security for such amount, or in the alternative the plaintiff claims to have an account taken of what, if anything, is due on the mortgage hereinbefore mentioned, dated the 16th day of September, 1887, and made by the said Harry Webb to the plaintiff, and to redeem the property comprised therein.

The following is a description of the lands: * *. The plaintiff claims an injunction restraining the defendants from proceeding to sell or convey the said property under the power of sale in the said mortgage mentioned, or otherwise disposing of the same, or from executing any deed of conveyance thereof.

The interim injunction asked for in the notice of the motion was accordingly to restrain the defendants "from selling, disposing of, or in any way dealing with the mortgage made by Harry Webb to the defendants, * * and any security or securities held by the said defendants as collateral security for the indebtedness of the said Harry Webb to the defendants."

The circumstances were as follows: On September 16th, 1886, Harry Webb being indebted to the defendants in a large sum, for which the defendants held the commercial paper of his customers, and other paper on which the advances had been made, executed a mortgage to the defendants upon certain lands in Toronto to secure payment of the said paper and all renewals, substitutions, and alterations thereof, and all his indebtedness to the defendants. Afterwards Webb executed a mortgage to the plaintiff. Webb having become insolvent, the defendants were proceeding to enforce their mortgage by sale under the powers therein contained, when the plaintiff, with a view to redeeming, tendered to the defendants the amount claimed by them as due under their mortgage, but coupled the tender with a demand for the execution of a deed of assignment to him by the defendants of their mortgage debt and security. The assignment thus tendered to the defendants for execution, was in the following form:

This Indenture, made the 15th day of October, 1888, between the Traders Bank of Canada, the assignors of the first part and George Gooderham, of the city of Toronto, Esquire, hereinafter called the assignee of the second part. Whereas by a certain mortgage dated the 16th day of September, 1887, one Harry Webb, mortgaged the lands hereinafter mentioned to secure the payment of certain moneys as is therein set out unto the said assignors.

And whereas the said assignors have agreed to assign the said mortgage to the said assignee.

Now this indenture witnesseth that in consideration of $11,020 of lawful money of Canada now paid by the said assignee to the said assignors (the receipt whereof is hereby acknowledged.) The said assignors do grant and assign unto the said assignee his heirs, executors, administrators, and assigns for ever, all and singular that certain parcel of land situate in the said city of Toronto * *

Together with the said mortgage and all moneys and interest thereby secured to hold unto and to the use of the said assignee his heirs, executors, administrators, and assigns subject to the equity of redemption subsisting therein by virtue of the said mortgage. The said assignors for themselves their successors and assigns covenant with the said assignee, his heirs, executors, administrators, and assigns, that they the said assignors have done no act whereby the said mortgage has been in anywise released, discharged, or encumbered, or whereby the lands thereby mortgaged have been in anywise encumbered.

And that there is now unpaid and secured by the mortgage the sum of $11,020.

In witness whereof, etc.

The defendants refused to execute this assignment, but expressed their readiness to accept the money, and give an undertaking to afterwards execute such assignment, reconveyance, or discharge, as the plaintiff might be legally entitled to, fully acknowledging his right to redeem. This plaintiff would not agree to, and as the defendants threatened to sell, commenced these proceedings.

Several of the notes held at this time by the defendants in renewal of the notes which represented the indebtedness as it existed at the time of the mortgage, were made by accommodation makers for Webb, and these accommodation makers, the defendants, were anxious to protect if possible. and therefore to have any assignment to be executed on redemption so drawn as to secure these accommodation parties from being made to pay up their notes in full, and left to rank for a dividend only on Webb's insolvent estate.

T. P. Galt, for the plaintiff.
Z. Lash, Q.C., and *A. H. F. Lefroy*, for the defendants.

The motion came up for argument upon October 17th, 1888, before Boyd, C.

October 22nd, 1888. BOYD, C.—Before the Act, R. S. O. 1887, ch. 102, sec. 2, the mortgagor on redeeming had no right to require the mortgagee to assign the mortgage debt, that is, to transfer the mortgage; all that he could call for was, a reconveyance of the mortgaged estate. As to a subsequent mortgagee who might redeem he was entitled to have the lands assigned and conveyed to him, but not the debt: *Colyer* v. *Colyer*, 11 W. R. 1051; *Smith* v. *Green*, 1 Coll. 555, 563; *Hart* v. *McQuesten*, 22 Gr. 146, 149: *Davidson*, Conv. Prec. 3rd ed., vol. ii., pp. 830, 832. The Act now gives a right in both cases to call for the assignment of the debt as well as a conveyance of the land to a third person as the person entitled to redeem may direct. But the conveyance is to be on the terms on which the mortgagee would (before the Act) be bound to reconvey: R. S. O. 1887, ch. 102, sec. 2. Upon the English original of this clause, Chitty, J., observes, "I consider that the words, 'on the terms on which he would be bound to reconvey' do not refer merely to the amount of principal, interest and costs, but to 'the terms' generally:" *Alderson* v. *Elgey*, 26 Ch. D. at p. 573.

Davidson says, that transfer and redemption are perfectly distinct things, the former being always the consequence of contract, and the latter being the obligation imposed on the mortgagee by the nature of his security, Conv. Prec., 3rd ed., vol. ii. p. 830. Reconveyance is also, I take it, to be distinguished from transfer in like manner as being the usual result of redemption, and not the outcome of a bargain distinct from the mortgage transaction. Now the effect of the statute is to entitle the person redeeming to call for something more than reconveyance, namely, an assignment of the debt, so as to keep it

alive. In such a case, Davidson says, when the charge is kept up, the redemption and reconveyance of a mortgage approximate in their character and consequences to a transfer of the mortgage, *ib.* p. 829. Again, *ib.*, at p. 814, he speaks of a mode of transfer which is the nearest to this case *i. e.*, "when the mortgagor cannot be made a party, and the instrument is therefore merely an assignment of the mortgage debt and conveyance of the mortgaged estate subject to redemption, without the mortgagee's covenant against incumbrances."

According to the practice of conveyancers this appears to be the only covenant which should appear in a reconveyance. A reference to early and later precedents shews this very plainly: *Barton's* Conv. Prec. 3rd ed., vol. iii. pp 576, 586. *Davidson's* Conv. Prec. 3rd ed., vol. ii. pp. 1330, 1332: *Bythewood's* Conv. Prec. 4th ed., vol. iii. pp. 1193, 1197. Where there is a contract for the purchase of a mortgage it may be proper to have a covenant as to what is due upon the security. See *Barton, ib.*, at pp. 788, 794, although the most recent authorities do not sanction this as of course; *Prideaux's* Conv. Prac. 13th ed., vol. i. p. 644. *Davidson's* Conv. Prec. 3rd ed., vol. ii., pp. 1292, 1298; *Bythewood's* Conv. Prec. 4th ed., vol. i, p. 1202. So far as the form of conveyancing under this Act is concerned, nothing more can, in my opinion, be insisted on, than the covenant which is usual from trustees, viz., that against incumbrances. The other covenant as to what is secured by the mortgage is at best of little use. If more is exacted by the mortgagee on redemption than is due as between him and the mortgagor there is the right to recover this without a covenant, and the covenant establishes nothing against the mortgagor who is not a party to the transfer. However in this case, the bank is willing to give such a covenant and the affidavit on which the injunction was obtained states a willingness to pay if such covenant is given. That should end the matter and close the litigation.

Apart from this, the whole affair resolves itself into a question of costs, and the so-called merits reduce themselves into some minute points of conveyancing which in England, would have been submitted to a conveyancing counsel instead of being brought into Court. The parties were agreed about redemption except as to the form of the transfer of the mortgage. The form of this conveyance depends upon the circumstances. In a case where the money was paid by one who had not the whole equity of redemption, Lord Hatherley said it should be drawn in such a manner as that there should be very little difficulty upon the subject afterwards, and there should be expressed on the face of the conveyance a statement of some kind with reference to the exact position of the parties, shewing that the person so redeeming, having only a partial interest, is to hold subject to the rights of redemption of all the parties who hold other interests: *Pearse* v. *Morris*, L. R. 5 Ch. at p. 231. See also *Boyd* v. *Petrie*, 7 Ch. at p. 392. In proper technical shape the instrument should be framed so as to assign the mortgage debt and interest and the full benefit of all securities, collateral and otherwise held for the same, and then to convey the estate subject to such right and equity of redemption as subsists in the premises by virtue of the mortgage transferred.

It is of moment to provide for the securities, and refer to them specifically in a schedule, or otherwise, because they might be separated from the mortgage itself, and so give rise to great complications: *Morley* v. *Morley*, 25 Beav 253; *Walker* v. *Jones*, L. R. 1 P. C. 50. In the transfer tendered in this case there is no reference to the collaterals held by the bank, which consist of notes made by the customers of the mortgagee and "other paper" as it is called in the mortgage. The clause in this transfer "to hold subject to the equity of redemption" is referable to the land, and not the securities which are not mentioned. Notwithstanding this the securities when delivered or endorsed would have to be held by the person redeeming on precisely the same terms as they were held by the bank.

I deem it of no importance that this transfer is drawn to the subsequent mortgagee himself, and not to a third person as expressed in the Act. The transferee is to be a nominee of the person redeeming, and if he chooses to have the transfer to himself the mortgagee cannot object. But I think it was essential for the bank to have the collaterals turned over specified, lest any subsequent loss of them might give rise to disputes as to what was actually handed over. It is said that on some of this "paper" the makers who appear to be primarily liable have signed for the accommodation of Webb, and so are in truth only guarantors for the payment of the mortgage. The bank desires that this, of which they are cognizant, should be manifested upon the transfer so that the transferee may have notice of the nature of the securities. While this is not perhaps essential, I cannot say that it is unreasonable to set it forth in some succinct and inexpensive way. I do not follow the argument that this is necessary, and that the transfer should be to a third person, in order that tacking may be prevented. The subsequent mortgagee cannot after the transfer insist on being redeemed as to his own mortgage to the prejudice of these sureties: *Forbes* v. *Jackson*, 19 Ch. D. 618. Even if what the bank desires is no more than the expression of what is implied, I should hesitate to say that the request was either vexatious or oppressive: *Wicks* v. *Scrivens*, 1 J. & H. 220. Upon the whole application as now before me I cannot find that the attitude of the defendants as mortgagees has been such as to deprive them of the costs of this motion. These costs may be added to their claim. See *Cotterell* v *Finney*, L. R. 9 Ch. 541. The injunction is dissolved, and if the parties choose to cut the matter short, I will refer it to the Master to take the mortgage accounts as in a redemption suit, or I will refer it to him to settle the terms of the transfer if the parties cannot agree thereon after hearing this judgment. If either party objects this action will have to take its usual course, the injunction being dissolved.

The plaintiff elected to proceed at once to the Master's office and have the account taken, and the form of assignment settled, but on settling the minutes of the judgment a dispute arose as to whether the money to be paid for redemption was to remain in Court pending the reference, or to be paid direct to the defendants.

The matter coming before BOYD, C., he held that though the plaintiff might be allowed to pay the money into Court instead of to the defendants, there was no reason why it should not be forthwith paid out to the defendants, and the judgment was ultimately settled as follows:—

2. This Court doth order and adjudge that upon payment into Court forthwith of the sum of $11,339.68, being the amount claimed by the defendants to be due upon their mortgage for principal and interest, computed up to the 7th day of November, 1888, and costs, including the costs of this motion, the defendants, their servants, attorneys, and agents, be, and they are hereby restrained from selling, disposing of, or in any wise dealing with the mortgage hereinbefore mentioned, and any security or securities held by them as collateral security for the indebtedness of the said Harry Webb to the defendants, until this Court shall make other order to the contrary.

3. And this Court doth further order and adjudge that the said sum of $11,339.68, when paid into Court as aforesaid be forthwith paid out to the defendants on account of their claim under their said mortgage for principal, interest, and costs as aforesaid, but without prejudice to the account hereinafter directed, and upon such payment that the defendants do forthwith assign and convey the said mortgage and the mortgaged land, and collateral securities held by them, and deliver up all deeds and documents in their possession or power relating to the said mortgage to the plaintiff or whom he may appoint, such conveyance and assignment to be settled by the Master in Ordinary of the Supreme Court of Judicature for Ontario, in case the parties differ about the same.

4. And this Court doth further order and adjudge that it be referred to the said Master to ascertain the amount due upon the said mortgage for principal and interest, and also to tax to the defendants their costs in connection with the said mortgage, and with this motion, and also in case the plaintiff shall elect to pay the same, the costs of the action and the reference hereby directed.

5. But in case the plaintiff shall not so elect then this Court doth reserve the question of further directions and costs of the action and the said reference until after the said Master shall have made his report.

6. And in case the plaintiff shall so elect to pay the defendants' costs of the action and reference, and in case the money so to be paid into Court, shall be insufficient to pay what shall be found due to the said defendants

for principal and interest, and costs as aforesaid, including the costs of the action and reference, this Court doth order and adjudge that the plaintiff do forthwith pay to the defendants what shall be found due over and above the sum so to be paid into Court as aforesaid.

7. But in case the said moneys so to be paid into Court as aforesaid shall exceed what shall be found due to the defendants for principal and interest and costs as aforesaid, this Court doth order and adjudge that the defendants do forthwith, after the making of the Master's report, pay to the plaintiff the amount of such excess.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

REGINA v. PERRIN.

Justice of the Peace—Summary conviction under R. S. O. ch. 214, sec. 15—Dog killing sheep—Award of compensation—Proving character of dog—Territorial jurisdiction of justices—R. S. C. ch. 178, sec. 87.

The owner of a sheep killed or injured by a dog can, under R. S. O. ch. 214, sec. 15, recover the damage occasioned thereby without proving that the dog had a propensity to kill or injure sheep; and the Act applies to a case where the dog has been set upon the sheep.

It did not appear upon the face of the conviction in question that the offence was committed within the territorial jurisdiction of the convicting justices of the peace, but upon the depositions it was clear that it was so committed.

Held, that the saving provision of sec. 87 of R. S. C., ch. 178, should be applied; and the order *nisi* to quash the conviction was discharged.

THE defendant was, on the 10th day of August, 1888, at the township of Augusta, in the united counties of Leeds and Grenville, convicted before three justices of the peace, on the information and complaint of Wesley Pyke, of the said township of Augusta, for that he, the defendant, of the said township of Augusta aforesaid, "owned and had in his possession and now owns and has in his possession a dog, which, within these six months of the date hereof, to wit on the eleventh day of June, A.D. 1888, worried, injured, and destroyed a sheep belonging to the

said Wesley Pyke," and they adjudged the defendant "for the said offence to forfeit and pay the sum of six dollars to Wesley Pyke for sheep, and the sum of eleven dollars and sixty cents for the costs in this behalf." This conviction and the information, depositions, and evidence having been brought before this Court upon *certiorari*:

Shepley, on the 6th September, 1888, obtained an order *nisi* to quash the said conviction with costs, on the following among other grounds: 1. The conviction purports to be made under R. S. O. (1887) ch. 214, and is not warranted or authorized by said statute. 2. The said statute does not justify the imposition of any penalty or fine by way of compensation or otherwise upon a conviction for the offence charged in the conviction. 3. The conviction cannot be supported under section 15 of the said Act, inasmuch as no evidence was given that the dog in question was fierce, vicious, or accustomed to worry sheep. 4. The statute in question does not apply to a case where the injury is done by a dog acting under the command of the owner or person in charge, as was shewn here. 5. No jurisdiction is disclosed on the face of the said conviction, and it is not shewn where the offence in question was committed.

On November 21, 1888, *Shepley* supported the order *nisi* before the full Court, and referred to *Oliphant's* Law of Horses, 4th ed., p. 352; *Card* v. *Case*, 5 C. B. 652; *Orr* v. *Fleming*, 25 L. T. 73.

No one appeared to shew cause.

December 22, 1888, the judgment of the Court was delivered by

ARMOUR, C. J.—It was contended that the owner of any sheep or lamb killed or injured by any dog could not under R. S. O. ch. 214, sec. 15, recover the damage occasioned thereby from the owner or keeper of such dog, without proving that the dog had a propensity to kill or injure sheep; but we think that the statute, by the necessary

inference to be drawn from its language, renders such proof unnecessary.

Section 13 provides that in case any person is convicted on the oath of a credible witness of owning or having in his possession a dog which has worried and injured or destroyed any sheep, the justice of the peace may make an order for the killing of such dog.

Now this section clearly refers not only to a dog that had a propensity to kill or injure sheep, but also to a dog that has for the first time killed or injured any sheep.

Section 14 provides that no conviction under this Act shall be a bar to any action by the owner or possessor as aforesaid of any sheep, for the recovery of damages for the injury done to such sheep, in respect of which such conviction is had—clearly contemplating the recovery of damages against the owner or keeper of a dog that has for the first time killed or injured any sheep.

Section 15 then provides that the owner of any sheep or lamb killed or injured by any dog shall be entitled to recover the damage occasioned thereby from the owner or keeper of such dog. This is clearly not confined to damage occasioned by a dog that had a propensity to kill or injure sheep, but extends also to damage occasioned by a dog that has for the first time killed or injured sheep.

The latter part of this section, it is true, provides that such aggrieved party shall be entitled so to recover on such action or proceedings, whether the owner or keeper of such dog knew or did not know that it was vicious or accustomed to worry sheep; but this provision was wholly superfluous, for it is plain from what precedes this provision that it was intended that the owner or keeper of any dog should be responsible to the owner of any sheep or lamb killed or injured by such dog for the damage occasioned thereby, whether such dog had or had not a propensity to kill or injure sheep, and whether the owner or keeper of such dog knew or did not know of such its propensity. And it cannot be contended that the introduction of this provision into this section raises any

implication, against the express words of the Act, of a necessity to establish a propensity in the dog to kill or injure sheep.

It was also contended that the Act did not apply to a case where, as here, the son of the owner of the dog had set the dog upon the sheep; but we do not think that we ought to restrict by judicial decision the generality of this very beneficial Act.

It was also contended that the conviction did not shew on its face jurisdiction in the convicting justices, that is, that it did not appear on the face of the conviction that the subject matter of the complaint was within their jurisdiction.

The Summary Convictions Act, R. S. C. ch. 178, is applicable to this conviction, and section 87 of that Act provides that no conviction or order made by any justice and no warrant for enforcing the same, shall, on being removed by *certiorari* be held invalid for any irregularity, informality or insufficiency therein, provided that the Court or Judge before which or whom the question is raised is, upon perusal of the depositions, satisfied that an offence of the nature described in the conviction, order, or warrant, has been committed, over which such justice has jurisdiction; and upon a perusal of the depositions in this case, it is abundantly clear that the subject matter of this complaint was within the jurisdiction of the convicting justices.

The order *nisi* will, therefore be discharged, but as no one appeared to shew cause, it will be discharged without costs.

[QUEEN'S BENCH DIVISION.]

BANK OF HAMILTON v. ISAACS ET AL.

Evidence—Action against indorser of promissory note—Denial of indorsement—Admissibility of evidence as to circumstances connected with the indorsement—New trial—Con. Rule 791.

I., the maker, and F., the indorser, of a promissory note were sued upon it, and F. denied his indorsement.

At the trial an indenture of conveyance of land from I. to F. was put in without objection, and I. testified that it was given to secure F. against his indorsement of certain notes of which the one sued on was a renewal. There was nothing in the indenture to shew that it was given for anything but the expressed consideration of $1,500, and it was not pretended that such consideration was paid.

Held, that it was competent for F. to shew what the indenture was given for; that it was not given to secure him against such indorsement; and therefore evidence of the existence of an indebtedness from I. to F. upon an open account was receivable to support the proof that it was given to secure such indebtedness.

I. was asked whether F. did not say to him when he asked him to indorse another note, the indorsement on which was admitted by F. to be his, that he, F., "never backed anybody's note."

Held, that this question was irrelevant, and I.'s answer to it conclusive; and evidence contradicting such answer was inadmissible.

Held, also that, having regard to the whole case and the charge of the trial Judge adverting to the evidence so improperly received and to its importance, substantial injury and miscarriage were thereby occasioned, and there was sufficient ground for granting a new trial.

ACTION on a promissory note dated 19th October, 1887, at three months for $2,000, made by the defendant Isaacs, and alleged to have been indorsed by the defendant Fletcher.

The defendant Isaacs suffered judgment by default, and the defendant Fletcher pleaded that he did not indorse; upon which issue was joined.

The case was tried before Falconbridge, J., with a jury, at the Spring Sittings of this Court at Barrie, 1888.

It appeared that the note sued on originated in a note dated the 29th March, 1886, at three months for $1,500, made by the defendant Isaacs, and purporting to be indorsed by the defendant Fletcher, which upon its maturity was renewed by a note dated 2nd July, 1886, at three months for $1,500, made by the defendant Isaacs, and purporting to be indorsed by the defendant Fletcher, which

upon its maturity was renewed and increased by a note dated 5th October, 1886, at three months, made by the defendant Isaacs, and purporting to be indorsed by the defendant Fletcher, which upon its maturity was renewed by a note dated 8th January, 1887, at three months for $2,000, made by the defendant Isaacs, and purporting to be indorsed by the defendant Fletcher, which upon its maturity was renewed by a note dated 11th April, 1887, at three months for $2,000 made by the defendant Isaacs, and purporting to be indorsed by the defendant Fletcher, which upon its maturity was renewed by a note dated 14th July, 1887, at three months for $2,000, made by the defendant Isaacs, and purporting to be indorsed by the defendant Fletcher, which upon its maturity was renewed by the note sued on. A note was put in evidence made the 5th of June, 1886, at three months for $1,500, made by the defendant Isaacs, and purporting to be indorsed by the defendant Fletcher, the indorsement of which as well as of all the above mentioned notes was denied by the defendant Fletcher. This last mentioned note was paid by the defendant Isaacs at maturity.

There was also put in evidence a note dated 30th December, 1886, at 12 months, for $433.60, made by the defendant Isaacs, and purporting to be indorsed by the defendant Fletcher, the indorsement of which the defendant Fletcher admitted to be genuine.

The principal witness to prove the fact that the defendant Fletcher indorsed the note sued on was the defendant Isaacs, and as confirmatory of his evidence to that effect an indenture was put in, made the 11th day of January, 1888, between the defendant Isaacs of the first part, his wife for the purpose of barring her dower of the second part, and the defendant Fletcher of the third part, whereby the defendant Isaacs for the expressed consideration of $1,500, conveyed to the defendant Fletcher the north half of lot number 9, 3rd concession Tecumseth, subject to two mortgages in favour of one Robert Calhoun, amounting to $2,000, and all interest due and accruing thereon respect-

ively, also a certain mortgage in favour of one Walker for $1,000 and all interest accruing thereon; the execution and delivery of which was admitted.

The defendant Isaacs swore that this indenture was given by him to the defendant Fletcher as security against the note sued on; that he did not owe the defendant Fletcher on any other account, but that the defendant Fletcher owed him. On the other hand, the defendant Fletcher swore that the indenture was given to him for the amount of an open account the defendant Isaacs owed him, and called witnesses to establish the account, the learned Judge against the objections of the plaintiffs' counsel ruling that the defendant might do so. The defendant Isaacs was asked on cross-examination as to what took place on the occasion of the defendant Fletcher indorsing the note of the 30th December, 1886, for $433.60 for goods bought at Mrs. Carswell's sale, and if when he asked the defendant Fletcher to indorse this note in the presence of one Jamieson, the clerk of the sale, the defendant Fletcher did not say that he never backed anybody's note, and he said that the defendant Fletcher did not say so. The evidence of the defendant Fletcher was ruled by the learned Judge to be admissible to shew that he did say so, and the evidence of Jamieson was also admitted for the same purpose.

The jury found for the defendant.

On 25th May, 1888, *McCarthy*, Q.C., for the plaintiffs, obtained an order *nisi* to set aside the verdict, and to enter it for the plaintiffs or for a new trial, on the grounds of the improper reception of evidence as to the indebtedness of the defendant Isaacs to the defendant Fletcher, and as to the conversation alleged to have taken place between the defendants, with reference to the indorsement of the Carswell note, and because the verdict was contrary to law and evidence.

On the 8th June, 1888, *Lount*, Q.C., shewed cause, and *McCarthy*, Q.C., supported the rule before a Divisional Court composed of Armour, C. J., and Street, J.

November 19, 1888. The judgment of the Court was delivered by

ARMOUR, C. J.—The admissibility of the indenture of the 11th January, 1888, was not objected to, but, if admissible at all, it was only admissible as confirmatory of the fact of the indorsement of the note sued on by the defendant Fletcher, and it could only be confirmatory of that fact on its being shewn to have been given to the defendant Fletcher to secure him against such indorsement. Now, there was nothing in this indenture to shew that it was given except for the expressed consideration of fifteen hundred dollars then paid, and it was not pretended by any one that such consideration was then paid. That it was given to secure the defendant Fletcher against such indorsement, rested, therefore, entirely on oral testimony, and the plaintiffs having called the defendant Isaacs to prove, and he having sworn, that it was given to secure the defendant Fletcher against such indorsement, it was competent for the defendant Fletcher to shew what it was given for, that it was not given to secure him against such indorsement, but that it was given to secure the indebtedness of the defendant Isaacs to him upon an open account, and it was, in our opinion, pertinent and relevant to shew that such indebtedness existed, as tending to support the proof that it was given to secure such indebtedness.

We are of opinion, however, that the question asked the defendant Isaacs by the counsel for the defendant Fletcher whether the defendant Fletcher did not say to him when he asked him to indorse the note of the 30th December, 1886, (the Carswell note) that he "never backed anybody's note," was clearly irrelevant, and that the answer of the defendant Isaacs to that question was conclusive, and that the evidence of the defendant Fletcher and of the witness Jamieson contradicting such answer was therefore inadmissible, and was improperly received. See *Attorney-General* v. *Hitchcock*, 1 Ex. 91.

It is not sufficient ground, however, for granting a new

trial that evidence was improperly received, "unless, in the opinion of the Court to which the application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action";* but we think, having regard to the whole case, and to the charge of the learned Judge adverting to this evidence so improperly received, and to its importance, we must hold that substantial wrong and miscarriage was thereby occasioned.

The order *nisi* will, therefore, be absolute for a new trial, with costs to be costs in the cause.

* See Con. Rule 791.

[QUEEN'S BENCH DIVISION.]

REGINA v. SMITH.

Canada Temperance Act—R. S. C. ch. 106, sec. 100, construction of—"Not less than $50"—Penalty—Powers of magistrate.

The words "not less than $50" and "not less than $100," in the Canada Temperance Act, R. S. C. ch. 106, sec. 100, should be construed as "$50 and no less" and "$100 and no less"; and a summary conviction by a Police Magistrate for a first offence against the Act was quashed because the penalty imposed, $75, was beyond the jurisdiction of the magistrate; FALCONBRIDGE, J., dissenting.

Regina v. *Cameron*, 15 O. R. 115, not followed.

Stimpson, qui tam, v. *Pond*, 2 Curtis 502, referred to, and approved.

THE defendant was, on the 19th December, 1887, convicted before the Police Magistrate for the county of Brant, at the township of Brantford, in the said county, for that he the defendant did between the 1st November and 16th December, 1887, at the township of Brantford, in the county of Brant, a place where the second part of the Canada Temperance Act, 1878, then was in force, unlawfully sell intoxicating liquor contrary to the said Act, and was thereby adjudged to forfeit and pay for his said offence the sum of seventy-five dollars, to be paid and applied according to law.

This conviction having been brought before this Court by *certiorari*, *Mackenzie*, Q. C., for the defendant, obtained an order *nisi* to quash the same upon the ground that the magistrate had no power to impose a penalty of more than fifty dollars for a first offence against the second part of the Canada Temperance Act.

On the 26th November, 1888, *S. A. Jones* supported the order *nisi*, and *Delamere* shewed cause.

December 22, 1888. ARMOUR, C. J.—By R. S. C. ch. 106, sec. 100, "Every one who, by himself, his clerk, servant or agent, exposes or keeps for sale, or directly or indirectly, on any pretence or by any device, sells or barters, or in consideration of the purchase of any other property, gives to any other person any intoxicating liquor, in violation of the second part of this Act, shall, on summary conviction, be liable to a penalty of not less than fifty dollars for the first offence, and not less than one hundred dollars for the second offence, and to imprisonment for a term not exceeding two months for the third and for every subsequent offence."

What construction is to be placed upon the words "not less than fifty dollars," and "not less than one hundred dollars," in this clause? Are we to construe them so as to give the functionaries who may try the offences referred to in the clause a discretion to impose under these words penalties to any amount?

In putting a construction upon them we must bear steadily in mind the nature of the offences that are to be tried; that they are not *mala in se*, but merely *mala prohibita*; the judicial character and position of the functionaries that are to try them--too often partisans appointed solely for the purpose of enforcing this Act; the fact that they have the power to try the offences summarily; the fact that *certiorari* is taken away; and that appeal is limited to the case where the conviction has been had before two justices.

Under these circumstances, are we to impute to the Legislature the intention of giving these functionaries power to impose under these words penalties to any amount? Do the words used themselves necessarily give such power? The power is given to impose the penalties of "fifty dollars" and "one hundred dollars." Are we to imply from the words "not less than" the power to impose greater penalties and to any amount? For the third and for every subsequent offence the penalty is imprisonment only, and for a term "not exceeding two months." Was it intended that the penalties for the first and second offences might be made more severe and oppressive than the penalty for the third and for every subsequent offence, as they might well be made if the functionaries who are to try the offences have power for the first and second offences to impose penalties to any amount? It seems to me that it could never have been intended by the Legislature that greater penalties should be imposed for the first and second offences than fifty dollars and one hundred dollars respectively, nor could it have been intended that the functionaries who were to try these offences should have unlimited discretion or indiscretion to impose penalties for such offences to any amount they pleased.

The words, "not less than fifty dollars," and "not less than one hundred dollars," may well be construed as "fifty dollars, and no less," and "one hundred dollars, and no less," and it appears to me that they ought to be so construed.

In *Stimpson, qui tam*, v. *Pond*, 2 Curtis 502, which was an action to recover "a penalty of not less than $100," under an Act imposing this penalty for marking the word "patent," on an unpatented article, for the purpose of deceiving the public, Mr. Justice Curtis, an associate Justice of the Supreme Court of the United States, and a very able jurist, held that the Act did not, by imposing a penalty of not less than $100, authorize the imposition of a greater penalty than $100. "Power," he says (p. 504), "to inflict a

particular penalty must be conferred by Congress in such terms as will bear a strict construction. The only power expressly given by this Act is to impose a penalty of not less than one hundred dollars. This power may be exhausted by imposing a penalty of just one hundred dollars. The terms of the Act do not authorize the infliction of a penalty greater than one hundred dollars. Is there a safe implication that authority to inflict a greater penalty was intended to be conferred? The objections to this seem to me too strong to be overcome. In the first place, mere implication can hardly ever be safe ground on which to rest a penalty, and when penalties of unlimited magnitude are the subjects of the implication, the danger of making it, and the improbability of its correctness, are proportionably increased. It would be difficult to reconcile such an implication with the constitutional prohibition to impose excessive fines. It makes Congress, in effect, say that for a mere *malum prohibitum* not of great public importance, any amount of fines might be imposed."

In my opinion the conviction must be quashed without costs, and with the usual order for protection.

FALCONBRIDGE, J.—I am of the opinion that the conviction ought to be affirmed. I do not think that by anything I can say I can add to the force of the opinion of my brother Rose in *Regina* v. *Cameron*, 15 O. R. 115. His reasoning and his conclusions are drawn from a critical analysis and comparison of the different sections of the Act itself—surely one of the best methods of arriving at an interpretation of a clause in a statute, where there was no precedent to guide.

The case of *Stimpson, qui tam*, v. *Pond*, 2 Curtis 502, does not appear to have been cited in *Regina* v. *Cameron*. If it had been, it would not of course have been binding on my brother Rose, save in so far as the soundness of Mr. Justice Curtis's logic, and the accuracy of his conclusions might have commended themselves to my brother, and so have bound his reasoning faculties.

Mr. Justice Curtis says (p. 505): "It must be admitted that 'a penalty of not less than $100' is not a well-chosen expression to indicate a penalty of one hundred dollars."

I venture to think that if that learned Judge had found in another section of the Act which he was then discussing the expression, "a penalty of $100," he would have gone further and said that the words "not less than $100" were neither apt nor meant to read "just one hundred dollars."

The probable intention of the enactment was that for a first offence there might be inflicted a penalty of from $50 to $100, and that for the second offence a reasonable discretion over $100 was reposed in the administrators of the law.

STREET, J., agreed with ARMOUR, C. J.

Order absolute quashing conviction without costs.

[CHANCERY DIVISION.]

NIHAN v. ST. CATHARINES AND NIAGARA CENTRAL RAILWAY COMPANY.

Railways—Notice to expropriate—Notice of desistment—Bond—Ultra vires—Injunction—51 Vic. ch. 78 (D)—51 Vic. ch. 29 (D.)

The defendants, who were originally incorporated under an Ontario Act, gave notice of their intention to expropriate certain lands, and also executed the usual bond, which was duly allowed by the County Judge, and possession taken by them. Subsequently, the Act 51 Vic. ch. 78 (D.) was passed, bringing the railway under the legislative authority of the Dominion, and incorporating the provisions of the Dominion Railway Act as to expropriation of lands, except where inconsistent with the Ontario Act, but ratifying all acts already done in that regard. Afterwards the arbitrators who had been appointed in the matter of the above lands to give the compensation therefor, gave notice of intention to proceed with the arbitration, immediately after which the defendants gave notice of desistment, and then a new notice of intention to expropriate the same with other lands, and subsequently another notice specifying the original land only.

Held, that the notice of desistment served avoided the original bond, and the defendants must now give security by deposit of money in a bank instead of a bond, that being the mode of giving security under the Dominion Railway Act, and unless they did so, the plaintiff was entitled to an injunction restraining the defendants from using the land.

Where a railway company gave notice of their intention to expropriate certain lands adjoining their lines, but which were not required for building any of their works upon, and the evidence shewed grounds for supposing that the powers were to be exercised for other than those purposes which the railway laws of this country permit and allow.

Held, that they should be enjoined from proceeding with the expropriation.

THESE were two cases, which were argued together, and consisted of motions for interim injunctions by the plaintiff against the defendants, under the following circumstances, as detailed by Robertson, J., before whom the motions were argued, by way of introduction to his judgment:

On September 7th, 1888, the plaintiff commenced an action and gave notice of motion to restrain the defendants from proceeding to expropriate certain lands of the plaintiff, containing 2 71/100 acres, referred to on the argument as the "Barrow Pit," on the grounds that the said lands were not required by the defendants for purposes mentioned

in their notice to treat for same; and that no agreement had been attempted to be made by the defendants with the plaintiff for the purchase thereof; and on the grounds that the quantity of lands described was greater than the defendants were authorized to expropriate by the Railway Act for the purposes mentioned in their notice.

And afterwards, on September 12th, 1888, the plaintiff commenced another action, and gave notice of motion for an order restraining the defendants from continuing in possession of another piece of the plaintiff's lands containing 3 18/100 acres.

The facts connected with this last proceeding were as follows:

The defendants were originally incorporated by the Legislature of Ontario (44 Vic. ch. 73, 1881), and on June 13th, 1887, gave notice to the plaintiff that they required for the purposes of their railway two pieces of his lands one containing 1 acre and 8/100 of an acre, being part of lot 8 in 10th concession of Grantham, and the other containing 2 acres, being a part of lot 9 in said concession, together 3 acres and 8/100 of an acre; and the notice stated that the company required the said lands for "the purpose of constructing and thereafter of operating their railway thereon," and that the company was willing and offered to pay the plaintiff $400 for the said lands and as compensation for such damages as the plaintiff might sustain by reason of the exercise of the powers conferred upon them by the Railway Act; and they also gave notice that in the event of the plaintiff not accepting their offer, they appointed one Montgomery as the arbitrator of the company in the premises. To this notice was attached a certificate by Mr. B. N. Molesworth, P. L. S. and C. E. under the statute, and that $400 was a fair compensation for the land and all damages, &c.; and with the said notice and certificate was also served a notice of an application to be made to the County Judge for a warrant placing the company in possession of the said lands, the company giving the necessary security in the shape of a bond in the penal sum of $1,800,

that the company would pay to the plaintiff, or deposit the same under "The Railway Act of Ontario," the sum to be found due him by any award made in pursuance of the said Act, &c. The plaintiff, having refused the amount proposed to be paid by the company, appointed an arbitrator on his behalf and the two appointed a third. The bond was allowed by the County Judge and he issued his warrant to place the company in possession of the land, and they went on and constructed their railway on the same, and had full possession thereof and the railway was in operation. While the proceedings before the County Judge were being taken, the company had a Bill before the Parliament of Canada, declaring that "the said railway was for the general advantage of Canada," and on the 23rd day of the same month that Bill became an Act of Parliament, but doubts having arisen as to the corporate powers possessed by the company and the manner in which the same should be exercised, another Act was passed by the Dominion Parliament on May 22nd, 1888, (51 Vict. ch. 78) clearing away these doubts and declaring that the company should be subject to the legislative authority of the Parliament of Canada, with all and every of the powers, &c., conferred upon it by, under and by virtue of certain Acts of the Legislature of Ontario (which were set out) in as full and ample a manner in all respects as though the several provisions of the said Ontario Acts were incorporated into and re-enacted in that Act, and that the condition of the company was to remain unchanged, and that the provisions of the "Railway Act" of the Dominion from section 4 to section 39 inclusive, should apply to the said company, "and in so far as they are applicable to the undertaking and except to the extent to which they are inconsistent with the provisions of the said Acts of the Legislature of the Province of Ontario above recited, shall be read and construed therewith, &c." There was also a clause (6) which declared that all acts done under the provisions of the Ontario Acts, and purchases by and grants to the company, and that surveys and expropriations already made &c, should

be deemed and held to be legal and valid and binding to the same extent as if done and taken under the authority of the Acts of Canada, &c., but the "securities or bonds" given under the expropriation clauses of the Ontario Acts were not included, and it was contended by the plaintiff, for the reason that the "Railway Act" of Canada, 51 Vic. ch. 29, D., requires by sec. 164, another description of security, viz.: "By deposit in a chartered bank, designated by the Judge, to the credit of the company and such person or party jointly, of a sum larger than the company's estimate of the probable compensation, and not less than 50 per cent. above the amount mentioned in the notice served," &c.

The arbitrators appointed by the plaintiff and the company, in respect to the valuation of the land in question, did not give an appointment of their intention to proceed in the matter of the arbitration until August 22nd, 1888, and immediately upon the service of such notice the company gave notice of desistment, under the 158th sec. of the Railway Act, which declared that the company "may abandon the notice of intention to expropriate and all proceedings thereunder, but shall be liable to the person notified for all damages and costs incurred by him in consequence of such notice and abandonment, * * and the company may give to the same * * person notice for other land or material, or for land or material otherwise described, notwithstanding the abandonment of the former notice." Immediately after serving this notice of desistment or abandonment the company served a new notice of lands required by them, stating "that the lands required to be taken by the St. Catharines and Niagara Central R. W.Co. consisting of parts of lots 8 and 9, in the 10th concession of Grantham, are particularly described as follows." Then followed a description which covered and included the lands in the first notice, under which all proceedings, &c., were abandoned by the notice of desistment, as well as an angular piece lying to the east thereof, and said to contain about 2 acres and 77/100 of an acre, making

in all 5 acres and 85/100 of an acre, and that the company were ready and willing, and thereby offered to pay $3,500, as compensation for the said lands, and damages, &c. The president of the defendants' company, Mr. Oille, in his cross-examination on his affidavit made in the action stated, that at the time this notice was served it was the intention of the company to use the additional piece of land, the angular piece, as "a barrow pit." Subsequently, however, on September 27th, 1888, the defendants served another notice of the lands required by them, which described only the piece in the first notice mentioned, being the part already taken possession of under the warrant of the County Judge, and on which they had constructed their line of railway, having, as he said, abandoned the "barrow pit" parcel. This notice described the land as containing 3 acres and 18/100 of an acre, instead of 3 acres and 8/100 of an acre, and that the company were ready and willing, and thereby offered to pay the sum of $2,300 as compensation for the said lands, and for damages, &c.

On receipt of this the plaintiff gave notice that he declined the sum offered, and appointed an arbitrator, and also demanded from the company that they should deposit the security required by the 164th section of the Railway Act. This the company refused to do, and the plaintiff then commenced this action.

The defendants contended that the plaintiff was obliged to proceed with the arbitration, and that the bond given by the company, while their works were under the jurisdiction of the Ontario Legislature, was all the security that the plaintiff was entitled to, and resisted this motion on that ground. The plaintiff on the other hand alleged that the bond and the condition thereof afforded no security now: that the Dominion Railway Act did not recognize the giving of a bond as security, but that the estimated value with at least 50 per cent. added, must be deposited with one of the chartered banks of the country, to the joint credit of the company and the plaintiff, there to remain, subject

to the award that might be made in the premises, and the plaintiff therefore moved the Court to restrain the defendants from continuing in possession of the lands in question until that deposit was made.

The motion came up for argument on October 9th and 12th, 1888.

Blake, Q. C., and *Collier* for the plaintiff, cited *Loosemore* v. *Tiverton and North Devon R. W. Co.*, 22 Ch. D. 25; *The Corporation of Parkdale* v. *West*, 12 App. Cas. 602, and remarks of Lord Macnaghten, who delivered the judgment at p. 613-615; the Railway Act (1888) 51 Vict. c. 29 (D.); *Murphy* v. *Kingston and Pembroke R. W. Co.*, 11 O. R. 302; *Cosens* v. *Bognor R. W. Co.*, L. R. 1 Ch. 594; *Joyce* on Injunctions, 2nd ed. Vol. 2, p. 841; *Barbeau* v. *St. Catharines and Niagara Central R. W. Co.*, 15 O. R. 586.

Aylesworth and *Ingersoll*, for the defendants, contra. This is really an action for the recovery of land which cannot be maintained under the circumstances herein. The entry of the defendants was lawful under the warrant of the County Judge. An injunction cannot go restraining the defendants from "continuing in possession." As to security, the giving of it is not a condition precedent. But the defendants have given a bond and the plaintiff must proceed to arbitrate. It would be an irreparable injury to the defendants to grant the injunction asked. The statute 51 Vict. ch. 78, sec. 6, (D) makes valid all things done under the Acts of the Ontario Legislature, and the bond is therefore kept alive and binding, &c. When possession has been taken under the Act, the landowner has no right to resume possession—his only right is to have compensation ascertained and paid: *Tiverton and North Devon R. W. Co.* v. *Loosemore*, 9 App. Cas. at p. 504, per Lord Watson.

October 19th, 1888. ROBERTSON, J.—The effect of the two statutes 50-51 Vic. ch. 60, and 51 Vic. ch. 78 (D.), was to bring the company and its works under the legislative control of the Parliament of Canada, with all and

every of the powers, rights, privileges, immunities, franchises, and authorities from time to time conferred upon it under and by virtue of the several Acts of the Legislature of Ontario theretofore passed in regard to the company in as full and ample a manner in all respects as though the several provisions of the said several Acts had been incorporated into and re-enacted by the Parliament of Canada, in either of its before mentioned Acts. So that on May 22nd, 1888, the day on which ch. 78 of 51 Vic. (D.) came into force, if not on the day when 50-51 Vic. ch. 60 was passed, this company stood in all respects as if it had received its original charter from the Parliament of Canada, and the acts, transactions, and things mentioned in sec. 6, ch. 78 of 51 Vic. (D.) done by the company under the provisions of the Ontario Statutes, were declared to be valid, &c. This section, the defendants contend, continues the validity of the bond given to the plaintiff before referred to, and that therefore this application must fail.

It is consequently necessary to consider the effect of this section in so far as it may relate to the matters in controversy now between the parties. The only part of it which in any way can apply to the question is as follows:

"And every and all notices to land owners of intention to take or exercise powers of the company with regard to any lands, declarations, certificates of surveyors, appointments or awards of arbitrators, orders or warrants of possession heretofore made or granted by any Judge, and all and every act or thing heretofore done, or proceeding of any sort heretofore taken, by the said company in the exercise of any of their corporate powers in connection with the construction of their said line of railway, and the taking and using of lands for that purpose, and the ascertaining and determining of the amount of compensation to be made in respect of lands taken or injuriously affected by the said railway, if, and so far as, made, done, or taken in accordance with the provisions of the above recited Acts of the Legislature of the Province of Ontario, or of "The Railway Act of Ontario," or of "The Railway Act," shall be, in all respects, deemed and held to be legal, valid, and binding, in the same manner and to the same extent as though the same had been made, done, or taken under the authority of, and in accordance with the provisions of Acts of the Parliament of Canada passed in the same words as the several Acts above mentioned."

It must be borne in mind that at the time this section came into force there were outstanding and in full effect the notice served by the company in June, 1887, of their intention to expropriate the 3 8/100 acres of land for the roadway of their railway, and all the proceedings taken in consequence of that notice except in so far as the same is affected by the previous Act, 50-51 Vic. ch. 60, (D.). as to which it is not necessary now to determine. And had the defendants not given notice of desistment, I think the inutility of the bond in question would not have been so clear, as it appears to me that it now is in consequence thereof. It is not easy to understand exactly what the defendants meant by giving that notice, if it was not to get rid of the effect of that bond.

This, however, is mere conjecture on my part, but the surrounding facts suggest that idea to my mind. First we have the notice of intention to expropriate 3 acres and 8/100 of an acre describing the property by metes and bounds, showing that it was required for that part of their line of railway which extended from the division line between lots 9 and 10 to Maple Street, in the plaintiff's survey on lot 8, and under this notice all proceedings were to be taken in accordance with the Acts under and by which the defendants were governed at the time. The bond was given, the arbitrators appointed, and the warrant of the County Judge issued, authorizing the placing of the defendants in possession; this was done and they at once commenced the construction of their works thereon and completed the same, but immediately upon receiving notice of intention to proceed with the arbitration, the defendants avail themselves of the powers conferred by sec. 158 of "The Railway Act," and give notice of desistment, so that by their own act they, in the words of the notice, "abandon" all things done under their notice to treat, served in June, 1887. Now what is the effect of this notice of desistment? The statute declares that in case the land has been improperly described in the notice to treat, or in case the company

has decided not to take the land, they may give notice of desistment, and may also afterwards give to the same or any other person, notice that they require other lands &c., or land otherwise described, notwithstanding the abandonment of the former notice. It is, therefore, pertinent to enquire what was the reason for giving the notice of desistment? Was it because the Company had decided not to take the land? That cannot be, because they had taken possession and constructed their railway over it. Was it then because the land was improperly described? That cannot be, for the same reason, and for the additional reason, that the land taken by them was exactly and correctly described in the notice, so that for no reason sanctioned by the statute, did the company give the notice of desistment. And further proof of this is to be found in the second notice viz. that of August 22nd, that the company require the lands described therein which covers the same lands, and an additional piece lying to the east, and which is angular in form and is the subject of the other action, which I will consider after.

This angular piece, however, the company afterwards also abandoned, leaving the original piece, used and appropriated by them, as their roadway between the points hereinbefore mentioned, so that the notice of desistment was served for some purpose which has not been explained, if it was not for the purpose of placing the plaintiff at a disadvantage, in reference to the security for the payment of whatever sum might be allowed him by the arbitrators. But whether that was the motive or not I have come to the conclusion that the defendants having availed themselves of what they conceived to be their strict right, under the desistment section of the statute, and being at the time under the jurisdiction of the Parliament of Canada, they were after that notice was served exactly in the position of a company taking lands without the authority provided by the statute, and that being the case, I am of opinion that the plaintiff is within his rights, when he comes to this Court and seeks relief against what may be called the devious proceedings of these defendants.

The 146th and 147th sections of "The Railway Act," 51 Vic. c. 29 (D.), declare what shall be done by the company requiring the lands,—notice thereof to the landowner, and what the notice shall contain, and a declaration of readiness to pay some certain sum as compensation for such lands, &c., and the name of an arbitrator on behalf of the company, if its offer is not accepted, and that such notice shall be accompanied by the certificate of a sworn surveyor for the Province in which the lands are situated, or an engineer who is a disinterested person, &c., which certificate shall state, *inter alia*, that the sum so offered is, in his opinion, a fair compensation for the land and damage aforesaid.

Section 151 provides that if the opposite party gives notice to the company of the name of his arbitrator, then the two arbitrators shall jointly appoint a third, &c.; but before possession is taken or can be required by the company they must apply to the Judge for a warrant under sec. 163, but not unless ten days' notice of the application for such warrant is given to the owner of the land, and unless the company gives security to the satisfaction of the Judge by deposit in a chartered bank to be designated by him, to the credit of the company and the landowner, jointly, of a sum larger than his estimate of the probable compensation and not less than 50 per cent. above the amount mentioned in the notice served, &c.

The new notice served on August 27th, 1888, states that the lands are required for the purposes of the company's railway, and the description shews that they are the same lands exactly, although described by different phrases and words, as the lands described in the original notice of June, 1887; and that the company is ready and willing to pay $2,300 as compensation, &c.; and in the event of this offer not being accepted, Samuel Montgomery is the name of the company's arbitrator. On receipt of this notice the plaintiff notifies the company that he declines this offer of $2,300, and appoints his arbitrator, and demands from the defendants the deposit of the security required by the Railway Act, in cases where the company are desirous of

taking possession of the land before compensation is ascertained and paid; and the company refused to comply with this demand.

I think there is ample authority for granting the relief sought by the plaintiff. In *Cosens* v. *Bognor Railway Co.*, the company took land, and made a railway thereon, and afterwards leased the railway to another company. Part of the purchase money remained unpaid, and the landowner filed his bill, against both companies, praying for payment of the money, or an injunction to restrain them from using the land, An order was made on motion, affirming the decision of Stuart, V. C., that the first company should pay the money, and in default, that both companies should be restrained from using the road: L. R. 1 Ch. 594. If it could be held that the bond given, while the company was under the jurisdiction of the Ontario Legislature, was legal and now binding, this motion could not be granted; but a reference to the condition of that bond will at once show that the result of the action taken by the defendants in praying the Parliament of Canada to declare their work for the general advantage of Canada has made that bond entirely inoperative, so that the plaintiff is without the security which the statute declares he is entitled to, and although there is no provision in "The Railway Act" under which the plaintiff can bring himself, I think that the arm of this Court is sufficiently long to enable it to reach such a case, and I therefore am of opinion that the plaintiff is entitled in this action to an order requiring the defendants to pay into Court to the credit of this cause the sum of $3,450, being the sum of $2,300, which the defendants say is a fair compensation, and which they say they are willing and ready to pay for the lands in question, and all damages, &c., together with fifty per cent. added in terms of the 164th section of "The Railway Act." And in default of the said sum of $3,450, being so paid, within the space of days, that the company be restrained from using the said lands, and that the money, if paid in by the company, shall remain until the result of the aforesaid arbitration

is known and ascertained by the publication of the award to be made in the premises.

As to the costs, I will reserve them until the matter is finally determined.

JUDGMENT IN THE FIRST MENTIONED ACTION.

The other action is for an injunction restraining the defendants from expropriating 2 71/100 acres of land on the grounds first above set forth. The defendants have not taken possession of this parcel, nor have they taken any steps towards that end, further than to give the preliminary notice of intention to expropriate, &c., which was served on August 27th, 1888, and to which was attached the surveyor's certificates of the description by metes and bounds of the land, a map thereof, and that he knows the land and that $1,200 is a fair compensation for the same, and all damages, &c., and the defendants in their notice state that the powers intended to be "exercised by the railway company with regard to the lands &c., are for the purpose of constructing and maintaining, and thereafter of operating their railway, and that the company are ready and willing and hereby offer to pay $1,200 as compensation for the said lands, and all damages &c., that in the event of the plaintiff not accepting this offer Samuel Montgomery is the name of their arbitrator."

These lands consist of a valuable stone quarry containing an almost inexhaustible supply of building, paving, and curbing stone, and is within that part of the town plot of Merritton, laid out into lots by the plaintiff and lies on the east side of the defendants' railway, which the plaintiff alleges practically cuts off all access to the quarry except by way of Catharine or Maple streets, the former of which runs through the same, and the latter bounds it on the south. The plaintiff alleges that it will be necessary for the defendants to carry Catharine and Maple streets over their line of railway by means of overhead bridges, which the defendants, as is alleged by the plaintiff, desire to avoid, and which

they will be able to do by acquiring the said lands, as the plaintiff is the only person whose lands will be affected by the closing up of Catharine and Maple streets, except one Ball, with whom the defendants have come to an arrangement whereby he has agreed to relieve them from the duty of keeping open Maple street so far as he is concerned. The defendants do not pretend that they require the land in question for the purpose of building any of their works upon and it lies to the east, although adjoining their line, and is angular in shape, has four sides, and extends from Maple street north-westerly 528 feet thence south 77°, east 610 feet to the lands of Ball thence along these lands 182 feet to Maple street, thence westerly along Maple street 277 feet to the place of beginning.

The defendants deny that their object in acquiring the said land is to avoid the expense of the bridging of Maple and Catharine streets; and allege that the said land largely consists of clay and earth, and it is of the greatest importance that the company should acquire the same for the purpose of filling up the trestle work, &c., which is all within a mile and a half of said land. They also deny that the said land has ever been used as a quarry, "nor can the same be utilized for quarry purposes." And the president of the company sets forth other facts and circumstances, which go to shew that there is no value in it as a quarry, &c. The same engineer also makes an affidavit in which he states that he recommended the taking of the land for the purpose of procuring earth and clay for the uses and purposes of the railway, as there is a large quantity of trestle work within one and a half miles of the same which must be filled in, &c. And he also sets forth facts which go to shew that as a quarry the property in question is of no value, &c. The plaintiff was cross-examined on his affidavit by the defendants, and in answer to a question put says that two of the directors of the company offered him a sum of money if he would agree to dispense with the bridges over Maple and Catharine streets, and this offer was made before August 27th last, the date of notice to treat for this

land, and they did not then offer to buy this land, but proposed to give him a much larger sum for the piece of land dealt with in the other action than they had before offered for it. And he also says that he offered to give defendants, *free of charge*, all the earth, clay, &c., on the land in question for nothing if they would take it off to the road and leave his quarry otherwise undisturbed: that there is a layer of shale under the clay and above the rock, which is easily removed by picks, &c. The defendants, however, have refused to avail themselves of this offer Peter H. Ball, an adjoining neighbour, was also examined, and he says he resides on the land north and east of plaintiff's land, and at one time owned it, and that the land now in question can be used as a quarry, and he gives an account of the best way to get out from this parcel with stone, &c., which is by Alice street to Maple street, and thence along Maple street to the Canal; and this refers as well to that part of the plaintiff's quarry which lies and extends north-west from the lands in question, and he says if the company obtain possession of this land it will shut out the plaintiff from reaching the Canal by the route indicated by him, which is the most convenient, and is about one-third the distance of the route the plaintiff would be obliged to take in the event of the defendants acquiring this land. He says he entered into an agreement on August 23rd, 1888, with the defendants then produced (as to dispensing with bridges, &c. ?) He also says there is plenty of land in the vicinity of this land fit for the purposes of the railway.

After carefully reading and considering the affidavits, papers, and examination of the parties, I have come to the conclusion that, apart from the question involved in the objection that defendants are seeking to take more land than by law they are entitled to against the will of the owner, there is the more important question, whether the defendants are not, by their action and under cover of the powers conferred upon them by "The Railway Act," endeavouring to acquire the land in question for the purpose of enabling them to get rid of the expense of

building and afterwards maintaining one or two overhead bridges regardless of the injury it would do to plaintiff's property. Lord Cairns, L. C., in *Richmond* v. *North London R. W. Co.*, L. R. 3 Ch. at p, 681, says:

"One of the best established objects of the jurisdiction of this Court is, to take care that companies exercising powers under their Acts shall not exercise them otherwise than for the purpose of the Act; and when there is any ground for supposing that the powers are to be exercised for any other purpose the Court should see whether the company is really misusing its powers."

And Lord Cranworth, L. C., in *Galloway* v. *Mayor, &c., of London*, L. R. 1 H. of L. Cas. 34, at p. 43, gave utterance to the same proposition in these words: "The principle is this, that when persons embarking on great undertakings for the accomplishment of which those engaged in them have received authority from the Legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorized cannot be allowed to exercise the powers conferred upon them for any collateral object."

Without being able to say that it is quite clear that the defendants are trying to, or by their acts will bring themselves within the scope of these remarks, I cannot divest myself of the idea that there is "ground for supposing that the powers are to be exercised for others than those which the railway laws of this country permit and allow. I think, therefore, that the plaintiff's motion should be granted, and that an order should go restraining the the defendants from proceeding to expropriate the lands in question until after the hearing of the action, and I reserve the question of costs of this application until the said hearing.

The result is, that both the orders will go in the two cases, the plaintiff undertaking to go to trial at the next sittings at St. Catharines, the defendants not throwing any obstacle in his way to that end.

A. H. F. L.

[CHANCERY DIVISION.]

JONES v. THE CORPORATION OF THE TOWN OF PORT ARTHUR.

Municipal Corporations—Right to purchase land—By-law—Ultra Vires—Post Office—Custom House—"For the use of the Corporation."—R.S.O. 1887, c. 184, s. 479 (1).

Held, that a municipal corporation has no power to pass a by-law for the purchase of land to be presented to the Dominion Government as a site for a post-office and custom-house.

"For the use of the corporation" in R. S. O. 1887, c. 184, s. 479 (1) does not mean merely "for the benefit of."

A by-law should state its purpose in its face.

THIS was a motion to continue an injunction restraining the defendants from passing a by-law providing for the raising of $5,000 for the purpose of purchasing real estate for the use of the corporation. Although not stated on the face of the by-law the real estate was to be presented to the Dominion Government for the purposes of a post-office site and custom house. The by-law had been submitted to the ratepayers and passed by a small majority, but the final reading by the council had not taken place.

The motion came on for argument on November 6th, 1888, before Ferguson, J.

Symons, for the motion, relied on *Wallace* v. *The Corporation of the Town of Orangeville*, 5 O. R. 37.

Watson, for the defendants, contra. The defendants will take judgment on this motion as decisive of the legality of the by-law. There is no controversy as to the facts. The council is acting in good faith; the only question being, whether it has authority. The *Orangeville Case*, does not decide the question, which is whether the municipality can purchase and pay for the land and devote it to the purpose for which it is destined. Sec. 479, sub-sec. 1 of the Municipal Act, R. S. O. (1887) ch. 184, says the council may acquire property for the use of the corporation. Sec. 489, subsecs. 10 and 11, provides for acquiring lands for

schools and cemeteries, and sec. 504, sub-secs. 8, 9, for acquiring an estate for different purposes. All these are for acquiring land for specific purposes; nothing is said about a post-office or custom house, so we must rely on section 479, sub-sec. 1, and if not entitled under that are not entitled at all. The corporation consider that it is for its advantage to acquire this land. "Use" in the sub-sec. must be taken in the sense of "benefit or advantage" not of "user." I find no authority in point directly. *The first Municipality of the City of New Orleans* v. *McDonough*, 2 Robinson's (Louisiana) 244, is something like it. In the enactment there in question words "for the use of" are not employed. The words "for the use of" are not a limitation. The citizens will have the advantage of these buildings, just as much as they would of a park.

Symons, was not called on in reply.

November 27th, 1888. FERGUSON, J.—It is clear that the corporation are not purchasing the land "for the use of the corporation" though it may perhaps be for the benefit of the corporation. It might as well be said that a corporation could buy a farm outside the city, rent it, and apply the rent to some charitable purpose. The Municipal Act after using these general words, goes on to define more particular uses. The by-law is not on its face bad; but the proper way to draw a by-law is to state on its face the purpose of it. I am clearly of opinion that a corporation cannot buy land for this purpose. The injunction must be continued to the trial.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

ANDERSON V. FISH ET AL.

Sale of goods—Stoppage in transitu—Consignor and consignee—Right of carriers to prolong period of transitus.

The defendants, unpaid vendors of goods, shipped them over the Grand Trunk Railway to the vendee at W. When the goods arrived the railway company's agent at W. sent an advice note to the vendee, who refused to take it. After this the vendee assigned to the plaintiff for the benefit of his creditors, and the plaintiff as soon as the assignment was delivered to him produced it to the railway company's agent and claimed the goods, offering to pay the freight, but producing no advice note. The agent did not refuse to deliver the goods, but stated that, according to the rules of the company, when the person claiming the goods was an assignee for the benefit of creditors, his duty was to telegraph to the company's solicitor for instructions; he did so telegraph, but before he received an answer and on the same day the defendants notified him not to deliver the goods to the vendee or his assignee, assuming a right to stop them in transitu.

Held, [FALCONBRIDGE, J., dissenting,] that the action of the railway company's agent in delaying till he received instructions from the solicitor was not wrongful; that the transitus was not at an end when the defendants intervened, and the right of stoppage was well exercised.

THIS was an interpleader issue directed to try whether James Anderson, as assignee of the insolvent estate of Charles Chamberlain, was entitled to the possession of two cases of cigars consigned by Fish, Hyman, & Co., from Montreal, Quebec, to Chamberlain, and then lying at the Windsor station of the Grand Trunk Railway Company, as against Fish, Hyman, & Co.

The issue was tried at the Autumn Sittings of this Court at Sandwich, in 1888, before Falconbridge, J., without a jury.

It appeared that the goods in question, which were sold on four months' credit, were shipped by the vendors, Fish, Hyman, & Co., from Montreal, on the 10th August, 1888, by the Grand Trunk Railway, to the purchaser, Chamberlain, at Windsor, Ontario. The goods arrived at Windsor on Saturday, 18th August, and on Monday, 20th August, an advice note was made out and taken by a clerk of the railway company to Chamberlain's place of business, and offered to his clerk, who refused to take it, saying he

would have to write to the shippers about the terms. On the 22nd August the railway clerk again took the advice note to Chamberlain's place of business and saw the same clerk, who said he had no answer from the shippers, and refused to take it, and the railway clerk took it back to the freight office. On the 22nd August Chamberlain made an assignment which was perfected on the 23rd August, and was delivered to the assignee on the morning of the 24th August, who at once went to the railway office, taking no advice note; (no objection was raised by the railway agent, however, on this account); but taking the assignment with him, which he shewed to the railway agent and offered to pay the freight. The railway agent did not refuse to deliver the goods, but said that by a rule of the railway company, when the person claiming delivery of the goods was an assignee for the benefit of creditors, he was required to hold the goods, and at once telegraph the company's solicitor at Belleville for advice, and that he would have to get instructions from the solicitor before he could deliver the goods. To this the assignee made no objection, but went away awaiting such instructions. A short time after, and on the same day at 11.30 a.m., the railway agent received a telegram from Fish, Hyman, & Co., requiring him to hold to their order the said goods. On the same day, and immediately after sending this telegram, Fish, Hyman, & Co. notified the freight department of the railway company at Montreal to hold the goods to their order, and a telegram was immediately thereupon sent from such department to the railway agent at Windsor, directing him to hold the said goods for further instructions: Fish, Hyman, & Co. also telegraphed their solicitor at Windsor, who, also on the same day, forbad delivery by the railway agent at Windsor of the said goods to Chamberlain or to his assignee. By one of the conditions of the bill of lading of the railway company: "Storage will be charged on all freight remaining in the company's sheds or warehouses over twenty four hours after arrival." At Windsor trains run into a large freight shed, on the floor of which all

freight for Windsor is deposited, and the goods in question were there deposited and there remained until after the 24th August, and no charge was in fact made for their storage, nor had the Railway Company been requested by any one to store them, but the Railway Company was holding them in the usual way, the same as any other goods that came there.

The learned Judge gave judgment for the plaintiff, holding that the act of the carrier was tortious in not delivering the goods to the plaintiff; that he could not thus prolong the transitus; and that the case was governed by *Bird* v. *Brown*, 4 Ex. 786.

On 29th November, 1888, *J. B. Clarke* moved to enter judgment for the defendant or for a new trial, on the following amongst other grounds: that the judgment was contrary to law and evidence and the weight of evidence; that before the transitus was at an end the railway company were notified by the defendants not to deliver the goods to the plaintiff; that the refusal of the railway company to deliver the goods to the plaintiff prior to the defendants' demand was not a wrongful refusal, but a refusal only according to the general rules of the company until instructions from a superior officer could be obtained, and was assented to and acquiesced in by the plaintiff, during which period they were stopped by the defendants; that the position of the goods was not changed between the time of the alleged demand by the plaintiff and the demand by the defendants; that there was no sufficient demand by the plaintiff; that before the consignee executed the alleged assignment to the plaintiff he had refused to accept the said goods, or to accept a draft for the price thereof according to the terms of the sale, and had rescinded the sale of the said goods; that there was no sufficient evidence given that the plaintiff was, at the time of the making of the alleged demand, the assignee of the consignee, and as such entitled to the said goods.

G. T. Blackstock shewed cause.

December 22, 1888. ARMOUR, C. J.—In *Bethell* v. *Clark*, 20 Q. B. D. Lord Esher, M. R., says, p. 617: "The doctrine of stoppage in transitu has always been construed favourably to the unpaid vendor. The rule as to its application has been often stated. When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are in transitu and may be stopped."

"When the goods have arrived at their destination and have been delivered to the purchaser or his agent, or when the carrier holds them as warehouseman for the purchaser, and no longer as carrier only, the transitus is at an end:" per Cave, J., in *Bethell* v. *Clark*, 19 Q. B. D. 553, at p. 561.

"The authorities shew that the vendor has a right to stop in transitu until the goods have actually got home into the hands of the purchaser, or of some one who receives them in the character of his servant or agent. That is the cardinal principle. In order that the vendor should have lost that right the goods must be in the hands of the purchaser or of some one who can be treated as his servant or agent, and not in the hands of a mere intermediary:" per James, L. J., in *Ex parte Rosevear China Clay Co.*, 11 Ch. D. 560, at p. 568.

"The mere sending a barge to the ship, and the man in charge of such barge being told that he must wait until the goods can be got at, does not amount to an actual delivery of possession of the goods, which are not 'at home' until actually in the barge or cart sent for them:" per Sir W. Page Wood, V.C., in *Coventry* v. *Gladstone*, L. R. 6 Eq. 44, at p. 50. See also *Whitehead* v. *Anderson*, 9 M. & W. 518; *McLean* v. *Breithaupt*, 12 A. R. 383; *Morgan Envelope Co.* v. *Boustead*, 7 O. R. 697.

The goods in question, at the time the unpaid vendors exercised their right of stoppage, were still in the possession of the railway company, and the assignee had not

acquired any possession of them, either actual or constructive: they were in the possession of the railway company solely, under their contract to carry them, and no contract had been made by which they were to hold them as the agents of the assignee or otherwise then as carriers.

Under these circumstances the right of stoppage in transitu was well exercised, unless it can be held that what took place between the assignee and the railway agent prevented the exercise of such right.

The offer of the freight was of no avail of itself to prevent such exercise, nor would the actual payment of the freight have sufficed of itself to prevent it; for in *Coventry* v. *Gladstone*, above quoted, the freight had not only been paid, but an overside order for the delivery of the goods had been obtained and had been presented to the chief officer of the ship, who promised to deliver the goods as soon as they could be got at.

Nor did the demand, or more properly the claim, made by the assignee upon the railway agent for the goods prevent the exercise of such right; for there was no absolute refusal to deliver the goods, but only a refusal to deliver them until such time as he could, in obedience to the rule of the railway company, obtain the instructions of the railway company's solicitor as to the course to be pursued by him with respect to the goods.

This rule of the railway company was a perfectly reasonable and proper one, and the obedience of the railway agent to it was lawful, and did not have the effect of making the detention of the goods until he could communicate with the solicitor and receive his instructions wrongful, nor did it have the effect of altering the character of the possession which the railway company had as carriers of the said goods: *Jackson* v. *Nichol*, 5 Bing. N. C. 508; *Gilpin* v. *Royal Canadian Bank*, 27 U.C.R. 310; *Schaffer* v. *Dumble*, 5 O. R. 716.

There was evidence from which it might be inferred that the course taken by the railway agent, if not assented to, was not dissented from by the assignee, but whether it was

or not, it was not tortious, and this case is not, therefore, brought within the principle of the decision in *Bird* v. *Brown*.

It was suggested that the right of the assignee might be held to be greater in respect to the goods than that of his assignor, but there is no ground for this suggestion.

The verdict and judgment must be entered for the defendants.

STREET, J.—On 10th August, 1888, the defendants, who are cigar manufacturers in Montreal, sold two cases of cigars to one Chamberlain, a hotel-keeper in Windsor, Ontario. On the same day the goods were shipped by the Grand Trunk Railway by the vendors, consigned to the purchaser at Windsor, and a draft was drawn for the price of the goods, which, although presented several times between the 13th and 20th August, was never accepted or paid. The goods reached Windsor on the 18th August, and notice of their arrival was sent the consignee by the railway company on the 20th August. On the 24th August Chamberlain made an assignment for the benefit of his creditors to the plaintiff, Anderson, who at once, on the same day, went to the agent of the railway company at Windsor and presented the assignment to him, at the same time demanding the goods and offering to pay the freight. The agent, acting in obedience to printed instructions from the company, told the plaintiff that as the goods were demanded, not by the consignee himself, but by an assignee for the benefit of creditors, he must telegraph the company's solicitor for advice before giving up the goods to him. He telegraphed accordingly to the company's solicitor for instructions, but before he received a reply, and on the same day, an agent of the defendants gave him notice exercising his right to stop in transitu and claiming the goods on behalf of the defendants. The question in this case is whether, under these circumstances, the right to stop in transitu had been determined.

The mere arrival of goods at the place of destination is

not necessarily a termination of the transit unless the carrier has made himself the agent to hold them for the vendee. The transit remains until the goods, if they have not come into the constructive, have come into the actual possession of the vendee; and although they are landed at the place to which they are destined, unless the vendee has taken possession of them they are still in transit, and the vendor, on the insolvency of the vendee, may still exercise his right to stop them in transitu: *Heinekey* v. *Earle*, 8 E. & B. at p. 423; *Coventry* v. *Gladstone*, L. R. 6 Eq. 44; *Whitehead* v. *Anderson*, 9 M. & W. 518.

The right of the defendants to stop these goods seems to be clear unless it has been taken away by the demand made by the assignee upon the railway company for the delivery to him before the right of the defendants to stop was exercised.

The plaintiff relies upon *Bird* v. *Brown*, 4 Ex. 786. In that case an unauthorized agent of the vendors, immediately upon the arrival, from New York, in Liverpool of the ships containing the goods in question, gave a notice to the masters and consignees of the ships claiming to stop them in transitu. A few days afterwards the assignee in insolvency of the vendees demanded delivery of the goods from the master and consignees of the ships, and at the same time tendered the freight. The master and consignees unconditionally refused to comply with this demand, and on the same day delivered them to the vendors' agent. The act of the vendors' agent in claiming on their behalf to stop the goods in transitu was subsequently ratified by the vendors. It was held that this ratification did not relate back to the original notice, and that the master and consignees could not by a *wrongful* detainer of the goods after demand made for them prolong the transitus, and so extend the time during which they might be stopped by the vendor. See to the same effect *Bohtlingk* v. *Inglis*, 3 East 381.

In *Blackburn* on Sales, Blackstone edition, p. 271, part 3, ch. 1, it is suggested that "possibly an unequivocal de-

mand of possession made upon the middleman and refused by him, may have the same effect upon the transitus that an actual taking of possession against the assent of the middleman would have had. That is, it would terminate the transitus *if the refusal was so tortious as to render the middleman liable in trover*, just as the actual taking of possession would terminate the transitus if it was justifiable against the middleman."

The question here then, I think, is whether the detainer by the railway company was a wrongful detainer, whether it was so tortious as to have rendered the railway company liable to the plaintiff in trover.

In *Coventry* v. *Gladstone*, L. R. 6 Eq. 44, and in *Whitehead* v. *Anderson*, 9 M. & W. 518, there was a qualified refusal by the carrier in each case to comply immediately with the demand of the vendees' assignee for delivery, and the refusal was not treated as tortious nor as affecting the right of the vendor coming in subsequently to stop the goods in transitu.

In *Lee* v. *Bayes*, 18 C. B. at p. 607, it is said by Jervis, C.J.: "As between master and servant, or perhaps as between principal and agent, where the servant or agent receives from his master or his principal goods which belong to a third person, on their being demanded of him by such third person he is entitled to say: 'I received them from my master or my principal; and I require a reasonable time to ascertain whether the party making the demand is the real owner'; and such qualified refusal would not be evidence of conversion so as to render him liable in trover."

In *Vaughan* v. *Watt*, 6 M. & W. 497, Parke B., says: "It was a question for the jury, whether the defendant meant to apply the goods to his own use, or assert the title of a third party to them, or whether he only meant to keep them in order to ascertain the title to them, and clear up the doubts he then entertained on the subject, and whether a reasonable time for so doing had not elapsed, without which it would not be a conversion."

This statement of the law is approved in *Pillott* v. *Wilkin-*

son, 3 H. & C. 345, in error, and in *Gilpin* v. *Royal Canadian Bank*, 27 U. C. R. 310.

Here the plaintiff in his evidence says that the railway company's agent told him when he demanded the goods, not that he would not give the goods to him, but that he would have to get instructions from the solicitor before he would deliver the goods, and that thereupon he, the plaintiff, went away awaiting the result of these instructions; that the agent told him when he called the next day that his instructions were to hold the goods until the ownership was established, but in the meantime the defendants' notice stopping the goods had been served.

I think that under the circumstances, the goods being claimed by a third person, who produced no advice or shipping note, the railway company's agent was entitled to a reasonable time to obtain instructions from the company's solicitor; that this was acquiesced in at the time by the plaintiff, and that trover could not have been maintained against the company by the plaintiff until a reasonable time had elapsed. There was no attempt on the part of the railway company to set up against the plaintiff any right in themselves or any third person.

I am of opinion, therefore, that the transitus had not terminated when the defendants' notice to stop the goods was given, and that the issue should be found in their favor.

FALCONBRIDGE, J.—The principle that in cases of stoppage *in transitu* the most favorable construction should be afforded to the claims of an unpaid vendor, is prompted by natural justice, and well settled by the authority of legal decision.

Therefore, I am pleased to find that my lord and my brother Street clearly see their way to finding this issue in favour of the defendant.

But, as the logical result of their judgment is, in my humble opinion, to place it in the power of the carrier or of his local agent practically to decide to whom the goods shall belong by prolonging the period of transitus

after they have been demanded with every formality, including tender of expenses, &c., so that by accident or by information conveyed, the consignor has a further and an undue opportunity of exercising his right of stoppage, I must, with all deference, decline to concur.

It may be that in the judgment appealed from, the expression "*tortious act*," as indicating a technical conversion by the carrier, is somewhat loosely used, although Abbott, C. J., in *Greenway v. Fisher*, 1 C. & P. at p. 192, seems to think that the position of a carrier is different from that of a servant refusing to give up goods.

Be that as it may, on the broad ground stated above, I adhere to the judgment which I gave after the trial.

I have simply generalized in stating what I think to be the effect of the judgment of the majority of the Court. There is not the slightest suggestion in the present case that there was any collusion between the railway company and the consignor, nor that the delay in delivery to the consignee was otherwise than *bonâ fide* and in obedience to the general rule of the company.

Judgment for defendants in the issue.

[CHANCERY DIVISION.]

BUTLAND V. GILLESPIE ET AL.

Toronto General Hospital—Will—Devise of lands to corporation—Mortmain Act—9 Geo. II., ch. 36—16 Vic. ch. 220—51 Vic. ch. 89, sec. 8.

The Act of incorporation of the Toronto General Hospital provides that the trustees shall have the powers and rights of bodies corporate, and shall be capable of taking from any person by grant, devise, or otherwise, any lands, or interest in lands, etc., for the support and use of the Hospital.

Held, following *Smith* v. *Methodist Church*, 16 O. R. 199, that the plain meaning of this provision is to capacitate any person to devise land to the Hospital, and to qualify the Hospital to receive and hold beneficially land so devised.

It is the duty of the Court where it finds legislation intended to legalize the dedication of property to laudable public purposes, to construe the Act so as to enlarge rather than limit its operation.

THIS was an action brought for the construction of the will and codicils of R. B. Butland, and to have certain bequests and devises to the trustees of the Toronto General Hospital declared void. The plaintiff was the child and sole heiress-at-law of the testator, and the defendants were the administrators *cum testamento annexo* of the testator, the trustees of the hospital, and certain beneficiaries under the will.

The will in question was dated August 9th, 1886, and the codicils October 2nd, 1886, and October 14th, 1886, respectively. The testator died October 22nd, 1886.

By the said will and codicils the deceased gave and bequeathed to his executors and trustees, the trustees of the Toronto General Hospital, the whole of his property whatsoever and wheresoever, consisting largely of real estate, on certain trusts, first to pay certain annuities, and then to apply the rents and proceeds to the uses of the Toronto General Hospital. The Hospital appointed the administrators above referred to as their syndics to obtain probate, and letters of administration, with the will and codicils annexed, were granted to them on January 11th, 1887.

The trustees of the Toronto General Hospital are incorporated by 16 Vic. ch. 220, sec. 2, in the words following:

"From and after the passing of this Act the Mayor, Aldermen, and Common Councilmen of the city of Toronto, and the President and Board of Trade of the said city for the time being, shall each appoint one person, who, together with three other persons resident within the said city, to be appointed by the Governor-General during pleasure, shall be a body corporate by the name of the trustees of the Toronto General Hospital, and as such shall have the usual powers and rights of bodies corporate, and shall have and hold all such parcel or parcels of land and premises as may have been heretofore assigned or conveyed to any former trustees of the said hospital by letters patent, or by any person or persons whatever for the use and support of the said hospital, and shall and may be capable of receiving and taking from any person or persons or any body corporate or politic by grant, devise, or otherwise, any lands or interest in lands, or any goods, chattels, or effects which any such person or persons or body corporate or politic may be desirous of granting or conveying to them for the use or support of the said hospital."

The trustees of the hospital set up in their statement of defence that they are by their "Act of Incorporation and other Acts of the Legislatures of the late Province of Canada and of the Province of Ontario, amending or referring to the same, authorized and empowered to receive and take from any person or persons, or any body corporate or politic, by grant, devise, or otherwise, any lands or interest in lands which any such person or persons, or body corporate or politic, may be desirous of granting, devising or conveying to them for the use or support of the Toronto General Hospital," and they claimed the benefit of all the said Acts.

The action came on for trial before Boyd, C., on November 23rd, 1888.

Blake, Q.C., and *W. F. Creelman* for the plaintiff. There are no sufficient words in the statute of incorporation, 16 Vic. ch. 220, to shew that the general law as to the time limit under 9 Geo. II. ch. 36, is superseded: *Nethersole* v. *School for Indigent Blind*, L. R. 11 Eq. 1; *Mogg* v. *Hodges*, 2 Ves. Sr. 52; *Trustees of the British Museum* v. *White*, 2

S. & Str. 594; *Church Society of the Diocese of Toronto* v. *Crandall*, 8 Gr. 34; *Luckraft* v. *Pridham*, 6 Ch. D. 205.

Moss, Q.C., and *Barwick* for the defendants. The case is covered by *Smith* v. *Methodist Church*, 16 O. R. 199. Capacity to take by devise is correlative with the power to devise. It is not necessary that there should be an express reference to the Mortmain Acts: *Robinson* v. *Governors of the London Hospital*, 10 Ha. 19.

Blake, in reply, cited *Doe d. Baker* v. *Clark*, 7 U. C. R. 44.

November 28th, 1888. BOYD, C.—The object of 9 Geo. II., ch. 36 (commonly termed the Mortmain Act) is very accurately pointed out by the Master of the Rolls in *Denton* v. *Lord John Manners*, 25 Beav. 36: "Before the Statute of Mortmain passed, a person might, in his lifetime, have given land for the establishment and institution of a school. Since the Statute of Geo. II. he can only do so by a deed enrolled within six months after the execution of it, and provided he himself survives the execution of the instrument twelve months, but he is unable to do so by will. Assume that he is afterwards at liberty to devise lands for that purpose, in particular circumstances and under particular conditions, still the Statute of Mortmain prohibits a person from doing that by will under all other circumstances." p. 45.

In *Perring* v. *Trail*, 18 Eq. 88, a hospital was empowered by statute to take, hold, and retain land acquired by will, gift, or otherwise. It was held that these words implied a power to devise lands effectually to the charity notwithstanding the Mortmain Act. It was decided that the fair meaning of the statute was to remove the double disability that would have otherwise existed, *i. e.* it enabled a testator to devise land, and the corporation to receive and hold the land so devised.

The statute incorporating the hospital in this case is 16 Vic. ch. 220, which provides it shall and may be capable of receiving and taking from any person * * by grant,

devise, or otherwise, any lands or interest in lands * * which any such person may be desirous of granting or conveying for the support and use of the hospital: sec. 2. Power is afterwards given to sell land by sec. 7, and to convey by sec. 5. According to the canon of construction in *Harris* v. *The Corporation of Southampton*, 2 Sm. & Giff. 387, it is the duty of the Court where it finds legislation intended to legalise the dedication of property to laudable public purposes to construe the Act so as to enlarge rather than limit its operation. But without involving this rule the plain meaning of this provision is to capacitate any person to devise land to the hospital, and to qualify the hospital to receive and enjoy beneficially land so devised. In brief, that particular Act enables to be done that which the Mortmain Act prohibits, viz., the devise of lands to a charity. No restrictions or conditions being imposed the corporation can enjoy (as any private person might) property bestowed by will duly executed. I came to the same conclusion in *Smith* v. *Methodist Church et al*, 16 O. R. 199, and that decision governs this as far as I am concerned. This conclusion is also in harmony with the opinion expressed by my predecessor, when Vice-Chancellor, in the last paragraph of his judgment in *The Church Society of the Diocese of Toronto* v. *Crandell*, 8 Gr. p. 36. It is also in conformity with the opinion of the Legislature as expressed in the Act relating to the estate: 51 Vict. c. 89, s. 8. but which was passed pending this action; although according to the language of Pollock, C.B., in *Burnaby* v. *Barsby*, 4 H. & N. 690, "It is the province of the Courts, and of the Courts only, to construe statutes."

A. H. F. L.

[CHANCERY DIVISION.]

TOTTEN v. TRUAX ET AL.

Crown lands—Indian lands—Assessment and taxes—Tax sale—R. S. O. ch. 193 sec. 159—R. S. C. ch. 43, s. 77, sub-sec. 3—51 Vic. ch. 22, sec. 2—Reeve purchasing at tax sale.

Held, that land in which the Indian title has been surrendered to the Crown and which has been afterwards sold or located, is liable to be sold for taxes imposed by a municipality, although while the title and interest are wholly in the Crown, the land is exempt from taxation; *Church* v. *Fenton*, 28 C. P. 384; 4 A. R. 159; 5 S. C. R. 239 referred to and followed.

Held, also, that a Reeve of the township in which the land so sold for taxes are situate is not disqualified, *ex officio*, from purchasing.

THIS was an action brought by William Totten against Joseph Truax and William Plews, to recover possession of lot 11, con. 5, in the township of Keppel, and mesne profits from November 16th, 1886, and damages for alleged waste committed by the defendants, and an injunction to restrain further waste.

The facts as set out in the statement of claim, showed that in 1854, the chiefs and principal men of the Indians tribes residing at Saugeen and Owen Sound, made a full and complete surrender to Her Majesty of all that peninsula then known as the "Saugeen and Owen Sound Indian Reserve," in trust to sell for the benefit of the said Indian tribes, and amongst the land so surrendered, was the lot in question: that on April 1st, 1881, the Superintendent-General of Indian affairs on behalf of the Crown agreed to sell the lot in question to one Pearson, who then became locatee and purchaser thereof: that from after that date, the land was, by the laws in force in this Province, subject to taxation for municipal purposes, and to the extent of the locatee and purchaser's interest liable to be sold for arrears of taxes: that the locatee suffered the taxes for 1882, 1883, 1884, and 1885, to be in arrear and unpaid: that the lot was offered for sale on October 29th, 1886, by the treasurer of the county of Grey, for arrears of taxes

amounting to $168.60, but no bid was received therefor: afterwards, on November 16th, 1886, the lot was sold to the plaintiff, who received a certificate from the treasurer accordingly, and the lot not being redeemed, on November 27th, 1887, the warden and treasurer of the county executed a deed to the plaintiff of the lot, which deed was duly registered in the Indian land office at Wiarton, and in the office of the Superintendent-General of Indian affairs, who duly approved of the same, and directed the plaintiff's name to be entered in the books of his office and of the Indian land office in Wiarton, as locatee and purchaser thereof: that the defendants were in possession and claimed title from the original locatee, and refused to give up possession, and were cutting timber and committing waste, and the plaintiff accordingly claimed as above mentioned.

The defendants, by their statement of defence, amongst other things set up that the lands were not at the time of the plaintiff's alleged purchase or at any time prior thereto subject to taxation for municipal purposes, or liable to be sold for arrears of taxes: that at any rate the sale was invalid, amongst other reasons because the plaintiff was at the time of his pretended purchase, reeve of the township in which the lot in question was situate, and a member of the county council by whose warden and treasurer the lot was put up for sale: that they the defendants had made lasting improvements on the land under the *bonâ fide* belief that they were the owners of the land, and claimed compensation for the same.

The action came on for trial before Boyd, C., at Owen Sound, on December 18, 1888.

Masson, for the plaintiff, referred to and relied on *Church* v. *Fenton*, 28 C. P. 384; 4 A. R. 159; 5 S. C. R. 239; 51 Vic. ch. 22 (D.)

O'Connor, for the defendant. The law has been changed since *Church* v. *Fenton*, *supra*. When these lands were taxed in 1882, they were not liable: R. S. C. ch. 43, sec.

77, sub-sec. 3; *Stevenson* v. *Traynor*, 12 O. R. 804. As to the plaintiff being reeve, he could not purchase for taxes due to his own township: *Greenstreet* v. *Paris*, 21 Gr. 229; *In re Cameron*, 14 Gr. 612; *Beckett* v. *Johnston*, 32 C. P. 301, 319; *Massingberd* v. *Montague*, 9 Gr. 92. His interest is to get the land low, and that of the township to get the largest price. Thus there is a conflict of interest. Besides, he has influence over the officials of the township. Then the Crown should be a party, because the patent has not issued.

Masson, in reply. There has been no change of the law since *Church* v. *Fenton*, *supra*. The Act of last session 51 Vic. ch. 22 D. only removed doubts and declared the law. The Crown has approved of the sale, and so it was not necessary to make it a party. As to the disqualification of the reeve, the Assessment Act prohibits no one from buying. The reeve had nothing to do with the sale or the preliminaries thereto.

November 28th, 1888. BOYD, C.—This sale appears to me to be valid, because the principle of the decision in *Church* v. *Fenton*, 28 C. P. 384, applies to it. The clause in the statute, which in that case was held to justify the sale of land held by the Dominion, in which the Indian title was extinguished by surrender, was 27 Vic. ch. 19, sec. 9, which is precisely the same as and is the original of R. S. O. ch. 180, sec. 126, (1877), and R. S. O. ch. 193, sec. 159, (1887.) The clause exempting from taxation to be found in the Indian Act, R. S. C. ch. 43, sec. 77, sub-sec. 3, is in substance the same provision which is referred to in *Church* v. *Fenton* as found in 16 Vic. ch. 182, and which is carried forward in subsequent legislation. While the title and interest are wholly in the Crown, the land is exempt from taxation, but by construction put upon the statutes, if the Crown sells or locates then the interest of the purchaser or locatee is subject to taxation by the local government. That appears to me to be a strained exegesis, but so far as I can judge, it is the one promulgated by Mr. Justice

Gwynne, which received the sanction of a majority of the Judges in the Supreme Court: 5 S. C. R. 239. The fact that the taxation in the one case began before Confederation, and was continued after it; and in this case, that the whole of the taxation was after Confederation, does not, to me, appear a material distinction. The recent legislation at Ottawa is in recognition of the right thus to sell the interest of holders of Indian lands while yet unpatented. By 51 Vic. ch. 22, sec. 3, the part of the Indian Act which exempts is repealed, and the following substituted:

> 3. All land vested in the Crown or in any person, in trust for or for the use of any Indian or non-treaty Indian, or any band or irregular band of Indians, or non-treaty Indians, shall be exempt from taxation, except those lands which, having been surrendered by the bands owning them, though unpatented, have been located by or sold or agreed to be sold to any person; and except as against the Crown and any Indian located on the land, the same shall be liable to taxation in like manner as other lands in the same locality; but nothing herein contained shall interfere with the right of the superintendent-general to cancel the original sale or location of any land, or shall render such land liable to taxation until it is again sold or located.

That affirms the right of the municipality to make sale for taxes subject to the recognition of that sale by the superintendent-general of Indian affairs. I suppose the usual course would be to accept all such sales if validly conducted, and to treat the purchaser as assignee of the original purchaser from the Crown. In this instance the superintendent-general has acted under the provisions of sec. 2, sub-sec. 5 of this late Act, and has signified his approval of the plaintiff's tax deed by endorsement thereon made on July 4th, 1888, and prior to this action.

I see no reason to invalidate the tax sale and deed for any breach of statutory requirements under the Assessment Act of Ontario. If there was the right to impose taxes at all, they were regularly levied by sale of the land.

The only remaining point is the objection that the plaintiff as reeve of Keppel in which the lands are situate, and a member of the county council of the county of Grey by

whose warden and treasurer the lands were put up for sale was disqualified from purchasing at the sale for taxes. But the plaintiff had no powers or duties with reference to the taxes, or to the sale, of a personal or official nature, and no interference in fact is proved or even suggested on his part.

On the other facts of the case, I was of opinion at its close, that the damages resulting from the user and cutting on the part of the defendants, should be set off against their claim for improvements of which the plaintiff gets the benefit, so far as the fixtures are concerned. The one may very well go against the other. The plaintiff is, however, entitled to his costs of action and injunction.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

MARSHALL v. MCRAE.

Master and servant—Wrongful dismissal—Written contract—Consideration—Remedy on covenant—Construction of contract—Right to dismiss—Reasonable grounds—Bonâ fide exercise of power—Manner of exercise.

The plaintiff agreed to obtain patents for certain improvements in a machine of his invention, the patent for which had been assigned to the defendant, and to assign the patents for the improvements when obtained to the defendant, who in consideration thereof, agreed to employ the plaintiff for two years for the purpose of demonstrating and placing the patents on the market, the defendant covenanting to pay the plaintiff a certain sum per month and expenses during the two years, and to give him a share of the profits, and the plaintiff covenanting to devote his whole time and attention to "the business of the defendant."

By the 10th clause of the agreement it was provided that the defendant should be the absolute judge as to the manner in which the plaintiff performed his duties and should have the right at any time to dismiss him for incapacity or breach of duty.

The defendant summarily dismissed the plaintiff, within three months, for alleged breach of duty in relation to work not within the terms of his employment as above specified.

Held, that the work to be performed not being the only consideration for the wages to be paid, except for the tenth clause the defendant would have had no right to dismiss the plaintiff at all, but would have been left to his remedy upon the plaintiff's covenant.

"The business of the defendant" meant the business for which the plaintiff was employed, and the defendant had no legal right to dismiss the plaintiff for alleged breach of duty in connection with work not within the terms of his employment; and even if such work was within the terms of his employment, the defendant had, upon the evidence, no reasonable grounds for dismissing the plaintiff.

Held, also, that where one party put himself in the power of the other, the latter should exercise the power with entire good faith; and, upon the evidence, that the defendant had not exercised the power given him by the 10th clause in good faith; but even if he had, that he had not exercised it in a legal manner; for he was bound to give the plaintiff an opportunity to be heard and to explain his alleged misconduct, which he did not do.

ON 2nd February, 1886, the plaintiff and defendant entered into an agreement which recited that the defendant was the owner, by assignment from the plaintiff, of certain patents for inventions; that the plaintiff had made new improvements upon his inventions and had agreed with the defendant to obtain patents for the improvements and to assign them to the defendant so soon as he should obtain them; and the defendant in consideration thereof

agreed with the plaintiff to employ him for the period of two years from the date of the agreement "for the purpose of demonstrating and placing the said patents of invention granted or hereafter to be granted on the market, on the following terms, viz., said John A. McRae covenants to pay the said Thomas T. Marshall the sum of $100 per month during said term of two years, payable monthly, and in addition to said salary, the party of the first part (the defendant) covenants and agrees to pay the actual travelling expenses and board of the said party of the second part. And it is further agreed between the parties hereto that the said Thomas T. Marshall (the plaintiff) shall be entitled to and receive twenty per cent. of the actual net profits that are derived in any way whatsoever from the sale or otherwise of the said patents of invention."

By the 10th clause of the agreement it was provided as follows: "It is further agreed that the party of the first part is to be the *absolute judge* as to the manner in which the party of the second part performs his duties under this agreement and *shall have the right at any time to dismiss him for incapacity or breach of duty*, in which event the party of the second part shall only be entitled to be paid his salary up to the time of such dismissal, and shall have no claim whatever against the party of the second part."

By the 8th paragraph of the agreement it was provided that the plaintiff should devote his whole time and attention to the business of the defendant.

On the 29th April, 1886, the defendant without any previous notice to the plaintiff, and without at the time stating to him any definite grounds for doing so, beyond a general charge of disobedience, dismissed him from his employment, and paid him his salary to that date, whereupon this action was brought by the plaintiff for damages for an alleged wrongful dismissal.

The defendant in his defence stated that he had good grounds for discharging the plaintiff, and that under the

agreement he was the absolute judge of the manner in which the plaintiff performed his duties, and that he had the right to dismiss him at any time; and he set up in answer to the plaintiff's claim for an account of the profits of the business that the plaintiff's right to profits terminated with his dismissal under the 10th paragraph of the agreement.

In his evidence at the trial the defendant stated that he dismissed the plaintiff for violating or disobeying his orders, and because he had misrepresented to him the capacity of the machine which was the subject of the patents. The latter ground was not argued as a sufficient excuse for the plaintiff's dismissal, and the defendant relied upon the alleged disobedience of his orders. This, as stated by the defendant, occurred as follows: The defendant was anxious to test the machine which was the subject of the patents, and appointed the 6th April, 1886, for the purpose, giving to a man named Whittet, who was in his employment, directions to have one hundred pairs of upper leathers ready for the test by that date. The plaintiff seemed to have accepted as a part of his duty the preparing of these leathers for the test, and the defendant came on the day appointed from Montreal to Hamilton to make the test; but for some reason the plaintiff was not at the workshop when the defendant arrived, and the defendant went on to London the same day, having agreed to return on the 13th to see the test made. On that day he came back and saw the plaintiff, who had only some seventy pairs of the uppers ready for the test, and explained the reason why all were not ready, and the plaintiff agreed to return on the 16th. Before that day arrived the plaintiff was injured while preparing the uppers, and was laid up for some weeks in consequence. The defendant saw him in his room, and learning the reason for his being there, proposed that the defendant's son should proceed with the test with the uppers which had been prepared, and to this the plaintiff assented. The defendant became dissatisfied with the skill of the plaintiff's son during the test, and

summarily gave orders to his solicitor for the dismissal both of the plaintiff and his son. This occurred on the 16th April, 1886; the fact that he was dismissed was communicated to the plaintiff by the solicitor on the 29th April; and the reason for his dismissal was then for the first time stated to the plaintiff.

The action was tried at Hamilton, at the Spring Sittings, 1888, without a jury, by Rose, J., who gave judgment dismissing the action with costs.

The plaintiff moved before the Divisional Court to reverse the judgment or for a new trial, and the motion was argued on the 31st May, 1888.

Curscallen, for the motion.
Osler, Q. C., and *J. J. Scott*, contra.

November 19, 1888, the judgment of the Court was delivered by

ARMOUR, C. J.—In the case where the ordinary relationship of master and servant exists, and the only consideration for the wages to be paid is the work to be performed, the power of dismissal may be exercised by the master for the misconduct of the servant.

But where the work to be performed is not the only consideration for the wages to be paid and for the employment, but there is another and additional consideration, the power of dismissal does not exist unless the misconduct goes to the whole consideration. See *Winstone* v. *Linn*, 1 B. & C. 460; *Gould* v. *Webb*, 4 E. & B. 933; *Smith's* Master and Servant, 4th ed., 149.

In this case the work to be performed was not the only consideration for the wages to be paid and for the employment of the plaintiff by the defendant, but there was the other and additional consideration, the assignment by the plaintiff to the defendant of the letters patent, and but for the express provision of the tenth paragraph of the contract, the defendant would have had no right to

dismiss the plaintiff for his alleged misconduct, but would have been obliged to resort to an action upon the plaintiff's covenant to recover damages, if he suffered any by the alleged misconduct, because the alleged misconduct did not go to the whole consideration for the contract on his part, and he had an ample remedy upon the plaintiff's covenant for any damages he sustained.

We have to inquire, therefore, whether the provisions of the tenth paragraph gave the defendant the legal right to dismiss the plaintiff, whether he exercised such right *bonâ fide*, and whether he exercised it in a legal manner.

The recital in the contract is, that the defendant had agreed to employ the plaintiff for the purpose of demonstrating and placing the said patents of invention on the market for the purpose of sale in such manner as the defendant should deem most advantageous. The covenant on the defendant's part is, to employ the plaintiff for the purpose of demonstrating and placing the said patents of invention on the market. The covenant on the plaintiff's part is, to devote his whole time and attention to the business of the defendant. The word "business" used in the plaintiff's covenant must, fairly considered, mean the business for which he was employed, demonstrating and placing the said patents of invention on the market. And the tenth paragraph provides that the defendant is to be the absolute judge as to the manner in which the plaintiff performs his duties under this agreement, that is, his duties of demonstrating and placing the said patents of invention on the market, and shall have the right at any time to dismiss him for incapacity or breach of duty, that is, in demonstrating and placing the said patents of invention on the market.

Now, did the procuring of the leather from Hagersville, and preparing it for testing the machine for the satisfaction of the defendant, come within the terms of the plaintiff's employment as "a demonstrating and placing the said patents of invention on the market"? The demonstrating and placing the said patents of invention on

the market was, according to the recital, for the purpose of sale, that is, for the purpose of selling the patents of invention. Then, how can the procuring the leather from Hagersville and preparing it for testing the machine for the satisfaction of the defendant come fairly within the words "demonstrating and placing the said patents of inventions on the market for the purpose of sale?" In our opinion they cannot, and it was for not procuring the leather from Hagersville, and preparing it for testing the machine, if for any valid reason, that the defendant dismissed the plaintiff. We think, therefore, that the defendant had no legal right to dismiss the plaintiff. But, if procuring the leather from Hagersville and preparing it for testing the machine were within the terms of the plaintiff's employment, had the defendant reasonable ground for dismissing the plaintiff for neglect of duty in this respect? For, if he had not reasonable ground for dismissing him, it goes far to shew that he was not exercising the right to dismiss him *bonâ fide*.

[The learned Chief Justice then considered the evidence as to this, and continued:]

Reading and considering the whole evidence carefully, we have come to the conclusion that the defendant had not reasonable grounds for dismissing the plaintiff under these circumstances, and I am strongly inclined to the opinion that his motive in dismissing him was prompted, not by any breach of duty on the plaintiff's part, but by the desire of the defendant to forfeit the plaintiff's rights under the contract, which he thought he could do, as the letter of dismissal written by his solicitor shews, when it says, "he (the defendant) considers you have forfeited all your rights under said agreement;" and this opinion is strengthened by the answer given by the defendant to his counsel when his counsel asked, "Now, tell me shortly why did you discharge him?" "Discharged him for disobeying orders, for violating my orders, and making false representations to me at different times about the capacity of this machine."

In a case like the present, where one party puts himself as it were in the power of the other party, the fullest good faith must be shewn by the party who has the other in his power, and he ought to be able to shew satisfactorily that he has exercised the power which is placed in his hands with entire good faith, and we do not think that the defendant has so exercised the power given to him by the provisions of the tenth paragraph of this contract.

Assuming, however, that procuring the leather from Hagersville and preparing it for testing the machine, were within the terms of the plaintiff's employment, and that the defendant exercised the power given to him by the tenth paragraph of the contract in good faith, we still think that he did not exercise that power in a legal manner.

We do not stop to inquire whether the exercise of that power had the effect of depriving the plaintiff of the rights to which he was entitled under the contract; it is sufficient that it was in effect a forfeiture of so much of the consideration for the plaintiff's employment as was represented by the assignment by him to the defendant of the letters patent, and, as I have shewn, but for that power the defendant would have had no right to dismiss the plaintiff for his alleged misconduct, and the defendant being thereby constituted the absolute judge as to the manner in which the plaintiff performed his duties, before he could dismiss the plaintiff for his alleged misconduct was bound to give him an opportunity to be heard, and to explain the alleged misconduct, and, not having done so, he did not exercise the power in a legal manner. In *Wood* v. *Woad*, L. R. 9 Ex. 190, it is said by Kelly, C. B., at p. 196: "But they are bound in the exercise of their functions by the rule expressed in the maxim *audi alteram partem*, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters in-

volving civil consequences to individuals." See also *Blisset* v. *Daniel*, 10 Hare 493; *Clarke* v. *Hart*, 6 H. L. C. 633: *Const* v. *Harris*, Turn. & Russ. 496; *Steuart* v. *Gladstone*, 10 Ch. D. 626; *Russell* v. *Russell*, 14 Ch. D. 471; *Fisher* v. *Keane*, 11 Ch. D. 353; *Labouchere* v. *Wharncliffe*, 13 Ch. D. 346; *Bagg's Case*, 11 Coke 99; *Rex* v. *Cambridge*, 1 Str. 557; *Regina* v. *Archbishop of Canterbury*, 1 E. & E. 545; *Capel* v. *Child*, 2 Cromp. & J. 558; *In re Hammersmith Rent Charge*, 4 Ex. 87 at p. 97; *Dawkins* v. *Antrobus*, 17 Ch. D. 615; *Phillips* v. *Foxall*, L. R. 7 Q. B. 666, at p. 680; *Procter* v. *Bacon*, 2 Times L. R. 845.

In our opinion, the plaintiff was wrongfully dismissed by the defendant, and is entitled to recover damages for wrongful dismissal, and to have it declared that he is entitled to profits as by the contract provided, and to have an account of such profits from time to time.

[COMMON PLEAS DIVISION.]

THE BANK OF MONTREAL V. THOMAS.

Bill of exchange—Authority to draw—Promise to accept—Privity.

On the maturity of a bill of exchange the drawers thereof, thinking the acceptor would be unable to meet it telegraphed him, that if unable to pay it to draw on them for the amount. The acceptor took the telegram to the manager of the plaintiffs' bank, who on the faith of it discounted a sight bill drawn by the acceptor on the drawers with the proceeds of which he retired his acceptance which was held by another bank. The drawers refused to accept the bill so re-drawn.

Held, that the telegram having been sent for the purpose of inducing persons to advance money on it, and to take the bill so drawn in pursuance of it, a privity was created between the plaintiffs and the defendants, senders of the telegram, entitling the former to maintain an action against the latter for the money so advanced.

Held, also, that no time being mentioned in the telegram an authority to draw at sight would be implied.

THIS was an action brought to recover the amount of a a draft, dated 29th September, 1887, drawn by F. R. Feehan, on the defendants Thomas & Co., and discounted by the plaintiffs' bank, under the following circumstances:

On the 2nd of December, 1887, a bill of exchange for $225.76, drawn at Woodstock, by the defendants, E. G. Thomas & Co., on and accepted by F. R. Feehan, at Brockville, fell due and was payable at the Molsons Bank in Brockville.

The defendants Thomas & Co., being apprehensive that Feehan might not be able to pay the draft, telegraphed him as follows: "Woodstock, December 2nd, 1887, F. R. Feehan, Brockville. Draw on us for draft due to-day if you cannot pay it. E. G. Thomas & Co."

Feehan took this telegram to the manager of the plaintiff's bank at Brockville, who discounted a sight draft, drawn by Feehan on the defendants, for $225.76, and gave Feehan a certified cheque for that amount, which he paid into the Molsons Bank, and retired the draft due there.

The draft on being presented on the 9th December, was refused acceptance by Thomas & Co., who assigned as a

reason that the time at which draft was drawn was too short; that it should have been drawn at two months.

The action was commenced on the 31st December, 1887. The plaintiffs, in their statement of claim, in addition to the facts heretofore stated, set out:

Paragraph 8. That it is the common course of transactions among merchants and manufacturers, in order to prevent bills to which they are parties, as drawers thereof, being dishonoured, to authorize the acceptor of such bills, when unable to pay the same, to draw upon the drawers for the amount thereof; and it was the common course of business for said E. G. Thomas & Co., to allow said F. R. Feehan to do so; and he was authorized by them to do so in all cases, and he had done so frequently before; and the said Thomas & Co. well knew when they sent the said telegram to said Feehan that he would draw such bill of exchange upon them, and that he and the plaintiffs would rely on the said Thomas & Co. accepting and paying the same, and that the said Feehan would procure to be discounted the same bill of exchange to be so drawn.

Paragraph 9. By such telegram said Thomas & Co appointed the said Feehan their agent to draw such bill of exchange upon them as he did draw, and to discount the same, and with the proceeds thereof to retire the said bill of exchange accepted by the said Feehan so falling due in order that the same might not be dishonoured.

The action was tried without a jury, at Brockville, at the Spring Assizes of 1888, before Armour, C. J., who delivered the following judgment:

ARMOUR, C. J.—In this case I find that the defendants on the 29th September, 1887, made their draft upon F. R. Feehan, of Brockville, for the sum of $225.76, payable two months after date at the Molsons Bank at Brockville: that this draft was accepted by Feehan, and was held by the Molson's Bank for payment on the 2nd December, 1887, its due date: that on such due date the defendants were aware that Feehan was unable to pay this draft, and

that they authorized their book-keeper, Mr. Longmore, to send to Feehan this telegram: "Draw on us for draft due to day, if you cannot pay it." I find that Mr. Longmore had their authority to send this telegram in the words in which it was sent. I find that the defendants had reason to know, and did necessarily know, that this telegram would be shewn by Feehan to any bank through which he would draw on them to retire his acceptance. I find that Feehan did shew this telegram to the plaintiffs, and did procure them on the faith of that telegram to discount a draft drawn by him on the defendants to retire his said acceptance, and to give him the proceeds thereof, which he duly applied in retiring the same. I find that Feehan had the authority of the defendants to represent to the plaintiffs that they would accept the draft so to be drawn, and that he did make that representation to the plaintiffs, and that upon the faith of such representation he procured the said discount and proceeds. The representation so made to the plaintiffs by Feehan by the authority of the defendants, on the faith of which the plaintiffs so acted, bound the defendants to accept the draft.

I think, under these circumstances, there is a clear equity in this Court to order the defendants to accept the draft so drawn; and this Court so orders, but as the draft is long past due, I think, instead of ordering them to accept the draft, the Court has power to order them to pay it.

I therefore give judgment for the plaintiffs against the defendants for the amount of the draft, with costs of suit.

In Easter Sittings, 1888, *G. T. Blackstock*, moved on notice to set aside the judgment entered for the plaintiffs, and to enter judgment for the defendants.

During the same Sittings *G. T. Blackstock*, supported the motion, and referred to *Bigelow* on Estoppel, 4th ed., p. 553, *et seq.*; *Herman* on Estoppel, pp. 902, 3; *Pollock* on Contracts, 4th ed., p. 481-6; *Bank of Ireland* v. *Archer*, 11 M. & W. 383; *Johnston* v. *Collings*, 1 East 98; *Scott* v.

Pilkington, 2 B. & S. 11, 43; *Maddison* v. *Alderson*, 8 App. Cas. 467, 473; *Re Agra and Masterman's Bank*, L. R. 2 Ch. 391; *Re Barned's Banking Co.*, L. R. 3 Ch. 753.

Britton, Q.C., contra, referred to *Randolph* on Commercial Paper, vol. ii., sec. 606 *et seq.*; *Pillans* v. *Van Mierop*, 2 Burr. 1663.

September 15, 1888. MACMAHON, J.—Although the amount involved in this action is not large, the question for decision is an important one, not only as affecting banks and bankers, but also the mercantile community generally.

[The learned Judge after stating the facts proceeded:]

The learned Chief Justice of the Queen's Bench Division, who tried the case, ordered judgment to be entered for the plaintiffs, on the ground that Feehan shewed the telegram to the bank, and on the faith of the telegram procured a discount of the draft: that Feehan had the authority of E. G. Thomas & Co., to make the representation to the bank, that they would accept the draft so drawn; and that equity would compel Thomas & Co. to accept the draft so drawn; but, as the time for payment of the draft was long past due, instead of ordering them to accept an order was made for them to pay it.

If the plaintiffs are entitled to retain the verdict in their favour against Thomas & Co., they can, in my opinion, only do so on the ground of there being a contract which they are entitled to compel Thomas & Co., to carry out.

Mr. Blackstock, in his very forcible argument on behalf of Thomas & Co., strongly urged that there was no privity created between the bank and Thomas & Co. by the latter's telegram to Feehan agreeing to accept his draft; and that by reason of such want of privity, the bank could not maintain this action, the principle invoked being well established, that one who is no party to a contract cannot sue in respect of the breach of a duty arising out of the contract.

In *Chalmers* on Bills, 2nd ed., Art. 210, the position of the holder and drawee of a bill is thus stated:

"The drawee of a bill, as such incurs no liability to the holder, and there is no privity of contract between them; but privity may be created by agreement external to the bill, and the relations of the parties are then regulated by the terms of the agreement."

In support of the statement that "privity may be created by agreement external to the bill, and the relations of the parties are then regulated by the terms of the agreement," the learned author refers to *Re Agra and Masterman's Bank*, L. R. 2 Ch. 391.

Now, was there any "agreement external to the bill" drawn in this case, which can be considered as creating a privity between the Bank and Thomas & Co.? In other words: Did the telegram sent by Thomas & Co. to Feehan constitute an open letter of credit which it was intended by Thomas & Co. should be shewn to any bank through which Feehan might desire to draw for the purpose of inducing such bank to discount the draft which Thomas & Co. had authorized him to draw? And, if he did draw such draft, and the telegram was shewn to the manager of the plaintiffs' bank, and if it was on the representation contained in the telegram, that Thomas & Co. would accept such draft, the same was discounted, then, we think, this case comes within the authorities shewing that a privity has been created between the bank and Thomas & Co., entitling the plaintiffs to maintain this action.

Mr. Justice Story, in the 4th edition (1860) of his work on Bills of Exchange, after quoting Marius's description of a letter of credit, says, at sec. 462: "In the Supreme Court of the United States, the doctrine has been directly affirmed, on several occasions, that the letter-writer is positively and directly bound to any party making the advance upon the faith of the letter; and that it applies not only to cases where the letter of credit purports, on its face, to be addressed, generally, to any person or persons whatsoever who should make the advance, but also in cases where the letter of credit is addressed solely to the person to whom the advance is to be made, and merely states that the person signing the same

will become his surety for a certain amount without naming any person to whom he will become security, if it is obviously to be used to procure credit from some third person, and the advance is made upon the faith of the letter by such third person. And it has been further held, that if the engagement be to accept and pay any bills not exceeding a limited amount, drawn by the person to whom and for whose benefit the advance is to be made; in such a case, the person taking such bills and making the advance upon the faith thereof * * is entitled to treat it as a direct promise to accept and pay such bills, which promise he may enforce, accordingly, in an action in his name, founded upon such letter of credit, against the writer thereof."

In *Russell* v. *Wiggin*, 2 Story Rep. 213, the head note is: "A promise contained in a letter of credit, written by persons who are to become the drawees of bills drawn under it, promising to accept such bills when drawn, which letter is designed to be exhibited for the purpose of inducing persons to advance money on it and take the bills when drawn, is an available contract in favor of the persons to whom the letter of credit is shewn, who advance money and take the bills on the faith thereof."

One of the points to be decided in that case, was: If there was a contract between the parties, whether it was governed by the law of England, or that of the United States; and the opinions of Sir W. Follett, Sir John Bayley, Sir Frederick Pollock, and other counsel, were read at the bar during the argument, shewing what the law of England then (1842) was. The opinions were all to the effect that Russell, the plaintiff, could not maintain an action against Wiggin, the defendant, founded on the letter of credit, because there was no privity of contract or consideration moving between them.

Mr. Justice Story, in delivering judgment, at pp. 228-9, said: "It would be no matter of surprise to me, that if the doctrine contended for at the present argument, should be established to be law in England (as it is affirmed by Sir

Frederick Pollock and Sir Wm. Follett, and the other learned gentlemen whose opinions have been produced at the argument), that a promise to accept a bill would create no contract except between the drawer and the promisor, although shown and designed to be shown to induce the holder to take it upon the ground of a want of privity between the holder and the promisor; I say, it would be no matter of surprise to me that the Courts of England should, whenever the question shall again arise, go back to the doctrine of Lord Mansfield in *Pillans* v. *Van Mierop*, 3 Burr. 1663, and *Pierson* v. *Dunlop*, Cowp. 571, as founded on a wholesome, nay, necessary justice, to prevent gross frauds and manifest and irretrievable mischief in the intercourse of the commercial world."

See also the case of *Carnegie* v. *Morrison*, (Mass. Sup. Ct.) 2 Met. 381, at p. 395; *Coolidge* v. *Payson*, 2 Wheat. 66, 75, and *Boyce* v. *Edwards*, 4 Peters 111, p. 122.

The prediction of Mr. Justice Story, that the Courts of England would, whenever the question should again arise, go back to the doctrine of Lord Mansfield in the cases he there cited, has been fully verified by the decision of the Court of Appeal in the case of *Re Agra and Masterman's Bank*, L. R. 2 Ch. 391, where the bank gave to Dickson, Tatham & Co., a letter addressed to them, expressed thus: "No 394. You are hereby authorized to draw upon this bank at six month's sight, to the extent of £15,000 sterling, and such drafts I undertake duly to honour on presentation. This credit to remain in force for twelve months from its date, and parties negotiating bills under it are requested to endorse particulars on the back hereof."

Dickson, Tatham & Co., drew bills on the Agra and Masterman's Bank, under this letter for £6,000, and sold them to the Asiatic Banking Corporation.

Both banks failed and were being wound up, and the liquidator of the Asiatic Banking Corporation brought in a claim for the £6,000 under the winding up of the Agra and Masterman's bank.

Vice-Chancellor Wood refused to admit the claim made

against the estate of the Agra and Masterman's Bank; and the official liquidator of the Asiatic Banking Corporation appealed on three grounds: "1. That Dickson, Tatham & Co., were agents authorized by the Agra and Masterman's Bank to promise that the latter would accept the bills. 2. That the letter shewn to the person advancing money constituted, when money was advanced on the faith of it, a contract by the bank to accept the bills. 3. That it would be a fraud upon the part of the bank to deny their liability to pay the bills after they had been taken on the faith of the letter."

Cairns, L.J. upholds every one of the grounds of appeal taken by the Asiatic Banking Corporation, saying, at p. 396:

"The letter of the 31st October, 1865, is in form addressed to Dickson, Tatham & Co.; but it is evident that it is written to Dickson, Tatham & Co. in order that it may be shewn by them to those who are to take the bills drawn on the Agra and Masterman's Bank; that it is intended by the writers to be used as an inducement to make persons take those bills; and that the bills were to be taken by such persons under the letter, that is, upon the faith and under the protection and security of the letter. It is a general invitation issued by the Agra and Masterman's Bank, through Dickson, Tatham & Co., to all persons to whom the letter may be shewn, to take bills drawn by Dickson, Tatham & Co., on the Agra and Masterman's Bank with reference to the letter, and to alter their position by paying for such bills with the assurance that, if they or any of them will do so, the Agra and Masterman's Bank will accept such bills on presentation. If it be necessary to determine the question of the legal liability of the Agra and Masterman's Bank, I am of opinion that, upon the offer in this letter being accepted and acted on by the Asiatic Banking Corporation, there was constituted a valid and binding legal contract against the Agra and Masterman's Bank in favor of the Asiatic Banking Corporation. The cases as to the offer of rewards,

of which the case of *Williams* v. *Carwardine*, 4 B. & Ad. 621 is an example followed by the somewhat analogous cases of *Denton* v. *Great Northern R. W. Co.*, 5 E. & B. 860; *Warlow* v. *Harrison*, 1 E. & E. 295-309, and *Scott* v. *Pilkington*, 2 B. & S. 11, appear to me to be sufficient authority to shew that there may be privity of contract in such a case; and if the view be adopted, which appears to have been taken in the American Courts, that the holder of the letter of credit is the agent of the writer for the purpose of entering into such a contract, the same result would be arrived at by a different road."

Franklin Bank of Baltimore, v. *Lynch*, 52 Md. 270, is almost identical in its facts with those in the present case.

In that case the defendant on 27th of April, 1878, telegraphed from Westminster, to Barr & Co., at Baltimore. "You may draw on me for $700." And on the 29th of April, Barr & Co., drew their draft on the defendant for $700, payable at sight, which was discounted by the plaintiffs on the same day upon the faith of the telegram which had been shewn to the bank. The draft was sent to Westminster, where the defendant lived, and presented to him on the 7th of May, when he refused payment, and the bill was protested for non-payment.

It was held that the telegram must be construed as an authority to draw the draft payable at sight: that such an authority implies a promise to accept the draft upon presentation, and to pay it at maturity, that is to say at the expiration of the days of grace, viz., three days sight; that such authority to draw and promise to accept and pay, inures to the benefit of any *bonâ fide* holder of the draft who takes it on the faith of the promise.

The point most dwelt on in the cases is: Was the letter intended to be shewn for the purpose of inducing the person to whom it was exhibited to discount a bill of exchange? If it was intended, and was so intended and shewn, and the discount was made on the faith of the representation that the party writing the letter would accept the bill so dis-

counted, then a privity arises between the person so discounting and the party making the promise, for a breach of which an action is maintainable.

The learned Chief Justice who tried the case has found that the telegram of Thomas & Co. was intended to be shewn for the purpose of inducing the draft, which they desired Feehan to draw, to be discounted: that the telegram was shewn, and the discount made on the faith of the representation therein contained, that Thomas & Co. would accept.

I am clearly of opinion that the verdict of the learned Chief Justice is right; and, to repeat the language of Story, J., in *Russell* v. *Wiggin*, 2 Story 213, it is "founded on a wholesome, nay necessary, justice to prevent gross fraud and manifest and irretrievable mischief in the intercourse of the commercial world."

There was a question raised as to the draft being a sight draft when it should have been a time draft. There was no time mentioned in the telegram as to when it was to be drawn; and, that being the case, it manifestly meant a sight draft. And that was the view of the Court in *Franklin Bank of Baltimore* v. *Lynch*. The exhibits, however, disclosed that Feehan had in 1885 notified Thomas & Co. that the bank in Brockville would not discount any but sight drafts.

As to the point raised, which it was said the learned Chief Justice would not decide, viz., as to the indorsation of Feehan & Co. being struck out after the discount was made, I think the evidence of Feehan, shews conclusively that it was after the draft was discounted, and after he got the money, that Feehan & Co.'s name was put on at the instance of the bank accountant, and, upon its being stated by Feehan to the manager that Feehan & Co. had nothing to do with the matter, he struck the indorsement out.

The bill is not made payable to the order of Feehan & Co., the bank being made the payees of the bill.

The motion must therefore be dismissed, with the usual result as to costs.

ROSE, J.—The evidence discloses the fact that the defendant had accepted prior sight drafts drawn by Feehan through the plaintiffs' agency in Brockville, where, as the defendant quite well knew, Feehan kept his account; and further, that such acceptances were for the purpose of retiring other paper falling due, and which Feehan was unable to protect.

It further appeared that the telegram was sent on the very day the draft matured.

I read the telegram therefore as saying, in effect: "There is due to-day at the Molsons Bank a draft drawn by you on and accepted by me. It must be retired to-day. Draw on me through your bank as usual: discount the draft and thus obtain funds to enable you to retire the draft so falling due, and on presentation I will accept and protect according to its tenor."

No instructions were given as to the time. It seems to me, therefore, that Feehan, the defendants' agent, had authority to draw as he might deem best: that having previously, on more than one occasion, drawn at sight through the same bank similar drafts, or drafts for a similar purpose, the bank might well assume that it was within the scope of his power to draw then at sight. The defendant frankly states that, but for his then temporary straightened circumstances financially, he would have accepted as theretofore, and drawn back to cover, but that owing to his credit being at the time limited, he was unable to do so.

I would find as a fact, on the evidence, that the defendant in giving instructions to draw, had not present to his mind that a sight draft would inconvenience him, and that Feehan was justified in drawing at sight; and that the bank was justified in believing it was in accordance with his general instructions. And clearly this was so, for, as pointed out by my learned brother MacMahon in his most carefully considered judgment, in which I fully concur, Feehan had previously by letter notified the defendant that the bank would not take drafts at a longer date than at sight. See letters of July 2nd, 1885, and January 12th, 1886.

The facts bring this well within the *Agra and Masterman's Bank* Case, referred to by my learned brother. I observe that in *Re Barned's Banking Company, Ex parte Stephens*, L. R. 3 Ch. 756, Sir W. Page Wood, L. J., whose decision was reversed in the *Agra Case*, expresses himself as well pleased that the Lords Justices were able to take the view they did; and we are glad to be able to follow them in this case.

As to the alteration by striking out the endorsation, I am not disposed to quarrel with the conclusion arrived at by the other members of the Court, that the alteration was made with the assent of Feehan and prior to the draft being presented to the defendant for acceptance. Indeed the probabilities seem to me to point that way. I do not see why the bank could not strike out the endorsation after the defendants' refusal to accept; and the manager declares himself to be certain that the endorsation was struck out prior to the draft having been forwarded for acceptance. But, supposing it was not, the defendant, if he had accepted would have bound himself to pay the amount of the draft to the order of the bank, and any endorsement subsequent to that of the bank would not on this evidence have enured to his benefit. See *Ianson* v. *Paxton*, 23 C. P. 439.

I therefore agree to the conclusion arrived at that the judgment for plaintiffs must stand, and the motion be dismissed with costs.

GALT, C. J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

SHOEBRINK V. THE CANADA ATLANTIC RAILWAY. COMPANY.

Railways—Omission to ring bell and sound whistle—Highway.

In 1871 the owner of a block of land had a plan made and registered laying out the land, into lots with streets, &c. Most of the land including that part marked on the plan as O street, was fenced in and used for pasturage and so continued until 1881 when a portion thereof including O street, no lots fronting thereon having been disposed of, was sold by the owner to the defendants who treated the land as their private property, using it as a shunting yard. The plaintiff, a little boy, who lived with his father near by, was standing on a snowbank on the side of the track where it crossed O street. He saw a train approaching and when it came opposite where he was it gave a jerk which frightened him and he slipped down on to the track and was run over by the train and injured. No whistle was sounded or bell rung.

Held, that the omission to sound the whistle or ring the bell did not impose any liability on the defendants as it in no way contributed to the accident.

Held, also, that O street as marked on the plan was not a highway within the meaning of the Railway Act.

THIS was an action brought to recover damages for an accident received by the plaintiff, a young boy, by being run over by a train of the defendants.

The plaintiff, in his evidence, stated, that during the year 1887, he lived with his father on Ann street, in the village of Stewarton. In the month of April he went to look for his little brother, and was standing on a snowbank close to the railway track. He was looking in the direction in which a train was coming, and saw it approaching. As the train got opposite where he was, it stopped, and the cars gave a jerk which frightened him, and he slipped down the snowbank under the cars, and the wheels went over his hands cutting off his left hand and two fingers of his right hand. No bell was rung or whistle sounded as the train approached.

It was urged that the place where the accident happened was a street, and that the whistle should have been sounded, or bell rung, as the train approached, and that the omission to do so was evidence of negligence on the part of the defendants.

The additional evidence, so far as material, is set out in the judgment of MacMahon, J.

The action was tried before Falconbridge, J., and a jury, at Ottawa, at the Spring Assizes of 1888.

The learned Judge dismissed the action, on the ground there was no evidence to submit to the jury.

In Easter Sittings, 1888, *Robinson*, Q. C., moved to set aside this judgment, and to enter judgment for the plaintiff, on the ground that there was evidence of negligence, which should have been submitted to the jury, because the place where the accident happened was a street, and that no bell was rung or whistle sounded when the train was passing.

In the same Sittings *Robinson*, Q. C., supported the motion, and referred to: *Williams* v. *Great Western R. W. Co.*, L. R. 9. Ex. 157; *Schmidt* v. *Milwaukee and St. Paul R. W. Co.*, 23 Wis. 186; *Singleton* v. *Eastern Counties R. W. Co.*, 7 C. B. N. S. 287; *Redfield* on Railways, 2nd ed., vol i., pp. 495, 521; *Brown and Theobald* on Railways, 2nd ed., p. 300; *Shearman and Redfield* on Negligence, 4th ed., p. 469; *Patterson* on Railway Accident Law, sec. 40 and 145; *Pollock* on Torts, 352.

McCarthy, Q. C., contra, referred to *Re Morton and Corporation of St. Thomas*, 6 A. R. 323; *Auger* v. *Ontario, Simcoe, and Huron, R. W. Co.*, 16 U. C. R. 92; 9 C. P. 164; *Buxton* v. *North Eastern R. W. Co.*, L. R. 3 Q. B. 549; *Gorris* v. *Scott*, L. R. 9 Ex. 125.

September 15, 1888. GALT, C. J.—The subject of this painful accident is a little boy.

[The learned Chief Justice after setting out the evidence proceeded.]

It is manifest from the foregoing evidence that at the time when the unfortunate accident happened the plaintiff was not intending to cross the railway track. He had placed himself on a snow bank very close to the track, and as the cars were passing he became frightened and slipped

off the bank, and was run over. It is, therefore evident that the omission to sound a whistle or to ring a bell had nothing to do with the accident. I therefore agree with the learned Judge that there was no evidence to go to the jury of any negligence on the part of the defendants.

It was simply an accident caused by the youth of the plaintiff.

The case of *Williams* v. *Great Western R. W. Co.*, L. R. 9 Ex. 157, is in many respects similar to the present; but the ground on which the learned Judges set aside the judgment of the learned Judge at the trial, dismissing the action, is not applicable to the present. In that case there was no evidence as to the cause of the accident, the plaintiff being so young that she could not be examined as a witness. In the case now before us we find that the plaintiff took up a position on a snow bank close to the track, and being frightened he slipped down, and was injured.

ROSE, J.—It is very difficult to understand exactly how the facts are in this case. The lad's evidence is not free from many contradictions. I would judge, however, that he took his position on a slight mound of snow, about two feet in height, looking in the same direction as that in which the train moved, but not looking directly at the track: that he was about five or six feet from the train, although at one place he said about two feet, but he was so far away that he said he could not touch it with his hand: that the train was standing there when he took his position, although this is not perfectly clear. If he was not, then it may be that the train moved up alongside of him, the engine passing him and then stopped, for he says he was startled by the noise of a "jerk." At all events, he knew the train was alongside of him before he heard the noise. Startled by the noise, he probably turned towards the train; at all events, he lost his footing and fell under the wheels and was injured. He lived near by; knew that he was standing near the track, and that the

train had drawn up, and was alongside, either stationery or moving.

What was the negligence that "was so connected with the accident to the plaintiff as to entitle a jury to be consulted as to whether the action is maintainable?" to use the words of Kelly, C. B., in *Williams* v. *Great Western R. W. Co.*, L. R. 9 Ex. 157, at p. 160.

It was contended:

1. That the place where the lad stood was a highway, and so there was negligence in that that the bell did not ring nor did the whistle sound.

Assume it to have been a highway. I do not see how the neglect to ring the bell or sound the whistle in any wise caused the accident. The lad was not using the land as a highway; he was not crossing or intending to cross; he was not upon the railway track at all; he had knowledge of the fact of the track being where it was, and of the train being upon the track; he chose his position with this knowledge, and the sounding of the bell or whistle would not have given him greater knowledge.

Unless the statutory duty was created with the object of preventing the mischief complained of, it will not assist the plaintiff: *Gorris* v. *Scott*, L. R. 9 Ex. 125.

But I do not think that "highway" means highway in law, but highway in fact. To illustrate: Suppose a concession road had been surveyed and used as a highway, but afterwards closed by the wrong of some person or persons, the side fences taken down, all traces upon the ground obliterated, and thus not used as a road, and that a railway line or track was laid down crossing this road. Could it be successfully contended that the company's servants in running its trains must, whenever a train passed such road, ring the bell or cause the whistle to be sounded, under a penalty; or that a man happening to be upon the ground where the track crossed the road, and there suffering an accident, could search out the records in the Crown Office, or the facts as to user some years prior, so as to fix the railway company with liability for neglect of duty in

not observing the statutory precautions required to be taken by sec. 16 of R. S. C. ch. 109? Or, if a trespass road had been established in lieu of an original allowance, but under such circumstances as would entitle the owner of the land to have the trespass road closed and the original allowance opened, would the company be free from the liability to observe the statutory precautions as to the trespass road and be compelled to observe them with reference to the unopened original allowance?

I see no evidence to support the contention that the place where the lad was standing was a highway within the meaning of the Act.

Sec. 2, R. S. C. ch. 109, interprets "highway" as including "any public road, street, lane, or other public way or communication." Language which seems to me to indicate a way, in fact, upon the ground.

It was further contended that if this was not a highway there was a statutory duty to fence. Whatever argument may hereafter be founded on the amendment to the Railway Act of last session, made, as I understand, in consequence of the decisions of our Court of Appeal in *Conway* v. *Canadian Pacific R. W. Co.*, 12 A. R. 708, and *Davis* v. *Canadian Pacific R. W. Co.*, 12 A. R. 724, it seems difficult, upon the Act as it stood when this accident occurred, to found upon the language of the statute any argument which entitles this plaintiff to the benefit of any neglect on the part of the company to fence, if any such neglect there was. The duty was not to fence as against him, as I read the statute and the decisions.

The third ground taken was that, apart from the statute, there was a common law duty imposed upon the company to conduct its business with reasonable care; and therefore it was a question for a jury to determine whether on the facts of this case the company should reasonably have been required to fence.

Patterson's Railway Accident Law, pp. 40, 145, and *Pollock* on Torts, 352, were cited.

This involves the proposition that a jury might well find

that the company owed a duty to the lad to fence the track, so as to prevent him standing so near the cars that, when startled and losing his footing, he would fall under the wheels of the train.

As a general statement of law it is clear that "in the absence of any statutory provision to the contrary, a railway company is under no obligation to fence its track:" *Conway* v. *Canadian Pacific R. W. Co.*, at p. 721. And when the trains are run under statutory authority, and with certain defined obligations as to fencing, I would require direct and binding authority before I would lay it down as law that a railway company was bound to fence its track, so as to prevent persons standing so near as to be in danger of falling under the train in case of losing their footing, that is to say, that it owed such duty to the person who might choose to place themselves in such a position.

I have considered the above questions as if the lad had a right to be where he was. If not, the defendants' arguments tell against him with greater force.

In my opinion the motion must be dismissed.

MACMAHON, J.—I fully agree with the learned Chief Justice that the plaintiff's motion must be dismissed.

I do not think O'Connor Street, near to which the accident happened, can be considered a public highway even if the fact that it was such could have any influence in determining the judgment in the case.

In 1871 Mr. McLeod Stewart, being the owner of some lands in the township of Nepean, adjoining Ottawa, laid out a portion into town lots, and called it "Stewarton," a plan of which was registered. The streets, so far as is necessary for this case, were named from east to west, Elgin, Metcalfe, O'Connor, and Bank; and those from north to south, Argyle, Catharine, and Isabella.

Since the registration of the plan Mr. Stewart had sold lot 11 on Catharine Street and lots 13, 14, and part of 15 on Bank Street.

Most of the lands were fenced in and reserved for pasturage by Mr. Stewart between the years 1871 and 1881, when he sold portions to the defendants' railway, which has since then acquired all the lands on the plan between Catharine and Isabella from north to south, and Elgin to Bank from east to west, except the lot on Catharine street and the two and one-half lots on Bank street previously disposed of by Stewart. Between the boundaries above given the railway company have their shunting yard, treating Metcalfe and O'Connor streets as laid down on the plan registered by Stewart as their private property.

Under R. S. O. (1877), ch. 146, sec. 67, where an individual lays out a town or village, it is only where lots of land fronting on or adjoining streets according to the survey and plan have been sold to purchasers, that such streets shall be considered public highways or streets. And sec. 72 provides for the alteration or the cancellation of the former survey; but by sec. 2, "no part of any street or streets shall be altered or closed up upon which any lot of land sold abuts, or which connects any such sold lot with or affords means of access therefrom to the nearest public highway."

Under that Act the mere survey and registration of a plan shewing streets is not sufficient to make them public streets or highways unless lots of land fronting on or adjoining such streets have been sold to purchasers.

No lots were sold fronting on or adjoining O'Connor street, so that what was done by Mr. Stewart by a survey and registration of the plan did not necessarily constitute it a highway or public street.

Andrew Heakey, who was overseer of highways at Stewarton for some years, said he graded O'Connor street in 1881 between Argyle avenue and Isabella street, and made it passable. A portion of the work put on the street was paid for by money he got from the municipality of Napean and the statute labor. He says no work was done on that street after 1881.

The evidence does not shew that this was a road upon which the public money has been usually expended or whereon the statute labor has been usually performed, so as to make it a highway within sec. 524 of R. S. O. ch. 184. See *Regina* v. *Plunkett*, 21 U. C. R. 536, at p. 541.

Between Catharine and Isabella streets there is no evidence of user of O'Connor street between 1871 and 1881, as it was, as already pointed out, enclosed and used as a pasture field.

If it was not a highway, then was it obligatory to fence? I think not.

The 13th section of the Railway Act (R. S. C. ch. 109) provides that a railway shall within a time therein limited erect and maintain fences on each side of the railway of the height and strength of an ordinary division fence. And sub-sec. 2 of sec. 13 provides, "If * * such fences * * are not duly made and completed, or if after they are so made and completed, they are not duly maintained, the company shall be liable for all damages done on the railway by its trains or engines to the cattle, horses or other animals of the occupant of the land, in respect of which such fences * * have not been made or maintained."

There is a somewhat similar provision in the Imperial Act, 8 Vic. ch. 20, sec. 68; and in *Buxton* v. *North Eastern R. W. Co.*, L. R. 3 Q. B. 549 554, in considering that statute, it was said that a railway company are not bound at common law to maintain fences sufficient to keep cattle off the track under any circumstances; and that the obligation imposed by sec. 68 of the Act, "exists solely between the railway company and the owners and occupiers of the adjoining lands." See also *Ricketts* v. *East and West India Docks, &c., R. W. Co.*, 12 C. B. 160, at p. 175, judgment of Jervis, C. J.

If there is no common law liability imposed upon a railway company to fence, and if the obligation imposed by the statute to fence exists solely between the railway company and the owners and occupiers of adjoining lands so as to prevent the cattle of the latter from straying on the

railway, then no question can arise in this case as to whether the railway company did or did not maintain fences around the railway grounds where this accident to the plaintiff happened.

According to the evidence, the plaintiff was on the railway company's premises, a few feet from the line of O'Connor street, and had got on top of a snow bank about two feet high and four or five feet from the railway track, and was looking across to see if his brother was in the yard adjoining the house of a Mr. Nidd, and while so looking an engine attached to a train of cars passed him, and, after passing he says the cars gave a "jerk," and frightened him, and he slipped from the snow bank under the cars, and was injured by the cars passing over his hands.

Was there any negligence proved here against the railway which was the cause of the injury complained of?

It was urged that the company were guilty of negligence in not ringing the bell. If the place where the engine and cars were crossing was the yard of the railway company, then it was not necessary to ring a bell at all because of their being on their own premises, and the statutory obligation to ring only applies where the train is about to pass a public highway.

The object in ringing the bell is to warn people who are on the track or are about crossing it, of the approach of the train, so as to enable them to get out of the way. The plaintiff was neither on the track nor about to cross it when the engine and cars passed him. He saw the engine pass; saw the cars opposite to him; so that, even were it to be considered negligence in not ringing the bell, the omission to do so did not contribute to the accident by which the plaintiff was injured.

In *Shearman* and *Redfield* on Negligence, (4th ed., vol. 2), sec. 469, to which we were referred by Mr. Robinson, the law is thus stated: "When a human being is injured at a railroad crossing, there is a reasonable presumption that the warning conveyed by the sound of a bell or whistle would have been beneficial to him; and, therefore,

in such a case, it should be presumed that his injury was caused by the omission of such signals, if they were omitted. But if, without these signals, the injured person knew, or by the exercise of ordinary care would have known, of the proximity and approach of the train, this presumption is rebutted; and, without further evidence connecting the omission of the signals with the injury, the company is not responsible for it on that ground alone."

Here the plaintiff saw the train within four or five feet of and directly in front of him; but he did not recede from his position of danger, if dangerous he considered it.

I refer also to *Williams* v. *Great Western R. W. Co.*, L. R. 9 Ex. 157, and to the judgment of Pollock, B., at p. 161, where he quotes from the judgment of Willes, J., in *Daniel* v. *Metropolitan R. W. Co.*, L. R. 3 C. P. 216, at p. 222, which was approved in the same case in House of Lords, L. R. 5 H. L. 45: "It is not enough for the plaintiff to shew that there has been an accident upon the defendants' line, and thence to argue that the company are liable, even *primâ facie*. It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; and I go further and say that the plaintiff should also shew with reasonable certainty what particular precautions should have been taken." See also the judgment of the H. of L. in *Wakelin* v. *London and South-Western R. W. Co.*, 12 App. Cas. 41.

The plaintiff's motion must be dismissed.

Motion dismissed.

[COMMON PLEAS DIVISION.]

BALL ET AL. V. CATHCART.

Ejectment—Res judicata—Judgment by default of appearance—Divisional Court, jurisdiction of—Direct appeal from Master in Chambers.

Since the Ontario Judicature Act, a judgment recovered in an action of ejectment by default of appearance will sustain a defence of *res judicata* to an action subsequently brought by the defendant to try the same question.

Cochrane v. *Hamilton Provident and Loan Society*, 15 O. R. 138, followed.

A Divisional Court has no jurisdiction to hear an appeal direct from the Master in Chambers, or a substantive motion to set aside a judgment by default of appearance.

THIS was an appeal by the defendant against an order of the Master in Chambers refusing to set aside a judgment in ejectment signed in consequence of default of appearance. The order was made on the 16th March, 1888. The defendant also made a substantive and independent motion for relief.

The appeal and motion were argued before the Divisional Court on the 30th May, 1888.

Aylesworth, for the appeal and motion.
Masten, contra.

September 11, 1888. ROSE, J.—The order of the learned Master now appealed from was made on the 16th of March last. The notice of appeal was dated on the 18th of May, some two months later.

It was objected by Mr. Masten that this Court had no jurisdiction:

1. Because no appeal from the learned Master to the Divisional Court is provided for.

2. If this Court has jurisdiction to entertain an appeal from the Master in Chambers, the appeal is too late.

Rule 427, O. J. A., provides for an appeal from an order or decision of "the County Judge or officer aforesaid"

(including the Master in Chambers) to a Judge of the High Court in Chambers.

Rule 414 provides that the appeal must be made within eight days after the decision appealed against. Notice to be served within four days.

Rule 471 sets out certain things as within the jurisdiction of the Divisional Courts, and while it provides that appeals to them may be had from orders of a Judge in Chambers, no provision is made for appeals from orders of County Judges or the Master in Chambers.

The Divisional Courts are quite distinct from the Divisions of the High Court, as is clear from the provisions of the Judicature Act. See *Regina* v. *Beemer*, 15 O. R. at p. 272.

They have such jurisdiction as is conferred upon them by the Act and Rules, and no other; and, in my opinion, appeals from an order of the Master cannot be made to the Divisional Court in the first instance, but must be made to a Judge in Chambers, whose orders are reviewable before the Divisional Courts.

Mr. Aylesworth urged that, although, after the four days within which the notice of appeal to a Judge in Chambers must be given, the right to appeal to such Judge was gone, yet the right to appeal to the Divisional Court remained, citing *Parkinson* v. *Thompson*, 44 U. C. R. 29; *Phippen* v. *McLeod*, 7 P. R. 377; *Mahon* v. *Nicholls*, 31 C. P. 22; *Ryan* v. *Canada Southern R. W. Co.*, 10 P. R. 535; *Elliott* v. *Capell*, Printed Appeal Books No. 49; *Lowson* v. *C. F. M. Co.*, 9 P. R. 185; *Dobie* v. *Lemon*, 12 P. R. 64.

The decisions prior to the Judicature Act are not in point, as then there was no such Court as the Divisional Court, a Court of limited jurisdiction; and the jurisdiction vested in the old Courts of Queen's Bench and Common Pleas, as pointed out by the learned Chief Justice of the Queen's Bench Division in *Regina* v. *Beemer*, is now to be found not in the Divisional Courts, but in the High Court and in its Divisions.

There is no decision in favor of Mr. Aylesworth's conten-

tion as to the jurisdiction of the Divisional Court to hear this appeal, unless *Elliott* v. *Capell* furnish an authority.

There the point was raised. The appeal to the Divisional Court was from an order of the Master in Chambers affirmed on appeal by an order of Mr. Justice Osler, or rather from the affirming order, and a further order of the Master.

Cameron, J., in the Divisional Court said, "I think the appeal under sec. 36 of the Judicature Act is properly made to the Divisional Court."

Sec. 36 provided that an order made by a Judge of the High Court in Chambers might be set aside by the Divisional Court.

The judgment of the Divisional Court was appealed to the Court of Appeal, and, it is said, dismissed; but we have no written opinion on which the judgment was founded. The point was taken in the reasons of appeal.

Sec. 36 certainly warranted the appeal from the order of Mr. Justice Osler; but it would seem as if sec. 36 had not been read with rules 427 and 471, that is if Cameron J., intended his observation to apply to the Master's order.

Sec. 36 provides for an appeal to the Divisional Court, from a rule, order, or decision made by a Judge of the High Court in Chambers.

Rule 471 provides for appeals from orders of a Judge in Chambers.

Rule 427 provides for an appeal from any order or decision of the Master in Chambers to a Judge of the High Court in Chambers.

In my opinion, the term "Judge of the High Court in Chambers, or Judge in Chambers," means the same thing in the three places, and therefore does not in sec. 36 include the Master in Chambers.

And if it could be held otherwise, then the anomaly would exist that when the right of appeal under rule 427 was lost by delay, it still remained under sec. 36; so that a litigant might let the four days elapse and be prevented

from appealing to the Judge in Chambers, and appeal, as here, at any time to the next Divisional Court, within the limitations prescribed by rule 414.

From the discussions I had with the late Chief Justice of this Division, Sir Matthew Cameron, in considering the case of *Regina* v. *McAuley*, 14 O. R. 643, I feel sure, were he now with us, he would not dissent from the position I am taking. Although of course I cannot assume the responsibility of saying more than that, the impression is so strong that I feel free to express my own view, notwithstanding his observations in *Elliott* v. *Capell*.

I think, therefore, this appeal could not have been heard had the plaintiffs insisted upon their strict rights, although in another mode possibly relief might have been obtained.

But Mr. Masten, of counsel for the plaintiffs, agreed that the motion might be heard to this extent, viz., that the Court might express its opinion upon the merits, and if on the merits it was thought just that the defendant should have an opportunity to have the question of title tried, the plaintiffs would undertake not to plead the judgment obtained herein, in answer to an action which has been brought by the defendant to recover possession of the same premises, and which action is now pending; and he further agreed that the question of costs might also be disposed of on the merits. Such agreement confers jurisdiction under the 3rd sub-sec. of rule 471.

The learned Master has in his written judgment stated that he would have set aside the judgment and let the defendant in to defend, but that he was of the opinion that the judgment would not estop the defendant in her action from recovering on her title, if valid.

I agree that in this opinion there is error.

The old action of ejectment, as a distinct form of action, was in effect abolished by the Judicature Act, and in the late revision, R. S. O. ch. 51, has disappeared, and such sections as are in force are for the most part to be found in the Consolidated Rules.

The intention was, so far as possible, to have one form of action in which various rights might be determined.

Judgments in such actions are final judgments, and a matter once litigated and adjudicated upon is to be considered as finally determined, that there may be an end of litigation.

Therefore, when in this action the defendant admitted by not defending that she had no title, she could not assert to the contrary in an action brought by her against the same parties to try the same question: see *Cochrane* v. *Hamilton Provident and Loan Society*, 15 O. R. 138.

The laches or delay on the part of the defendant has been great, and were it not that, unless the will can be successfully attacked, she is plainly entitled to retain for her life the house and half acre of land, she is clearly not entitled to relief; that is to say, on the facts as exhibited upon the affidavits, I would not feel justified in disturbing the judgment to let in an apparently doubtful defence.

I agree, however, that it will be just that she be allowed to have her claim tried.

We are not able to entertain the appeal for the reasons stated, but the plaintiffs' undertaking will enable her to press forward her own action freed from the danger of the defence of judgment recovered in this action being set up in answer.

I do not lose sight of the notice of motion containing a clause notifying the plaintiffs that the relief sought for would be asked as on a substantive and independent application.

The rule upon which an application to set aside a judgment by default could be based is 214, and is as follows: "Any judgment by default * * * may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit."

In my opinion, this rule does not confer any jurisdiction upon the Divisional Court to hear such a motion, but only upon the High Court or a Judge of the High Court, and under the rules upon the Master in Chambers.

Rule 270 provides for the Divisional Court hearing a motion to set aside a verdict or judgment where a party does not appear at the trial: such motion can also be heard by a "Judge in Court," or by the trial Judge.

Rules 510 and 523 provide for motions to the Divisional Court against the judgment of a trial Judge, at or after the trial of an action by a jury. See also Rules 510, 523, *et seq.*

It is manifest that the policy or principle of the Judicature Act is that what I may call the general jurisdiction should be vested in the High Court, and that the business of the High Court should be disposed of by a single Judge; see sec. 28; and that the Divisional Courts should have only a limited jurisdiction, as assigned by sec. 29 and Rule 471 (Con. Rule 219) and other rules.

Sec. 29 is clear. It empowers the Divisional Courts to transact or dispose of such business and such only as is assigned them by Rules of Court, and declares that they "for that purpose" shall "exercise all or any part of the jurisdiction of the said High Court."

Rule 471 names certain matters that may come before the Divisional Courts, and, as if jealous of the jurisdiction of the High Court or a single Judge thereof, provides that "nothing herein contained shall be construed so as to take away or limit the power of a single Judge to hear and determine any such proceedings or matters in any case in which he has heretofore had power to do so, or so as to require any interlocutory proceeding therein, heretofore taken before a single Judge to be taken before a Divisional Court."

In my opinion, this motion does not lie to the Divisional Court, either by way of appeal or as a substantive or independent motion, and our jurisdiction to interfere is limited by the agreement of the parties, which can be only to the extent of Mr. Masten's consent, that is, that we should hear, consider, and determine whether the defendant should be permitted to have tried her title to the house and half acre, and that if we were of opinion that it was right that

she should be so permitted, then he undertook that the defence of *res judicata* should not be set up in the action at her suit now pending.

It having been determined that it is just that she should have the question of her title tried, she will of course be at liberty to prosecute her action freed from the defence of *res judicata*.

We were also to dispose of the question of costs.

It occurs to me that the litigation should not be continued. The expense will far exceed the value of the property in issue. Unless the execution of the will can be shewn to have been not in accordance with the statute, it does not appear what title the plaintiffs have to the house and half acre during the defendant's life time.

The judgment recovered herein sets at rest any question as to the defendant's claim (if any) made to the rest of the property.

I would suggest that it be agreed that the defendant be restored to the possession of the house and half acre, and that a consent order issue setting aside the judgment to that extent, and restoring possession to her, and that the defendant discontinue her action. And as to costs, that there be no costs to either party of this motion, or of the consent order.

If this is not agreed upon, we will consider what disposition of the costs of this motion should be made, but we hope that further litigation will cease, as its continuance will be burdensome and oppressive.

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

The order as issued dismissed the defendant's appeal and motion upon the plaintiffs' undertaking not to set up the judgment in this action as a defence to the action brought by the defendant, and reserved the question of costs to be disposed of upon another application.

[COMMON PLEAS DIVISION.]

ROBERTSON ET AL. v. HOLLAND ET AL.

Fraudulent preference—Disposal of property by preference creditor—Right of other creditors to set aside preference.

A favoured creditor, with the connivance of an insolvent debtor, procured a third person to purchase the debtor's entire stock in trade, for which the purchaser gave his note to the debtor, who immediately indorsed it to the favoured creditor, who discounted it with a bank. The debtor did not execute any assignment for the benefit of creditors. In an action by the other creditors to compel the preference creditors to share ratably with them,

Held, [reversing the judgment of GALT, C. J., at the trial], that as the preference creditor had disposed of the note to a *bonâ fide* holder for value no relief could be given.

THIS was an action tried before Galt, C. J., without a jury, at Toronto at the Fall Assizes of 1887.

The action was to recover judgment for the claims of the plaintiffs, Robertson & Co., Taylor & Co., and Gage & Co., against the defendant Fogg; and for a judgment on behalf of these plaintiffs, and all the other creditors of Fogg, except the defendants Holland & Co., declaring that the transfer or sale by Fogg, on the 20th of January, 1887, of his stock in trade to the defendant Phillips, or the transfer by Fogg to the defendants Holland & Co., of a note for $2,700 given by Phillips to Fogg for the stock, or both, be declared fraudulent and void as against the plaintiffs, and set aside.

The only plaintiff whose claim was overdue on the 20th of January, 1887, was Gage & Co.; but the claims of the other named plaintiffs were overdue at the time the action was commenced, namely, on the 15th February, 1887.

There was a suggestion following the statement of claim that the pleadings had been noted and closed as against Fogg.

The defendant Phillips admitted that he was aware at the time of the sale to him of the insolvent circumstances of Fogg; but claimed he was a *bonâ fide* purchaser for a fair and valuable consideration. He also admitted that he knew

that the note he gave for the purchase of the stock would be transferred by Fogg to the defendants Holland & Co., and that by such transfer Holland would obtain a preference; but he claimed there was no agreement between him and Holland that the note to be given should be so transferred. The note given by Phillips to Fogg and endorsed by him to Holland & Co. had been transferred by them to a purchaser for value.

Holland & Co. alleged that Fogg was indebted to them in the sum of $4,792.54. They admitted Fogg's insolvency: that they were aware of it; and that the transfer of the note was to prefer them. They alleged that the property sold by Fogg to Phillips did not comprise the whole of his effects. They claimed that the preference so obtained by them was fair and honest, and that they believed, until shortly before the transaction in question, that, with trifling exceptions, they were the sole creditors of Fogg.

The learned Chief Justice held that it was in effect a transfer by Fogg to Holland & Co., and was void as against Fogg's creditors; and he gave judgment against the defendant Fogg, with costs; and dismissed the action against Phillips, with costs to be paid out of the estate. He gave judgment against Holland & Co.; and declared that the plaintiffs and Holland & Co. were entitled to share rateably and proportionately, according to the several debts, in the proceeds of the note for $2,700, transferred by Fogg to Holland & Co., Holland & Co. to pay the costs of the action.

During Michaelmas Sittings, 1887, *J. J. Maclaren* moved, on notice, to set aside the judgment entered for the plaintiffs, and to enter a nonsuit or judgment for the defendants.

During the same Sittings, *E. D. Armour*, on behalf of the plaintiffs, moved on notice, to vary the judgment, in so far as it directed the costs of Phillips to be paid out of the estate, and to enter judgment for the plaintiffs for the

division of the whole fund not diminished by the costs of Phillips, on the ground that he was a party to a scheme with the other defendants, Holland & Co., to procure a preference for them.

In Hilary Sittings, 1888, *Maclaren* supported the defendant's motion, and showed cause to the plaintiff's. The judgment is wrong, for the point has already been determined by the Chancellor. In *Davis* v. *Wickson*, 1 O. R. 369, and in *Stuart* v. *Tremain*, 3 O. R. 190, the relief here sought was refused. The Court, in fraudulent conveyance cases, merely removes the obstacle to execution, and where the property assigned has left the possession of the person against whom the Court might enforce a judgment, it is useless to remove the obstacle, because execution would not be effectual.

E. D. Armour, contra. *Davis* v. *Wickson*, 1 O.R. 369, is not a direct authority against the plaintiffs. There the preferred creditor was not before the Court. The proper relief is that which was granted in this case. It is admitted that in cases of fraudulent assignments of property to defeat creditors, the Courts have merely removed the obstacle to execution by declaring the assignment void, or holding the assignee a trustee for the creditors; and it has been assumed that this is the proper remedy where one creditor has been preferred over others. *Stuart* v. *Tremain*, 3 O. R. 190, shews that it is not the proper remedy. There the Chancellor said that the effect of setting aside the assignment to the favoured creditor and allowing the plaintiff (another creditor) to seize under the execution, would only be to take the preference away from one creditor and give it to another; and this he would not do. It was also said that the only remedy for an aggrieved creditor, in such a case, was to sue under the statute of Elizabeth for the penalty given by that Act. But preferences were not unlawful under the statute of Elizabeth; and it would be a sufficient answer to such an action to say that the statute of Elizabeth did not apply. Our statute, in addition to re-enact-

ing substantially the provisions of the Statute of Elizabeth, made preferences of creditors unlawful: *Gottwalls* v. *Mulholland*, 15 C. P. 63. The intention was to compel all creditors to share ratably by declaring that no one should be preferred over another. The proper and only remedy, therefore, in cases of preference, is to make the preferred creditors share ratably with all the other creditors. If this be not the remedy then there is no remedy; for *Stuart* v. *Tremaine* shows that the Court will not set aside a preference to let another creditor in with his execution; and it is clear that the penalty of the Statute of Elizabeth is only imposed for fraudulently conveying to a stranger. Our Act does not give a new cause of action to the assignee, but declares that where there is an assignee he shall have the *exclusive* right of suing, that is, a right to the exclusion of others, namely, creditors. If the Legislature had intended to give a new and original cause of action, it would not have been necessary to exclude others from the right which they did not possess.

September 15, 1888. MACMAHON, J.—The defendants Holland & Co. and Phillips, having admitted on the pleadings their knowledge of the fact that Fogg was insolvent at the time the transactions, which are impeached in the present suit, took place, the question as to the extent of his assets to meet his liabilities need not be considered except in reference to one aspect of the case.

These defendants also admit that they were aware that the transfer of the note given by Phillips to Fogg as the consideration for the stock to Holland & Co. would give that firm a preference over the other creditors of Fogg.

It was urged that notwithstanding the state of facts existing, as contained in the admissions on the record, the plaintiffs cannot succeed against Holland & Co., because no fraud has been shewn: that, apart from our Act, it is not a transaction which would be void at common law or under the Statute of 13 Eliz. ch. 5; and therefore cannot be impeached by those plaintiffs who are not execution cred-

itors. And the case of *Building and Loan Association* v. *Palmer*, 12 O. R. at pp. 4-5, was referred to.

This action is brought to declare that a transfer which was made by a debtor to one of his creditors was with the intent of giving that one creditor a preference and priority over the plaintiffs and the other creditors of the debtor; or, that it has had the effect of giving the one creditor such preference and priority over the other creditors; and they ask that the transfer be declared void, and an order made for a rateable distribution amongst all the creditors of the assets of the debtor in the hands of Holland & Co.

It is not pretended there was any secret trust in favor of the debtor, or that he was retaining any benefit for himself in the transaction which took place between him and the defendants Holland & Co. and Phillips; so that we are not concerned as to the effect of the Statute of Elizabeth in considering our judgment. For the meaning of the Statute of Elizabeth as stated by Jessel, M. R., in *Middleton* v. *Pollock*, 2 Ch. D. 104, at pp. 108-9, is, "that the debtor must not retain a benefit for himself. It has no regard whatever for the question of preference or priority among the creditors of the debtor." See also *Ex p. Games*, 12 Ch. D. 314.

The right of the plaintiffs, under certain circumstances, to maintain the action has been settled beyond question by the cases of *Macdonald* v. *McCall*, 12 A. R. 593, 13 S. C. R. 247; and *Rae* v. *McDonald*, 13 O. R. 352.

The admission having been made of the knowledge of Fogg's insolvency, and that the transfer of the note to Holland & Co. gave them a preference over the other creditors of Fogg, renders such transfer utterly void under the authority of *Rae* v. *McDonald*, 13 O. R. 352; and *Warnock* v. *Klœpfer*, 14 O. R. 288.

The case was argued on the facts as they appeared in evidence, and as if the question whether the preference obtained was not in consequence of pressure by the creditors upon the debtor had to be dealt with, so that the question

of "intent" on the part of the debtor Fogg in making the transfer to Holland & Co. might be considered by the Court.

The facts clearly disclose the intention of Fogg to prefer Holland & Co., as he wrote Holland & Co. on the 27th December, 1886, saying that trade had been very bad and sales had not been sufficient to pay all the bills, and telling them they had better come and take the stock.

On receipt of this letter Holland & Co. sent Alfred Holland to Brantford with instructions to do the best he could in the interest of the firm. Fogg agreed to make an assignment, but afterwards declined doing so; and Alfred Holland then went to a Mr. Fry, a brother-in-law of the defendant Phillips, and asked him if he thought Phillips would buy Fogg's stock. Fry telegraphed Phillips, who came to Brantford; and the whole stock was sold as it stood on the shelves, without any stock taking on an estimate as to its probable value given by Fogg, Alfred Holland agreeing, on behalf of Holland & Co., that if the stock did not turn out as expected the firm of Holland & Co. would protect him.

The stock was estimated at $3,500, and was purchased by Phillips for $2,700, at six months' credit, for which he gave his note, Phillips also undertaking to pay the landlord's rent, $300. The $2,700 Phillips considered the outside value of the stock. In addition to the stock Fogg had furniture of the value, it is said, of $500 or $600, and some accounts due, which I gather would not be of much value.

Fogg's liabilities, as far as known, are as follows:

Holland & Co.'s claim	$4792 00
Landlord, for rent	300 00
Claims of plaintiffs in this action	658 00
	$5750 00

From the evidence it is apparent that Alfred Holland was dealing with Fogg's stock as if he had a right to dispose of it as he thought proper for Holland & Co.'s benefit.

He found the purchaser; he negotiated the sale; and he it was who gave the undertaking to Phillips, that if there was a deficiency in the stock, as estimated, Holland & Co. would protect him. The stock was afterwards taken and found to come to about $3,300, including the fixtures, and a reduction of $300 was made to Phillips.

The precaution was also taken by him to procure legal advice as to the position Holland & Co. occupied as to other cred itors of Fogg. And he was advised that if 30 days elapsed after the sale had taken place without a creditor of Fogg taking proceedings the transaction could not be invalidated.

The whole facts shew a design on the part of Fogg to give, and an intention on the part of Holland & Co. to obtain, a preference. But, according to *Rae* v. *McDonald*, 13 O. R. 352, and *Warnock* v. *Klæpfer*, 14 O. R. 288, if the act done has the effect of defeating, delaying, or prejudicing the creditors, or gives any one or more of the creditors a preference over the others, it comes within the mischief intended to be provided against by the statute; and is, therefore, utterly void.

The point most pressed upon us during the argument by counsel for Holland & Co. was that, even if the transaction between Fogg and Holland & Co. was held to be void under the 2nd section of the Act, 48 Vic. ch. 26, (O.) that Holland & Co. having, as the evidence shews, parted with the note received from the insolvent debtor, these plaintiffs cannot follow the proceeds in the hands of Holland & Co.

Should this contention hold good, then the plaintiffs are placed in this anomalous position: They have a judgment against the defendants Holland & Co., holding that the note for $2,400 obtained by them was a fraudulent preference as against the plaintiffs and the other creditors of Fogg, and that they are entitled to a pro rata share in the proceeds of the note when paid by the maker, and yet there is no legal machinery by which the plaintiffs can compel the defendants Holland & Co. to account.

Under sec. 8 of the Act, where the person to whom any ment, gift, conveyance, assignment, transfer, delivery or payment under sec. 2, shall have sold or disposed of the property, then the proceeds realized therefrom may be seized or recovered in any action under sec. 7.

Sec. 7, sub-sec. 1, provides as follows: "Save as provided in the next sub-section the assignee shall have an exclusive right of suing for the rescission of agreements, deeds and instruments or other transactions made or entered into in fraud of creditors, or made or entered into in violation of this Act." And sub-sec. 2 of sec. 7 provides that where the assignee refuses to take proceedings for the benefit of the estate, the creditor, desiring such proceedings to be taken, may, after such refusal, obtain an order from the Judge authorizing the proceedings to be taken in the name of the trustee, but for the exclusive benefit of the creditor instituting the suit.

There was no assignment made by Fogg, and consequently there is no assignee; and without an assignee there is no one who can recover from the defendants Holland & Co. the moneys realized from the sale or other transfer of this note to the Ontario Bank. Under sec. 8 the recovery of the moneys realized is by an action under sec. 7; and by that section (sub-sec. 1), "the assignee shall have an exclusive right of suing."

Sec. 8 of R. S. O. (1887), ch. 124, was passed after the judgment of Boyd, C., in *Stuart* v. *Tremain*, 3 O. R. 190, and was probably enacted for the purpose of meeting the difficulty pointed out in the judgment in that case of making a person to whom an insolvent has given a preference account for the proceeds after having *bonâ fide* sold or transferred the goods or property by which such preference was created.

But secs. 7 and 8 of the Act, R. S. O. ch. 124, do not assist the plaintiffs, as there is no assignee of Fogg's estate who can follow the moneys realized by Holland & Co. from the Phillips note. In fact, the legislature in the enactment referred to have not made provision for such a case as this,

and the plaintiffs are in no better position than the plaintiffs were in *Davis* v. *Wickson*, 1 O. R. 369, and *Stuart* v. *Tremain*, 3 O. R. 190.

This point was not argued at length by counsel, and was not considered by the learned Chief Justice at the trial.

This case affords another of the many illustrations lately furnished of the necessity for a Bankrupt Act, so that when insolvency takes place the estate of the debtor may be, if necessary, placed in compulsory liquidation, and the assets distributed *pari passu* amongst all the creditors.

The defendant Phillips knew of the intention to prefer Holland & Co., and he was a party to and assenting to the scheme by which that preference was procured. It may be a question, therefore, whether he is protected by the latter part of sec. 3 of the Act.

The verdict and judgment in his favor have not been been moved against, so that that question is not before us for discussion.

We think the plaintiffs should pay to the defendants Holland & Co., and Phillips one set of costs.

ROSE, J.—As the case comes before us on such of the findings of the learned Chief Justice as have not been moved against, the admissions in the pleadings and the evidence, the facts may be stated very briefly.

Fogg, the debtor, made a *bonâ fide* sale of his business to Phillips, taking in payment his note for $2,700, and Fogg transferred such note to Holland & Co. in payment, on account of past indebtedness. Fogg was at the time in insolvent circumstances, unable to pay his debts in full, and this was known to Holland & Co. The intention and effect of transferring the note was to give Holland & Co. a preference over the other creditors of Fogg.

If these were all the facts there would be no room for argument, for, as admitted by Mr. Maclaren, the transfer would under 48 Vic. ch. 26, sec. 2 (O.), have been utterly void.

But prior to the institution of these proceedings—for so

it was assumed in argument, although I have not noted that it is anywhere expressly stated what the exact date was—Holland & Co. discounted the note, transferring it to the Ontario Bank, in Montreal, where Holland & Co. reside and carry on business, and the said bank became, and at the date of the trial was, a *bona fide* holder for value.

The plaintiffs ask for a declaration that the transfer of such note to Holland & Co. was void; and for an order directing them to account for the proceeds realized from the discount of the note; and for an order for the rateable distribution of the proceeds among the creditors of Fogg, including Holland & Co.; and for an order for payment of costs by Holland & Co.

It is answered:

1. That the note having passed out of the hands of Holland & Co. prior to the institution of these proceedings, the action does not lie, and no relief can be had.

2. That Holland & Co., residing and carrying on business in Montreal, out of this Province, and the note having been discounted in Montreal with the Ontario Bank, the Act does not apply.

Davis v. *Wickson*, 1 O. R. 369, and *Stuart* v. *Tremain*, 3 O. R. 190, are authorities for the defendants; and, unless we are prepared to dissent from and not to follow these decisions, the defendants Holland & Co. are entitled to judgment.

It is clear that neither at common law nor under the statute of Elizabeth was it wrong to give a preference; and as the wrong complained of is one created by statute the Courts can do no more than administer the statute according to its provisions.

The statute declares certain transfers, &c., void, *i.e.*, voidable at the instance of anyone having the right to attack them. When proceedings are instituted in Court to determine whether or not such facts exist as bring any particular case within the statute, the Court will enquire and determine, and, if so found, then decree in the words

and according to the provisions of the statute. But beyond this apparently no power is given to the Courts. No general scheme of administration is provided save under an assignment. When an assignment is made, certain provisions are found in the statute in aid of an equal distribution of the estate.

Whether it would be good policy for the Act to provide that persons offending against its provisions should be subject to certain provisions in favor of the body injured by such offences, is not for us to say. In the present case, if the Legislature had said that, even without any assignment, a creditor might recover for the general body of creditors the proceeds realized from the transfer of the note in question, then the Court might have had such proceeds divided among creditors in the Master's office. Thus the Master would have for such purpose taken the place of the assignee spoken of in the Act.

But, so far as I can see, without an assignment, all that is provided for by the Act is that certain transactions are declared void, so that they shall not impede creditors in pursuing their ordinary remedies. In other words, so far as possible, the statute places creditors in the same position as if the void transactions had not taken place. As put in argument, the remedy is rather *in rem* than *in personam*.

In *Macdonald* v. *McCall*, 12 A. R. 593, may be found a discussion as to the power of the Court to provide a remedy where fraudulent transactions are impeached; and *Macdonald* v. *Crombie*, 2 O. R. 243; 10 A. R. 92, and 11 S. C. R. 107, affords an illustration of the care of the Courts not to legislate to prevent preferences.

It may be said that the object of the Act is to prevent preferences and to provide for ratable distribution of estates.

So saying does not add any new clauses to the statute, or confer upon the Courts the power of legislating.

It was urged that to allow this transaction to stand was to allow a fraud upon the statute. But this takes us no

farther. We cannot assume that the Legislature intended to prohibit a creditor doing what has here been done unless it has provided means for preventing the act or recovering the proceeds.

It has made special provision to enable an assignee to sue and recover proceeds realized from sales of property fraudulently transferred; and may in its wisdom see fit to provide, with proper safe-guards, means for creditors without an assignment having like remedies.

It is not without significance that the Act, 48 Vic. ch. 26, (O.) is entitled "An Act respecting Assignments for the Benefit of Creditors."

We were referred to *Labatt* v. *Bixel*, 28 Gr. 593, as a case not referred to in *Davis* v. *Wickson*, 1 O. R. 369, or *Stuart* v. *Tremain*, 3 O. R. 190, and as in the plaintiffs' favor. There the learned Chancellor Spragge did direct that the defendant should account for moneys realized from the collection of book debts. The facts are not precisely the same as in the cases referred to of *Davis* v. *Wickson* or *Stuart* v. *Tremain*, and yet I confess I am unable to distinguish them on any clear principle. No authority is cited in *Labatt* v. *Bixel*, and no case has been cited to us as following it on that point.

Stuart v. *Tremain* has been followed by Ferguson, J., in *Harvey* v. *McNaughton*, affirmed in appeal, 10 A. R. 616, without any doubt being thrown upon the correctness of the decision.

This was the question the parties came down to try. It was raised upon the record, and in argument, so far as was convenient, the learned Chief Justice having a decided opinion against the validity of the transaction. The plaintiffs have failed, and, as in *Stuart* v. *Tremain*, their action must, as against Holland & Co., be dismissed, with costs. It is too late to attack such a transfer after the property has passed into the hands of a *bonâ fide* holder for value.

The judgment in favor of Phillips not having been moved against he has moved for costs; and the plaintiffs

have moved to vary the order, allowing him costs out of the estate.

As in my view there will be no estate to be administered, the order may be varied by striking out that provision; and, as both he and Holland & Co. defend by the same solicitors, justice will probably be done by allowing to the defendants one set of costs, as if Holland & Co. had been the only defendants.

[COMMON PLEAS DIVISION.]

THE TEMPERANCE COLONIZATION COMPANY v. FAIRFIELD.

Contract—Misrepresentation—Rescision and recovery back of money paid—Statute of Frauds.

The plaintiffs, a company formed for the purpose of colonizing lands in the North West Territories, represented to defendant, by means of an advertisement issued in a daily paper, that the Dominion Government had agreed to the selection by the company of a "compact choice tract of land" in the said territories, "comprising 2,000,000 acres, for the purpose of settlement, free from the use of intoxicating liquors." The defendant, on the faith of these representations, desiring to send his son to a place where he would be precluded from the use of intoxicating liquors, entered into two agreements with the company, agreeing in each "to purchase and pay for 320 acres of land, in the order of choice from the odd numbered sections of our lands as procured or to be procured from the Dominion," and paid certain instalments thereon. It was proved that the company never had, and could not obtain, the choice compact tract stated, nor any special privileges as to the exclusion of liquors.

Held, that these were material misrepresentations; and defendant, having been induced to enter into the agreements thereby, was therefore entitled to have them rescinded and to recover back the money paid by him.

Per GALT, C. J., also, the agreements were void under the Statute of Frauds, as when they were made the plaintiffs had no lands, and there was nothing in the agreements to shew what lands the defendant was entitled to, or the plaintiffs were bound to convey.

THIS was an action tried before Galt, C. J., without a jury, at Toronto.

The statement of claim alleged that by two agreements, dated 29th March, 1882, the defendant agreed and covenanted with the plaintiffs to purchase from them two half

sections of land from lands of the plaintiffs, procured or to be procured from the Dominion Government, and to pay to the plaintiffs two sums of $640 each, &c.; and on the said date the defendant paid on each of the said scrip certificates the sum of $64; and on or about the 29th March, 1883, the defendant paid a further instalment on each scrip, and has not paid any other sum on account of either of the said contracts. The statement of claim then set out at considerable length other obligations which they alleged the defendant was bound to fulfil; and claimed that the defendant be ordered to perform certain settlement duties, and to pay the sum of $256, and interest.

The statement of defence was very voluminous, but may be summarized as follows: It alleged false representations made by promoters and officers of the company to induce him to subscribe for the scrip. It then alleged that under the terms of the agreement with the Government they had no power to enter into these scrip contracts. It then referred to a release of certain subscribers, not now material. It then pleaded the Statute of Frauds. It then alleged that the defendant was not aware of the falsity of the representations made to him until after he had made the payments referred to in the statement of claim. The defendant then prayed to be relieved from his contracts, and counter-claimed for the money paid by him.

The plaintiffs replied that the defendant was now precluded from setting up the defence that the representations made to him were false, because after "the representations were made and after the defendant had full knowledge of the falsity and deceit (if any) thereof, the defendant acquiesced in the position of the plaintiffs' society, and ratified his contract and waived his alleged rights, if any. It then reasserted the obligation of the defendant to perform settlement duties; and contained several other answers which are referred to in the judgment.

The learned Chief Justice reserved his decision, and afterwards delivered the following judgment:

GALT, C. J.—The case was tried before me at Toronto, and numerous defences were urged; but as my judgment is based on the objection that the case is concluded by the Statute of Frauds, it is unnecessary to consider them.

The action is based on two agreements dated the 29th March, 1882, whereby "the defendant promised and agreed to and with the plaintiffs, to purchase and pay for 320 acres of land in the order of choice from the odd numbered sections of our lands as procured, or to be procured, from the Dominion Government." At the time when these agreements were made the plaintiffs had no lands. They subsequently made an arrangement with the Dominion Government, by which twenty-one townships were allotted to them. There is nothing in the agreement to shew what lands the defendant was to receive, or which the plaintiffs were bound to convey. In my opinion, therefore, the agreement is void.

I therefore dismiss the action, with costs; and give judgment in favour of the defendant on his counterclaim for the sum paid by him to the plaintiffs.

If the parties cannot agree on the amount, there must be a reference to Mr. Winchester.

In Easter Sittings, 1888, *A. H. Marsh* moved on notice to set aside the judgment entered for the defendant, and to enter judgment for the plaintiffs.

In the same Sittings, *McCarthy, Q. C.*, and *Marsh*, supported the motion, and referred to *McKenzie* v. *Dwight* 2 O. R. 366, 11 A. R. 381; Fry on Specific Performance, 6th ed., sec. 329, p. 147; *Rumble Heygate*, 18 W. R. 749; *Toppin* v. *Lomas*, 16 C. B. 145; *Jenkins* v. *Green*, 27 Beav. 437; *Laird* v. *Berkenhead R. W. Co.*, 1 Johns. Ch. R. 500; *Shardlow* v. *Cotterell*, 20 Ch. D. 90; *McDonald* v. *Murray*, 11. A. R. 101.

Maclaren and *McClive*, contra, referred to *Agnew* on Statute of Frauds, p. 138; *Fry* on Specific Performance, 6th ed., sec. 325; *Sugden* on Vendors, 13th ed., 135; *Dart* on V. & P., 6th ed., 219; *Munro* v. *Taylor*, 8 Ha. 51, 56; *Ogilvie* v. *Foljambe*, 3 Mer. 53, 61; *Stuart* v. *London and North Western R. W. Co.*, 1 DeG. McN. & G. 721; *Bland* v. *Eaton*, 6 A. R. 73; *Cameron* v. *Carter*, 9 O. R. 426.

September 15, 1888. GALT, C. J.—When the case was tried before me, I dismissed the action with costs, and gave judgment in favour of the defendant on his counter-claim.

The ground on which I dismissed the action was, that, in my opinion, the contract was null and void under the Statute of Frauds, as at the time when it was made the plaintiffs had no land, and there was nothing in the agreement to show what lands the defendant was entitled to receive, or what lands the plaintiffs were bound to convey.

I expressed no opinion on any other point; but when the case was argued before the Divisional Court on the motion of the plaintiffs to set aside the judgment entered at the trial, and to enter judgment for the plaintiffs, the whole case was fully argued.

As the case is of great importance to the plaintiffs, although the amount at present involved is small, it is necessary to review the evidence at considerable length. I may say there was only one witness, for the other, Mr. Powell, had nothing to do with the company until long after these scrip certificates were given. But there was a good deal of documentary evidence.

The original organization out of which the company was formed, dates from the fall of 1881.

On 12th October, 1881, a prospectus was issued which states the objects of the Society. I do not refer to it at length because the evidence of the defendant does not satisfy me that he was induced to enter into these contracts by the representations therein made.

The company became incorporated on 14th March, 1882.

On 25th March, 1882, the company published the following advertisement in the *Mail*. I set it out because the defendant stated positively that it was in consequence of the statements contained in it he was induced to enter into these scrip contracts:

"*Saturday, March 25th*, 1882.

"Temperance Colonization Society, chartered March, 1882. Capital $2,000,000.

On 14th September, 1881, we issued our prospectus, commencing as follows: 'The object of this Society is to colonize a tract of land in the North-West Territory, furnishing lands to actual settlers at cheap rates, with the provision that such settlement be kept free from all intoxicating liquors. An application has been made to the Dominion Government for a compact choice tract of land comprising about 2,000,000 acres for this purpose, and the Government has replied favourably to the terms offered, which is to allot lands to subscribers under especially favourable conditions.'"

This prospectus concluded with the following paragraph:

"The management for the present will make subscriptions for lands in this tract at $2 per acre, and on easy terms of payment, ten per cent in cash, and ten per cent annually thereafter until paid, with interest on unpaid balances at the low rate of six and a half per cent, with the privilege of paying sooner if desired. They hope to be prepared to give titles inside of a few months, or soon as the lands are subscribed for, when the first payment of ten per cent will be required.

No departure has been made by us from the first. We then sent out 35,000 copies of the above circular form, and inserted the same as an advertisement in the *Globe*, and *Mail*, and other prominent newspapers, that the people might understand exactly and thoroughly our intentions, and what would be required of them if they wished to participate in the undertaking. In the latter part of November we found the lands were all subscribed for, and we were entitled to call for the ten per cent as above. This was much sooner than we expected, owing to the extraordinary popularity of the announcement. We accordingly deferred, as long as prudent and safe, making our selection and calling up the ten per cent, but we have now selected our tract of land being first choice over all others competing since, comprising two millions of acres of choice lands; and the Government have duly approved the same, and signified their readiness to execute the further papers on receipt of the first instalment. Therefore we now make the first call of ten per cent from the subscribers of September, October, and November. Fuller particulars will be given in a circular to be sent at once to all subscribers.

By order. ALPH LIVINGSTON, Secy-Treas."

There was a memorandum added, but it does not affect the case.

The defendant in his evidence stated that after previous consultation with his wife he had made up his mind to take up some land in the North-West, and that on visiting Toronto on 25th March, he saw the above advertisement, and being acquainted with Mr. Lake, who was one of the directors of the company, he called on him, and they went together to the office of the plaintiffs, and he then took

the scrip. He states that his object in taking up this land was to send his son there as a place where he would be precluded from the use of intoxicating liquors, the lad being at that time in the Reformatory.

The law bearing on this branch of the case, viz., the defence raised by defendant on the ground of false and fraudulent representation has been very fully discussed lately in the case of *Peek* v. *Derry*, 37 Ch. D. 541.

Cotton, L.J., in his judgment, states, at p. 566: "Now, before I go into the facts of the case, I think it the best course to state what, in my opinion, is the law with reference to such actions" (viz., an action brought upon false representations in a prospectus), "and what the circumstances are in which a defendant in such an action will be made liable. What, in my opinion, is a correct statement of the law, is this—that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false—that is, without any reasonable ground for believing it to be true—he is liable in an action of deceit at the suit of any one to whom it was addressed and who was materially induced by the misstatement to do an act to his prejudice."

Sir J. Hannen says, at p. 578: "I entirely agree in the judgment which has just been delivered by Lord Justice Cotton, and particularly with his statement of the law with which he commenced that judgment. But I will add my own statement of the principle, which I believe does not materially differ from his. I take the law to be that if a man takes upon himself to assert a thing to be true which he does not know to be true, and has no reasonable ground to believe to be true in order to induce another to act upon the assertion, who does so act, and is thereof damnified, the person so damnified is entitled to maintain an action for deceit."

Lopes, L.J., also states, at p. 585: "The law, I venture to say, is well settled, and well understood. I think the result of the cases amounts to this. If a person makes to another a

material and definite statement of a fact which is false, intending that person to rely upon it, and he does rely upon it and is thereby damaged, then the person making the statement is liable to make compensation to the person to whom it is made—first, if it is false to the knowledge of the person making it; secondly, if it is untrue in fact and not believed to be true by the person making it; thirdly, if it is untrue in fact and is made recklessly, for instance, without any knowledge on the subject, and without taking the trouble to ascertain if it is true or false; fourthly, if it it is untrue in fact, but believed to be true, but without any reasonable grounds for such belief."

Such being the law let us apply it to the present case.

In the advertisement by which the defendant was induced to enter into the contract it is stated "an application has been made to the Dominion Government of Canada for a compact choice tract of land, comprising about 2,000,000 acres for this purpose" (that is to say, such settlement to be kept free from all intoxicating liquors), "and the Government has replied favourably to the terms offered."

This was a positive misstatement. The promoters of the company had applied on 29th August, 1881, for an allotment "of about an area of a degree each way." To this application the acting Minister of the Interior replied on 1st September, 1881: "I beg that you will assure the applicants that every reasonable effort will be made to facilitate the object." He then enclosed copies of the land regulations. What these were I do not know; but before this advertisement was issued, viz., 6th March, 1882, which was prior to the incorporation of the company, Sir D. L. Macpherson, in writing to one of the most prominent members of the association, calls his attention to the then existing land regulations which came into force on 1st January, 1882, whereof it is expressly stated: "The even numbered sections in all the foregoing clauses are to be held exclusively for homesteads and pre-emption;" so that when the plaintiff stated that their application was for a compact choice tract of land, and that the Government had replied favourably thereto, they stated what is untrue.

This may not seem to be of much consequence; but when we remember the object the defendant had in purchasing the scrip, it is manifest that the company were not and could not be in a position to exclude intoxicating liquors from the area of land which they professed to have obtained.

The advertisement also states:

"But we have now selected our tract of land, being first choice over all others competing since, comprising two millions of acres of choice lands, and the Government have duly approved the same, and signified their readiness to execute the further papers on receipt of the first instalment."

This is without any foundation; and the latter allegation is positively false. The promoters of the company, not the company themselves, for they were not then incorporated, through the gentleman to whom I have already referred had been in communication with Sir D. L. Macpherson; and on the 6th March, 1882, Sir David wrote to this gentleman as follows:

"As some little time must elapse before the colonization agreement can be got ready for execution, I write to tell you that Sir John Macdonald will report to Council in favor of granting to the Temperance Company for colonization and settlement under plan No. 1 of the Dominion lands Regulations," (these are the regulations to which I have referred as expressly excluding the even numbered sections) "the one hundred townships I pointed out to you on the map. The land will be transferred to the company in parcels of twenty townships at a time; as fast as you settle one you will get another."

By the Dominion Lands Act, 1879, the size of a township is 36 square miles, equal to 23,040 acres. Deduct half or 11,500, and the Hudson Bay and school lands, and there remains about 10,100 acres in each township; and the letter would in no way justify the plaintiffs in stating that the Government had agreed to grant them 2,000,000; the outside limit would be 1,000,000; but in fact there was at that time no agreement with the plaintiffs; they were not then in existence, and subsequently, after they were incorporated, there was no agreement between them and the Government until 6th June, 1882, and then only for twenty-four townships, containing only 213,760 acres.

It thus appears that on the 25th March, 1882, the plaintiffs represented they had 2,000,000 acres, from which the defendant, by purchasing scrip, might obtain his choice whereas in truth they had none; and when on the 6th, March they had been informed that what would be recommended to council by the Minister of the Interior, would be a concession of 1,000,000, not of 2,000,000, it was, in my opinion, a positive fraud to induce the defendant to subscribe for a choice of Nos. 529 and 530 in the second division of 320 acres, each, under the representation that the choice extended over 2,000,000 acres.

It was under these circumstances the defendant executed the two scrip contracts now in question.

Before considering the form of these contracts, it must be borne in mind that the principal inducement held out by the company was that "the choice compact block of land of 2,000,000 was to be kept free from all intoxicating liquors," and that according to the evidence of the defendant this was his especial object in purchasing land in that locality.

It is unnecessary to set out the document at length, the expression to which I call attention is, that the defendant has agreed "to purchase and pay for 320 acres of land No. 2,529 in the order of choice from the odd numbered sections of *our* lands as procured, or to be procured from the Dominion." This appears to me to be a positive representation that they owned not only the odd numbered section, but the even numbered also, consequently no person becoming a purchaser of such scrip could have any idea that the representation made by the company that they had a compact block of land of 2,000,000 was totally untrue.

In accordance with the principle of law laid down in *Peek* v. *Derry*, 37 Ch. D. 541, as respects false representations, I consider that, as at the time when these contracts were entered into the statements made by the company as to their possession of the land were false, and false to the knowledge of the company, the contracts are void, and the

defendant is entitled to recover back the money paid and interest, unless the plaintiffs are entitled to succeed on the grounds stated in their replication.

These may be briefly stated as follows: 1st. That even if the allegations made by the defendant (that is, as to the fraudulent representations of plaintiffs) be proved true, the defendant is not entitled to relief, because he subsequently, with full knowledge of their falsity, ratified the contract; 3rd. Laches of defendant; 4th. A claim as to settlement duties to be performed by defendant. The 5th, 6th, 7th, 8th, 9th, 10th, and 11th paragraphs are of so singular a character that I set them out.

Before doing so, I call attention to the 3rd paragraph of statement of claim:

"By two certain agreements, dated the 29th March, 1882, the defendant agreed and covenanted with the plaintiffs to purchase from them two half sections of land from lands of the plaintiffs, procured or to be procured from the Dominion Government," &c.

As respects the second paragraph, containing an allegation of subsequent ratification by defendant with full knowledge of the falsity of the statements made by plaintiffs, there is no evidence. It is true he paid the second instalment, but according to his evidence he had had some correspondence with two persons, but none with the company, nor is there anything whatever to shew that he was aware that the representations made by them were untrue.

The third paragraph is as to the laches of defendant. I do not see in what these consist. The defendant in his cross-examination stated his readiness to lose what he had paid, and it is manifest his action now is caused by the proceedings taken against him by the plaintiffs.

The fourth paragraph is no replication. It is simply a repetition of the claim for settlement duties in the statement of claim.

As to the fifth paragraph. At the time when these scrip contracts were entered into, the plaintiffs had no lands, but it appears from the letter of 6th March, from Sir D. L.

Macpherson, that Sir John Macdonald was prepared to advise the Government to enter into an agreement as therein mentioned. Accordingly, on the 6th June, 1882, an agreement was entered into for the sale of certain lands therein mentioned.

This is the agreement referred to in the statement of defence to which the 5th, 6th, 7th, 8th, 9th, and 10th paragraphs reply. In the agreement it is expressly stated (sec. 26), that "the company shall not, without the consent in writing of the Governor-in-Council, make any transfer or assignment, whether by way of mortgage or otherwise, of this agreement, or their rights or interest, or any part of their rights or interest hereunder, or any sale, agreement for sale, assignment, transfer, mortgage, lien, or other disposition of any of the land forming the subject of the sale and purchase hereby contracted for."

The answer to this plea is paragraph 6: "That the said scrips are not sales, agreements for sale, assignments, transfers, or other dispositions of any of the said lands within the meaning of the said agreement. 7: That if the said scrip be held to be within the meaning of the said clause of said agreement, the plaintiffs say the said scrips are agreements, as far as any rights affecting the said lands are concerned, made with *bonâ fide* settlers claiming a right thereunder to exercise a certain choice, and by the said agreement with Her Majesty, it was provided that any agreement with reference to any of the said lands made with *bonâ fide* settlers, should not constitute a breach of said clause. 8. And the plaintiffs say that they had the consent in writing of the Governor-in-Council to make the agreement, if any, with reference to said land contained in said scrip.

I may dispose of these two paragraphs at once. The scrip in this case extends over two half sections of 320 acres each; and by the express terms of the agreement, (sec. 29), the proviso relied on in the 7th paragraph, shall not extend to a greater extent than 320 acres, which a *bonâ fide* settler shall have resided upon and cultivated for three years. The 7th paragraph is, therefore, no answer.

And as to the 8th paragraph, there is no evidence whatever; but on the contrary, there is an express intimation in a letter from the acting Secretary of the Interior to Mr. Page, the chairman of the company, dated 30th October, 1883, that such transactions would not be permitted. He states: "It is the fixed policy of the Government to prevent the locking up of land in the hands of companies or individuals." In my opinion, under the terms of this agreement, these scrip certificates are of no value unless and until the land has been located, and such location approved of by the government.

It really appears to me that when the company entered into this agreement with the Government, they were entirely reckless as to the effect it might have on those numerous persons who had been induced to become subscribers for scrip entitling them to make selections from lands to be thereafter acquired by the company.

In my judgment the plaintiffs have no cause of action against the defendant, as there is a total failure of consideration and actual fraud in the inception of the contract.

I have been considering the case upon what may be called the merits, in consequence of the argument of Mr. McCarthy, that the Statute of Frauds has no relation to such a contract. At the trial, I gave judgment against the plaintiffs on that ground. I am still of the same opinion.

To constitute an agreement, there must be two parties, and the subject matter of the agreement must be stated. In the present case there was no agreement as to the specific land to be chosen by the defendant and conveyed by the plaintiff, but it was to be of 320 acres in the order of choice in sections 2,529 and 2,530, so that it was absolutely necessary before such an agreement could be enforced to show what lands the plaintiffs' possessed, and from which the defendant was to make his selection, consequently parol testimony was absolutely necessary to give effect to such an agreement; and when that evidence was given, it was proved the plaintiffs had no lands whatever

from which the defendant could have made a selection either at the time of the contract or at any subsequent period, without the consent of the government, which was no part of his bargain; and consequently the agreement was void as the plaintiffs were not in a position to fulfil it. This motion must be discharged with costs.

After I had prepared my judgment, my attention was called to a report in the Times Law Reports, No. 30, vol. 4, for the week ending 27th January, last, which appears to me exactly in point. The case is *In re The British Burmah Co.* It was an application by a solicitor to be relieved from his subscription for shares on the ground that he had been induced to subscribe by reason of representations made in the prospectus. It was shewn that the representations were false, and he was relieved. In the present case the representations in the advertisement which induced the defendant to enter into these scrip contracts were equally false; and the defendant should be relieved and his money repaid.

ROSE, J.—I desire to rest my concurrence in the result arrived at by the learned Chief Justice, on the ground that the defendant was induced to enter into the contract by misrepresentation.

It is manifest from the advertisement referred to that the representation was made that the object of the society was to colonize a tract of land with the provision that its settlement should be kept free from all intoxicating liquors, and that the Government had replied favourably to an application for a compact district of land comprising about 2,000,000 acres of land for such purpose.

This was stated in the prospectus of date the 14th of September, 1881, and on the 25th of March, 1882, in the advertisement which appeared setting out the prospectus, from which I extract as follows: "No departure has been made by us from the first * * We have now selected our tract of land, being first choice over all others compet-

ing since comprising 2,000,000 of acres of choice lands, and the Government have duly approved the same and signified their readiness to execute the further papers on receipt of first instalment. Therefore, we now make the first call of ten per cent. * *"

I have no doubt it was this advertisement the defendant saw, and upon which he acted on the 29th of March.

Can it be reasonably contested that this was a representation that the Government had agreed to the selection made by the society of a "compact choice tract of land comprising 2,000,000 acres," for the purpose of settlement with such provisions as would keep the "settlement" free from all intoxicating liquors. I believe, and would find as a fact on the evidence, that this was a material fact inducing the defendant to enter into the contract.

As has been pointed out, the society never had any contract or agreement with the Government for 2,000,000 acres of land in a compact tract; nor was there any agreement with the Government which would keep the settlement free from all intoxicating liquors.

On the 24th of October, 1883, Mr. Page, first vice-president of the society, wrote to Sir David Macpherson, complaining that the reservation of the even numbered sections to homesteads and preemptions, with no control other than the placing of settlers on the land when applied for, "would be to destroy utterly our plan of a Temperance Colony, and violate our charter," and added: "We therefore ask your consideration of some plan whereby the authority granted us in our charter may be respected, and we can still carry out our original intentions, the establishing and maintaining of a colony which *shall forever be kept free* from the curse of intoxicating liquors, by requiring those registering for homesteads and preemptions, as well as purchasers of odd numbered sections, to subscribe to an agreement binding them, and their successors, to respect the temperance feature of our colony under penalty."

The answer to this letter was dated October 30th, 1883, and contained, amongst other clauses, the following: "In

all the communications which took place between the representatives of the company and the Minister or acting Minister of the Interior, it was stated in unqualified terms by the minister, that the transactions of the company with the governmeni and the settlers, must be carried on under the land regulations, and *that no special power could be conferred upon the company to exclude intoxicating drink from the townships allotted to them for settlement*: that settlers thereon would be subject to the same laws as the rest of the population of the North-West Territories. And it was known to the company that by one of these laws the traffic in intoxicating drinks is strictly prohibited."

It also appears from other correspondence that under a license from the Lieutenant-Governor, the sale of liquor in such territories was allowed.

The letter continued: "The promoters and managers of the company *were also informed* that public policy as embodied in the Dominion Lands Act, *prevented the granting or selling of a large tract of land in a "compact block."*

It is manifest, therefore, that not only was the society unable to carry out the promises made in its prospectus, but that the advertisement of the 25th of March, 1882, was unfounded in fact, as was known to some one or more persons who had been in communication with the Minister of the Interior. The society had no special privileges with respect to planting a Temperance Colony, and could not obtain, and never had been promised a compact block of land. Is it fair that this defendant should be compelled to specifically perform a contract which was induced by such misrepresentations?

My learned brother MacMahon calls my attention to the case of *Adam* v. *Newbigging*, in the House of Lords, 13 App. Cas. 308, where it was held that the respondent was entitled to rescission of a partnership agreement induced by misrepresentations made without fraud, and to repayment of his capital, though the business which he restored

to the appellants was worse than worthless; and that the contract being rescinded the appellant could not recover against him for money lent and goods sold by them to the partnership.

Lord Halsbury, L. C., at p. 313, *et seq.*, said: "My Lords, it is not necessary in this case to impute fraud to the appellants; the relief sought was not based upon the ground of fraud. * * The respondent is content to shew what the facts were, and that relying upon the representations made to him, he entered into a contract from which he seeks to be relieved."

In the Court of Appeal, 34 Ch. D. 582, Cotton, L. J., said, at p. 589: "The plaintiff here does not recover damages as in an action of deceit, but gets what is the proper consequence, in equity, of setting aside the contract into which he has been induced to enter."

It is clear that the misstatement need not have been the only inducement to act, if it materially tended to induce the party to enter into the contract.

I find no evidence of ratification as contended for by the plaintiff.

I, for these reasons, agree that we should not decree specific performance; but that the contract should be set aside; and I also agree that, as in *Adam* v. *Newbigging*, the defendant should get back the money he has paid as the proper consequence of setting aside the contract.

The defendant must have his costs.

MACMAHON, J., concurred.

Motion dismissed with costs.

[COMMON PLEAS DIVISION.]

REGINA v. REMON.

Justice of the peace—Conviction—House of ill-fame—Inmate—Satisfactory account of herself—R. S. C. ch. 157, sec. 8, sub-sec. (j).

Upon a charge against an inmate of a house of ill-fame under sub-sec. (j.) of sec. 8, of R. S. C. ch. 157, it is not necessary to shew that the accused was called upon to account for her presence in the house before arrest; the concluding words of the sub-section, "not giving a satisfactory account of themselves," are to be read as applying only to frequenters, and not to keepers or inmates.

Regina v. *Levecque*, 30 U. C. R. 509, distinguished.

THE defendant was convicted by the Police Magistrate of the city of Ottawa of being on the 15th of September, 1888, an inmate of a house of ill-fame kept by one Eva Rouleau, in Clarence street, in the said city of Ottawa.

A writ of *habeas corpus* issued on the 13th of October and a writ of *certiorari* in aid thereof issued on the same day, directed to the Police Magistrate of Ottawa and to the Clerk of the Peace for the county of Carleton, who returned the information, depositions, conviction, and other proceedings.

On the 28th November, 1888, *Aylesworth*, upon filing the return, moved in Chambers for an order to discharge the defendant from custody under a warrant of commitment pursuant to the conviction, on the ground, among others: (2) That the conviction did not shew that the defendant was asked at the time or before she was arrested to give an account of herself, and did not do so satisfactorily.

J. R. Cartwright shewed cause.

Judgment was delivered on the 11th December, 1888.

December 11, 1888. MACMAHON, J.—As to the second ground. The defendant was charged under R. S. C. ch. 157, sec. 8, sub-sec. (j.) which declares that all persons who "are keepers or inmates of disorderly houses, bawdy-houses, or

houses of ill-fame, or houses for the resort of prostitutes, or persons in the habit of frequenting such houses, not giving a satisfactory account of themselves," are loose, idle, or disorderly persons, or vagrants within the meaning of this section.

It was urged that the defendant came within the latter part of the above sub-section, and she should before or at the time of her arrest have been asked to give an account of herself. *Regina* v. *Levecque*, 30 U. C. R. 509, was relied upon to support this contention.

The information in *Regina* v. *Levecque* charged the defendant with being "a common prostitute wandering in the streets of the said city of Ottawa," the charge being under what now forms sub-sec. (i.) of sec. 8, ch. 157, R. S. C., which rendered it imperative before arresting a person in the public streets as being a common prostitute that she should be asked to give an account of herself—and it was only when such account proved unsatisfactory that the arrest could properly be made.

So, under sub-sec. (j.), before arresting a person on a charge of frequenting houses of ill-fame, it is necessary in order to a valid conviction that he or she should be asked to give an account of himself or herself; for it may be the person charged as being a "frequenter" is there for a lawful purpose, as collecting an account, a bailiff temporarily in possession under a landlord's warrant, &c., who might readily give a satisfactory account of his or her presence in such a house. When a person is charged as a frequenter of a house of ill-fame, the conviction must shew that he is an habitual frequenter, or it will be void: *Regina* v. *Clark*, 2 O. R. 523. But when the charge is against a "keeper" or "inmate" of a house of ill-fame under the first part of the sub-section, they are not called upon to account for their presence in those respective characters prior to arrest.

Motion refused.

[CHANCERY DIVISION.]

KLINCK v. THE ONTARIO INDUSTRIAL LOAN AND INVESTMENT COMPANY (LIMITED) ET AL.

Mortgage—Power to distrain—Interest or rent—Distress after maturity, without fixing new tenancy—Interest as damages—Rent more than six months overdue—8 Anne, ch. 14.

In 1881 plaintiff made a mortgage to the defendants maturing in 1886, in which was contained a proviso under the Short Forms of Mortgages Act, that the mortgagees might distrain for arrears of interest, and a special provision by which plaintiffs leased the lands until the maturity of the mortgage, at a rental of the same amount as the interest. In August, 1888, while plaintiff was in possession, the defendants distrained on his goods for rent or interest due at the maturity of the mortgage in 1886 and also for the amount in 1887 and 1888.

Held, in an action for illegal distress, that no right of distress existed as to the rent due at the maturity of the mortgage, as more than six months had elapsed after the expiry of the tenancy.

Held, also, on the evidence, that there was no definite tenancy after the maturity of the mortgage, and that the interest thereafter being recoverable not by the terms of the contract, but as damages, the rent became uncertain, and therefore there was no right of distress.

THIS was an action brought by James Klinck against the Ontario Industrial Loan and Investment Co., (Limited) and Hiram Rogers.

The statement of claim set out that the plaintiff was a mortgagor to the company and that his mortgage was dated 20th June, 1881, and matured on the 20th June, 1886, and contained a provision by which all interest in arrear became principal bearing interest: that more than six months after the 20th June, 1886, viz., on or before the 8th August, 1888, the company issued a landlord's warrant to the defendant Rogers, to seize and sell the goods and chattels on the premises for $788.63 claimed as rent due from the plaintiff to the company on the 20th June, 1888: that said Rogers seized on said 8th August and sold on 29th August following, and claimed that as all overdue interest became principal it could not thereafter be treated as rent or interest, and even if it could, that the right of seizure expired six months after the 20th June, 1886, when the mortgage matured.

The statement of defence set up that the mortgage was executed in pursuance of the "Act respecting Short Forms of Mortgages" and contained this proviso: "Provided that the mortgagees may distrain for arrears of interest; and the said mortgagees grant to the mortgagor possession and right of possession of the said lands and rent the same to him until the said 20th day of June, A.D. 1886, undisturbed by the said mortgagees or any one claiming through or under them: the said mortgagor, his executors, administrators, or assigns keeping the covenants herein contained by him or them to be kept, and yielding and paying therefor in every year during the said term, on each and every of the same days, as are in the proviso for redemption appointed for payment of interest, such rent or sums as equal in amount the amount of interest payable on such days respectively, according to said proviso, without any deduction": that default having been made a distress warrant was duly issued and a sale regularly had as a distress for rent.

The action* was tried at Barrie, on October 23, 1888, before Boyd, C.

The facts are sufficiently set out in the judgment,

George Moberly for the plaintiff. The defendants had no right to distrain when they did, as more than six months had elapsed after the tenancy ceased on June 20th 1886. 8 Anne ch. 14, lays down the law in that respect. I refer to *La Vassaire* v. *Heron*, 45 U. C. R. 7; *Laing* v. *Ontario Loan and Savings Co.*, 36 U.C.R. 114; *Harron* v. *Yeman*, 3 O. R. 126.

McCarthy, Q.C., for the defendants. The distress was quite proper under the terms of the mortgage as the

* Another action was also brought against the company by Abraham Klinck, to whom James Klinck had, in January, 1887, made a chattel mortgage to secure $650 on the goods seized and sold under the distress warrant; which mortgage was in force at the time of seizure, and that action was tried with the one above reported and is decided in the judgment.—REP.

plaintiff was an over-holding tenant, and the evidence shews he continued in possession and agreed to pay interest by way of rent. Even if that were not so, the distress for the amount due June 20th, 1886, was correct, and the plaintiff's action should be for distraining for too much; but if any rent was due the distress was legal. I refer to *McDonell* v. *The Building and Loan Association*, 10 O. R. at p. 585; *Kearsley* v. *Philips*, 11 Q. B. D. 621: *Trust and Loan Co.* v. *Lawrason* 6 A. R. 286, 10 S. C. R. 679.

November 28, 1888. BOYD, C.—Klinck mortgaged to the company on the 20th June, 1881, for $3,500, which was to be paid on the 20th June, 1886, with interest at 7 per cent. yearly. There was a proviso under the "short form" that the mortgagees might distrain for arrears of interest, and a special provision by which the mortgagees leased the lands to the mortgagor till the 20th June, 1886, the rent being the amount of the interest as stipulated in the proviso for redemption. The distress was on the 8th August, 1888, for rent or interest due on 20th June, 1886, being $245, and for the like sums with interest on capitalized interest due as of the 20th June, 1887, and 20th June, 1888.

The tenant remained in possession after default and down to the seizure. In January, 1887, he made a chattel mortgage on the goods afterwards seized, to his brother, to secure $650 payable in a year; which had been duly renewed and was in force at the time of the distress and sale of the goods thereunder.

Separate actions for illegal distress are brought by the mortgagor of the land and goods, and by the chattel mortgagee, against the company.

Apart from the mortgage, the chief and only defence of the company is that the tenancy was, after the date mentioned in the mortgage, continued with the mortgagor by arrangement.

To establish this some loose evidence was given without objection, though it is not set up as a defence in

the pleadings. But having regard to the correspondence, and the act of the defendants in issuing a writ in January, 1888, and the vague nature of the testimony, I think the proof is wanting as well as the pleading to shew any definite tenancy after 1886 beyond that at sufferance. There was no rent fixed for the period subsequent to the time appointed for payment in the mortgage.

The mortgage is the same as in *Powell* v. *Peck*, 15 A. R. 138, as to the terms in which payment is provided for, and therefore any interest payable after June, 1886, would be recoverable not by the terms of the contract, but as damages. There was an attempt in April and May, 1888, judging by the correspondence, to fix the rent at $200 a year; but this was not brought to a completion, and it is not the rent for which the distress is levied.

As to the mortgagor of the land and goods, the company relied upon the distress clause in the mortgage, which it was said amounted to a license to seize his goods, or his interest in the goods. That can operate, however, only as to the part which was due in June, 1886, and represented the payment to be last made under the mortgage. But it was objected that the Statute of Anne prevents a distress being made if more than six months has elapsed after the expiration of the tenancy, and to this I see no answer, and none was made at the argument.

Clowes v. *Hughes*, L. R. 5 Exch. 160, is in principle applicable here to negative the right to distrain: because the rent becoming uncertain after the expiry of the mortgage term, required a new fixation: *Bickle* v. *Beatty*, 17 U. C. R. 469.

The result is, that both plaintiffs succeed with costs: reference as to damages.

G. A. B.

[CHANCERY DIVISION.]

THE CORPORATION OF THE VILLAGE OF EAST TORONTO ET AL. V. THE CORPORATION OF THE TOWNSHIP OF YORK.

Municipal corporations—Erection of new municipality—R. S. O. 1887, ch. 184, secs. 11, 30—Division of assets—School fund.

On the erection of two village municipalities out of a township.
Held, that the moneys derived from "the Ontario Municipalities Fund," which had some years previously been appropriated by by-law to the school purposes of the township, were assets properly divisible between the township and the new village municipalities.
Re Albermarle, &c., 45 U. C. R. 133, distinguished.

THIS was a special case stated in which the Corporation of the Village of East Toronto, and the Corporation of the Village of West Toronto Junction were plaintiffs, and the Corporation of the Township of York were defendants.

The case set out the incorporation of East Toronto on November 23rd, 1887, and of West Toronto Junction on June 10th, 1887, and that they were portions of the territory of the township of York: that under the provisions of R. S. O. (1887), ch. 30, the municipality of the township of York received from the Government a portion of "The Ontario Municipalities Fund," and kept a separate account of the same, and invested the whole, or a portion thereof, and applied the income thereof to educational purposes: that by R. S. O. (1887), ch. 184, secs. 378, 379, it was provided in what manner any municipal corporation might apply any surplus derived from "The Ontario Municipalities Fund:" that the municipality of the township of York before January 1st, 1876, invested the said fund, and paid the income thereof annually to the several school boards of the township, but no by-law was ever passed until by-law No. 474, which declared that the said fund should after January 1st, 1876, be known and designated as the "school fund": that by secs. 11 and 30 of R. S. O.) 1887), ch. 184, upon the incorporation of the plaintiff municipalities they respectively became entitled to a portion of the assets of the township of York, and the plaintiffs alleged, and the

defendants denied that the said fund was divisible pursuant to the Municipal Act.

The case came on for argument on January 9, 1889 before Boyd, C.

E. D. Armour for the plaintiffs. The plaintiff municipalities were erected out of the territory of the township of York. On the dissolution of the union of two townships the real property situate in the junior township shall become the property of the junior township, R. S. O. (1887) c. 184 sec. 30 ss. 1. The plaintiffs are to be treated the same as a junior township, sec. 11. The application of this fund is confined to educational purposes by sec. 378, and it may be lent to school trustees, sec. 379. A separate account of it has always been kept, and it can be traced. By-law No. 474, when passed in 1876, referred to it as the fund known as "the school fund." It comes within the definition of "assets" in sec 30 ss. 3. The rule is laid down in *Dillon's* Municipal Corporations, 3rd ed. 188 and 189, that a new municipality erected out of another takes nothing but the land within it *unless provided otherwise.* Our Municipal Act, R. S. O. (1887) c. 184, does otherwise provide, sec. 30 ss. 3, 4 and 5. An educational fund is raised by general taxation, and the maintenance of public schools is one of the continuing and general obligations of all municipalities. In *Harrison* v. *Bridgeton*, 16 Mass. 15, the municipality held a fund for a special trust, the payment of a minister, which was held not to be divisible, but that was not an ordinary municipal burden. It was a special trust. In *The Corporation of the Township of Oakland* v. *Proper*, 1 O. R. 330, it was held that the school funds were not general funds of the municipality as against a treasurer's sureties, because they were specifically appropriated and not applicable to general municipal purposes. But the specific appropriation does not take away its character of assets, and there is nothing in the Municipal Act to limit the division to any particular kind of assets.

J. K. Kerr, Q. C., for the defendants. This fund has been appropriated by by-law No. 474, to school purposes, and when it has been appropriated to a specific use it ceases to be an asset of the township. [BOYD, C.—Was this fund appropriated to specific schools?] Yes, to those then existing. [BOYD, C.—But not exhausted on them.] The statute in force at the time of the separation was 46 Vic. (O.) c. 18, s. 11. The provisions in R. S. O. c. 184, sec. 30 will not apply. This fund was set apart, and so became a trust fund dedicated to school purposes. The school sections have an equitable interest in the fund, and the township municipality is only a trustee for the school sections. By-law 474 is sufficient as an appropriation. [BOYD, C.—Even if that were so, would it not be a divisible asset or fund restricted merely as to the purposes for which the junior township should use it. The villages would hold it upon the same trust as the township.] If not appropriated, it might be divided, but appropriated as it has been, it cannot be divided: *Re Albemarle, &c.*, 45 U. C. R. 133. See also *North Yarmouth* v. *Skillings*, 45 Me. 133; *Harrison* v. *Bridgeton*, 16 Mass. 15; *Milwaukee* v. *Milwaukee*, 12 Wis. 102.

Armour, in reply. If the school sections are entitled to an equitable interest in the fund, the plaintiffs' territory must get its share as embracing part of the school sections. The decision in *Re Albemarle, &c.*, is only in point as to moneys which had been expended and converted into other general property of the municipality.

January 9, 1889. BOYD, C.—The decision relied on by the defendants of *Re Albemarle &c.*, 45 U. C. R. 133, does not govern this case. The complaint there was that the arbitrators had dealt with money derived from the Municipal Loan Fund, which had been expended in the townships before their separation (p. 134). The argument was that nothing should be considered but the actual property of the union, and that all past transactions must be looked upon as at an end (p. 135). To this aspect of affairs

the judgment is addressed, the learned Judge saying: "The moneys so appropriated and expended would not now be either an asset or liability of the union" (p. 138.) He says, further, if the money remains in the hands of the treasurer unappropriated then the arbitrators may direct that a portion be transferred. He does not deal with the case of such a fund being appropriated and not expended. That manifestly would depend greatly upon the nature of the appropriation—if the appropriation was of such a character as to benefit equally or according to population the whole union, it is difficult to see why this should not be taken into account.

The separation of a part of the township should not deprive that part of this benefit—be it great or small. In the present case the only appropriation is by the by-law 474, which provides for present and future investments being for the benefit of public schools of the township. That provision extends to the parts of the township now separating, and it would seem to me both unjust and against the plain meaning of the statute, to say that this "school fund" is not an asset of the municipality to be taken into account in the separation of the villages. Remaining in the township of York these villages would get some benefit from this fund for all coming time; separating they should be allowed some equivalent in manner as provided by the statute.

Judgment will be, therefore, in favour of the plaintiffs' contention, with costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

McDIARMID v. HUGHES.

Company—Power to hold lands—Statutes of mortmain—Constitutional law—Powers of Dominion Parliament—Statute of Limitations—Defendant setting up—Estoppel by assenting to conveyance.

A conveyance of lands to a corporation not empowered by statute to hold lands is voidable only and not void under the statutes of mortmain, and the lands can be forfeited by the Crown only.

Where, too, a corporation is empowered by statute to hold lands for a definite period, without any provision as to reverter, and holds beyond the period, only the Crown can take advantage of it, and it is not a defence to an action of ejectment that the lands were acquired by the plaintiff from the corporation after the period fixed by the statute.

Semble, the Dominion Parliament has power to enact that a license from the Crown shall not be necessary to enable corporations to hold lands within the Dominion; and a Dominion Act enabling a Quebec corporation to hold lands in Ontario would operate as a license.

By an arrangment made within ten years before this action of ejectment was begun, the land in question was conveyed by the owners of the legal estate to D., through whom the plaintiff claimed. One of the terms of the conveyance and a part of the consideration was that D. should, and he did thereby, release a debt which he held against the defendant and others. The defendant did not execute the conveyance, but he was an assenting party to the whole transaction, and was aware that the conveyance was being executed, and that D. was releasing his liability.

Held, that he was estopped from setting up a prior adverse possession in himself as effectually as if he had been a conveying party.

Per ARMOUR, C. J.—At all events, upon the evidence, the possession of the defendant at the date of the conveyance, if any, was as tenant at will to the owners of the legal estate; and there was also evidence of an entry by D. sufficient to prevent the setting up by the defendant of any possession prior thereto.

THIS was an action brought to recover possession of part of the west half of lot 21, 2nd concession, Ottawa, front of the township of Nepean, and for mesne profits.

The defendant denied the plaintiff's title, and claimed title by length of possession.

The cause was tried at the 1888 Spring Sittings of this Court at Ottawa before Falconbridge, J., and a jury.

It appeared that the land in question was granted by the Crown to Mary Twohey, who conveyed to Rice Honeywell, who conveyed to Bernard Hughes, who died in possession thereof, leaving his widow and ten children him surviving, and by his will devised it to his widow for life, and to his

sons Barnabas N. and William (the defendant) in fee subject to certain provisions therein contained.

On the 12th April, 1876, all the children and heirs-at-law of Bernard Hughes deceased, including Barnabas N. and William, conveyed the said land to their mother, Catherine Hughes, in fee. On the 3rd November, 1877, the said Catherine Hughes conveyed ten acres of the said land to her daughter Alice Jane, the wife of David Richardson, and on the same day conveyed other ten acres of the said land to her daughter Catherine, the wife of William Hogg.

On the 1st March, 1878, the said Catherine Hogg purported to convey the said land so to her conveyed to one Alexander Spittal. Catherine Hughes, the widow of Bernard Hughes, continued to live in the dwelling-house on the lot of which the land in question was a part, from the death of her husband until her own death in 1884, and the defendant lived there with her until her death, and had since continued to live there. There were no buildings on the land in question; and neither Alice Jane Richardson nor Catherine Hogg took actual possession thereof; nor did Alexander Spittal; and the same continued to be worked with the residue of the lot.

In November, 1876, one George Dawson was a dealer in sewing machines at Ottawa, and had a branch business at Pembroke, and Barnabas N. Hughes bought from him the Pembroke business for the sum of $1,800, giving him as security therefor three promissory notes, each for the sum of $600, payable respectively at 8, 13, and 18 months, and made by Barnabas N. Hughes and his mother Catherine Hughes, and indorsed by the defendant. These notes being overdue and unpaid, proceedings were had for the recovery of the two last of them against the makers and indorser thereof; and on the 10th of April, 1878, by indenture of that date, made in pursuance of the Act respecting short forms of conveyances, between the said Alice Jane Richardson and her husband David Richardson of the first part; the said Alexander Spittal of the second

part, the said Catherine Hogg and her husband William Hogg of the third part; the said Catherine Hughes, widow of Bernard Hughes, and the said Barnabas N. Hughes of the fourth part; Margaret Spittal for the purpose of baring her dower of the fifth part; and the said George Dawson of the sixth part; the said parties thereto of the first, second, third, and fourth parts conveyed the land in question to the party thereto of the sixth part.

This indenture contained a recital to the following effect: Whereas the said Barnabas N. Hughes and his mother Catherine Hughes are the joint and several makers of two certain promissory notes bearing date 30th November, 1876, payable respectively eight and thirteen months after date to the order of one William Hughes for the sums of $600 each, and by him indorsed and delivered to the said party of the sixth part, which said promissory notes have long since matured, and were dishonoured; that subsequent to such maturity and dishonour the said party of the sixth part has as the holder thereof brought suit against the said Barnabas N. Hughes and Catherine Hughes, parties of the fourth part, and the said William Hughes, in Her Majesty's Court of Queen's Bench for the Province of Ontario, for the recovery of the money secured thereby, interest, notarial fees, and costs thereon; and that it has been agreed upon by and between the parties to said suit and the parties hereto, that upon the said parties of the fourth part and the said William Hughes obtaining a conveyance to the said party of the sixth part of the said lands by the said parties of the first, second, and third parts, the said Alice Jane Richardson of the first part, and the said party of the third part being at present trustees for the said Catherine Hughes of the fourth part, although apparently the absolute owners thereof, that the said party of the sixth part should release and discharge the said Catherine Hughes, one of the joint and several makers of said promissory notes, and the said William Hughes, the indorser thereof, from all their liabilities on said promissory notes, and from all interest, notarial fees, and costs thereon, and

from said suit instituted for the enforcement of the payment thereof, and also from all their liabilities on a certain other promissory note bearing date on or about the said 30th November, 1876, for other $600 payable three months after date, and similarly made and indorsed by the said parties of the fourth part and the said William Hughes.

The said indenture also contained a release by the said party of the sixth part of the said Catherine Hughes and William Hughes, in pursuance of the agreement contained in the recital.

William Hughes, the defendant, was not a party to this indenture, but he knew that it was being given, and upon its being given that he was to be released, and he made no objection to its being given.

At the trial George Dawson was asked: "Q. Now, after your purchase, did you take possession of this property or do anything to the property? A. Well, I went out on it, walked over it, and examined it."

On the 2nd December, 1879, George Dawson, being indebted to the C. W. Williams Manufacturing Company, conveyed the said land to them, their successors and assigns, for the consideration of $600.

The said company was incorporated by letters patent, dated the 10th September, 1872, under the great seal of the Province of Quebec, issued under the authority of the Act 31 Vic. ch. 25 of that Province, and was so incorporated for the purpose of carrying on the business of the manufacture of sewing machines and other machinery.

The name of the said company was changed to that of the Williams Manufacturing Company by the Dominion Act 45 Vic. ch. 118, passed 17th May, 1882.

On the 1st November, 1887, the Williams Manufacturing Company conveyed the said land to the plaintiff, and this action was commenced on the 7th December, 1887.

The jury found that the defendant was in actual possession of the premises for more than ten years prior to the 7th December, 1887, and that the possession up to the time of the death of Catherine Hughes was the possession of the defendant, and they assessed the damages at $25.

The learned Judge gave judgment for the plaintiff for the land, damages, and costs.

On November 20th, 1888, *Aylesworth*, (*Wyld* with him) for the defendant, moved to set aside the said judgment and to enter it for the defendant or for a new trial, on the following grounds: 1. That the judgment is contrary to law and evidence and the weight of evidence; 2. That the learned Judge should at the close of the plaintiff's case have directed judgment dismissing the action, on the ground that the plaintiff had failed to prove title or right to possession of the lands in question against the defendant, in this, that the description in the deeds produced was defective; that the alleged deed from the Williams Manufacturing Company to the plaintiff was ineffectual to vest said lands in the plaintiff, no evidence having been offered that the conditions entitling the said company to convey or hold said lands had been complied with; that the said company, being incorporated by ch. 118, 45 Vic. (D.), had at the date of the said conveyance to the plaintiff ceased to have any interest in the said land, and the plaintiff acquired no title by said deed; 3. That the defendant was not estopped by deed or by his conduct in any way so as to deprive him of the benefit of the Statute of Limitations; 4. That the defendant was entitled on the findings of the jury to judgment.

W. H. Walker shewed cause.

December 22, 1888. ARMOUR, C. J.—From the date of the deed to Catherine Hughes from her children, including the defendant, of the 12th of April, 1876, until the 3rd November, 1877, the date of the deeds from her to her daughters Alice Jane Richardson and Catherine Hogg, the possession of the lands in question must be ascribed in law to Catherine Hughes, for she had the title to the lot of which they formed part, and resided thereon, and the defendant lived with her.

From the 3rd November, 1877, until the 10th of April,

1878, the date of the deed to Dawson, the constructive possession of these lands would be in Alice Jane Richardson and Catherine Hogg, unless an actual possession were shewn in some one else. No evidence of any actual possession of these lands was shewn to have been had by the defendant or by any one during this short space of time.

Nor is it likely that any actual possession of these lands, such as would prevent the constructive possession of them being in Alice Jane Richardson and Catherine Hogg, could have been shewn, having regard to the condition of these lands and the season of the year comprised in this short space of time.

The defendant, however, knew of the deed of the 10th April, 1878, and of the agreement it was intended to carry out, and the benefit he was to receive upon its being given, and he allowed the deed to be given without any objection being made by him, and received the benefit it conferred upon him.

Under these circumstances, I am of opinion that he is precluded from asserting that this deed did not convey the possession it purported to convey, and from setting up any possession in himself prior to such deed: *Re Shaver*, 3 Ch. Chamb. R. 379.

At all events the inference from his conduct is, that if he had any possession of these lands at all at the date of the giving of this deed, it was possession as tenant at will to Alice Jane Richardson and Catherine Hogg. See *Doe Groves* v. *Groves*, 16 L. J. Q. B. 297.

Then we have the evidence of Dawson that after he got the deed he went on to the lands in question, walked over them and examined them, and this was a sufficient entry to prevent the setting up by the defendant of any possession prior thereto. See *Randall* v. *Stevens*, 2 E. & B. 641; *Cooper* v. *Hamilton*, 45 U. C. R. 502; *The Trustees, Executors, and Agency Co.* v. *Short*, 4 Times Law Reports 736.

The findings of the jury under the views I have expressed do not stand in the way of the plaintiff's recovery.

The C. W. Williams Manufacturing Company was incorporated under the provisions of the Act of the Province of Quebec 31 Vic. ch. 25, and, although a Quebec corporation, could acquire lands in Ontario subject to the laws of Ontario; and there is nothing in the laws of Ontario to prevent such acquisition, unless it be the laws against mortmain which were in force in England at the time of the passing of the Act 32 Geo. III. ch. 1, October 15, 1792, which have been held to be in force in this Province: *Runyon* v. *Coster*, 14 Peters 122; *Christian Union* v. *Yount*, 101 U. S. 352; *Green's Brice's* Ultra Vires, 2nd ed., page 11, note a; *Morawetz*, 2nd ed., sec. 958 *et seq.*

The statutes of mortmain in force in this Province, and applicable to this case, appear to be 7 Edw. I., St. 2, ch. 1, and Statute Westminister 2nd, which declared that no corporation, ecclesiastical or lay, should buy or sell or in any way take land by gift, lease, or otherwise, under pain of forfeiture of the same, with power to the next lord of the fee within one year to enter, and if he do not, then the next lord has half a year to enter, and in default of all the mesne lords, then the king can seize; and 15 Rich. II. ch. 5.

It seems that under these statutes an alienation in mortmain is voidable only, and not void, and that in this Province, where lands are held in free and common socage, the lands so aliened can only be forfeited by the Crown, and that only after office found. See *Grant* on Corporations, p. 98; *Green's Brice's* Ultra Vires, p. 12; *Becher* v. *Woods*, 16 C. P. 29; *Sheldon* on Mortmain, p. 1; *Hallock* v. *Wilson*, 7 C. P. 28; *Brown* v. *McNab*, 20 Gr. 179; *Vigers* v. *St. Paul's*, 14 Q. B. 909.

I am of opinion, therefore, that the defendant cannot take advantage of the statutes of mortmain as against the alienation by Dawson to the company; but that the Crown alone can take advantage of them.

The Act of the Dominion 45 Vic. ch. 118 cannot, it is said, cure this alleged infirmity in the plaintiff's title, for it is said to be *ultra vires* of the Dominion Parliament,

because of the illustration given by Sir Montague Smith in pronouncing the judgment of the Judicial Committee in *Citizens' Ins. Co.* v. *Parsons*, 7 App. Cas. 96. If, however, the only thing requisite to enable this corporation to hold lands in Ontario, is a license from the Crown to do so, I do not see why this Act may not operate as a license to this corporation to hold lands.

I do not see why an Imperial Act might not be passed extending to all Her Majesty's possessions, providing that thereafter a license from the Crown should not be necessary to enable any corporation to hold lands therein.

If so, I do not see why a similar Act should not be passed by the Dominion Parliament with respect to corporations within the Dominion.

Such a law would not prevent the Provinces from passing laws preventing altogether or restricting and regulating the holding of lands by corporations in such Provinces.

It would be merely an abnegation on the part of the Crown of its prerogative right to require a license.

That Act was, however, passed on the 17th May, 1882, and the license granted thereby by the terms of the Act extended only for five years from the passing of it, and the Williams Manufacturing Company held the lands for more than five years from the passing of it, for it was not till the 1st November, 1887, that they conveyed the lands to the plaintiff.

But, as I have said before, I do not think that this defendant can take advantage of this, but that the Crown alone can do so.

The motion will, therefore, be dismissed with costs.

STREET, J.—The defendant here denies the plaintiff's title, and claims title in himself by length of possession.

The objection urged to the plaintiff's right to recover was that the conveyance from the Williams Manufacturing Company to the plaintiff was ineffectual to vest the land in the plaintiff, because it was not shewn that the conditions entitling the company to convey or hold land had been complied with.

The C. W. Williams Manufacturing Company were incorporated on the 10th September, 1872, under the general Act, ch. 25 of 31 Vic., passed by the Legislature of the Province of Quebec, by the 8th section of which it is enacted that every company incorporated under its provisions "may acquire, hold, alienate, and convey any real estate requisite for the carrying on of the undertaking of the company." The purpose of the company mentioned in the charter of incorporation is that of carrying on the business of the manufacture of sewing machines and other machinery.

In the course of their business a debt became due to them, and the land in question was on 2nd December, 1879, conveyed to them by their debtor in part satisfaction of the debt due by him. This was a transaction which, I think, was within their powers, and the acquisition of this land took place in the course of carrying on the business for which the company was incorporated. See *Hope* v. *Glass*, 23 U. C. R. 86; *Bostock* v. *North Staffordshire R. W. Co.*, 4 E. & B. 798; *Lyde* v. *Eastern Bengal R. W. Co.*, 36 Beav. 10.

The land acquired was situated in the Province of Ontario. The corporation, at that time being incorporated only under a law of the Province of Quebec, could claim only those rights to which a foreign corporation was entitled under our law, and in acquiring this land was subject to our laws governing the rights of corporations, whether foreign or domestic, to take and hold land in this Province.

By statute 7 Edw. I., St. 2, ch. 1, called the Statute De Viris Religiosis, it is provided that no person religious or other, whatsoever he be, that will buy or sell any lands or tenements * * or that will receive by reason of any other title, whatsoever it be, lands or tenements, or by any other craft or engine will presume to appropriate to himself under pain of forfeiture of the same, whereby such lands or tenements may anywise come into mortmain, and that if any person religious or other offend against this statute

it shall be lawful for the King and other chief lords of the fee intermediate to enter into the land so aliened * * and to hold it in fee as an inheritance.

The right of the Crown to grant licenses to take and alien in mortmain, notwithstanding this statute, was recognized from an early period, and was confirmed by statute 7 & 8 Wm. III. ch. 37, which enacts that it shall and may be lawful for the King, his heirs and successors, when he or they shall think fit, to grant to any person or persons, bodies politic or corporate, license to alien in mortmain; and also to purchase, acquire, take, and hold in mortmain in perpetuity or otherwise, any lands, &c.

In *Coke* upon Littleton, 2 *b.*, the effect of the Statute De Viris Religiosis is thus stated: "If any sole corporation or aggregate of many, either ecclesiastical or temporal (for the words of the statute be *si quis religiosus vel alius,*) purchase lands or tenements in fee, *they have capacity to take but not to retain,* (unless they have a sufficient license in that behalf.")

This statement of the effect of the statute is quoted by Lord St. Leonards, and he states the law in accordance with it at p. 685 of the 14th Eng. ed. of his work on Vendors and Purchasers. In *Shelford* on Mortmain, p. 8, the same view is adopted; it is there said: "Notwithstanding this statute, grants to corporations are good for the purpose of vesting the lands in the grantees, for corporations, without such license, have capacity to take but not to retain." See also *Brice* on Ultra Vires, p. 8, ed. of 1874; *Angell* and *Ames* on Corporations, 11th ed., p. 125; *Grant* on Corporations, pp. 99 *et seq.* The passage in Co. Litt. in fact seems to have been generally adopted as correctly stating the effect of the statute upon the right of corporations to be that (provided they are not expressly forbidden by their charter to take lands at all) a conveyance to a corporation without a license to take in mortmain, will vest the land in the grantees, subject to the right of the Crown to enter and declare the land forfeited. Such being the law of this Province, for this statute forms part of it,

and this foreign corporation having become grantee of the land in question, it became vested in it, subject to the right of the Crown to enter.

On 17th May, 1882, by a statute of the Dominion Parliament, ch. 118, 45 Vic., the C. W. Williams Manufacturing Company was created a Dominion corporation, under the name of the Williams Manufacturing Company, with power to acquire and dispose of real estate for the purposes of their business, and with power to hold real estate theretofore conveyed to the C. W. Williams Manufacturing Company, subject to a proviso that the real estate held by the company at any time should not exceed an annual value of $5,000 in addition to the real estate held by the company for the purposes of its business, but the right to retain property conveyed to the company in satisfaction for debts due to it is limited to a period not exceeding five years.

On the 1st November, 1887, the company, having held this property for upwards of five years after the passing of the Act, conveyed it to the plaintiff for a valuable consideration.

The law under which the national banks in the United States are constituted contains a similar provision to this, but I have been unable to find any express decisions as to its effect.

A somewhat similar question is discussed in *Baird* v. *The Bank of Washington*, 11 Serg. & Rawle 411, where the opinion is expressed that even if the grantees, who had taken a conveyance in satisfaction of a debt, had no right to hold the property conveyed, it would not therefore follow that the acquittance of the debt would be cancelled, and the land revert to the grantor, but rather that the rights of the parties to the conveyance, *inter se*, would be preserved, leaving to the State the right to take advantage of the defective title of the grantees. See also *Leazure* v. *Hillegas*, 7 Serg. & Rawle 313. This view of the law is approved in *Morse* on Banks and Banking, 3rd ed., sec. 754, where these cases are cited and commented upon. In my

opinion, the same considerations should govern the stipulation in this statute which limits the rights of the company to hold for five years. The title of the company became defeasible by the Crown after the land had been retained beyond that period, and may be defeasible still, both on the ground of the limitation in the statute and because no license to take or alien in mortmain, effectual in this Province, was obtained by the company; but I can find no authority for the proposition that the title of the company, *ipso facto*, terminated at the expiration of five years from the passing of the Act, or the commencement of their holding of the property; and I am, therefore, of opinion that their conveyance to the plaintiff was effectual to pass to him the title which they held, subject to any right of entry or defeasance which the Crown might possess.

Should it be necessary to determine the question as to whether the provisions in the Dominion Act incorporating the company enabling them to hold lands, were a sufficient license under the 7 & 8 Wm. III. ch. 37, I should agree with the Chief Justice in holding them sufficient for the purpose, for the reasons which he has stated.

I think, therefore, that the objections to the plaintiff's title connot be supported.

The defendant claims title in himself by length of possession; but by an arrangement made in April, 1878, within ten years before this action was begun, to which he was a consenting party, the land in question was conveyed by the persons in whom the legal estate was vested to one George Dawson, through whom the plaintiff claims title. One of the terms of this conveyance, and a part of the consideration expressed in it, was, that Dawson should, and he did thereby, release a debt which he held against the defendant and his mother and one Barnabas N. Hughes, for some $1200, and to recover which Dawson had lately sued them. It is true that William Hughes did not actually execute the conveyance, but the evidence shews, I think, beyond question that he was an assenting party to the

whole transaction, and was aware that the conveyance was being executed, and that Dawson was taking it in satisfaction of this debt. I think that under these circumstances his right to set up his own possession against the title of Dawson and his grantees under this conveyance must be taken to have begun afresh from its date, and that he is estopped from setting up a prior adverse possession in himself, as effectually as if he had been a conveying party

I think the motion should be dismissed with costs, and that judgment should be entered for the plaintiff with costs.

FALCONBRIDGE, J., was not present at the argument, and took no part in the judgment.

[QUEEN'S BENCH DIVISION.]

REGINA EX REL. JOHNS V. STEWART.

Municipal corporations—Municipal elections—Corrupt practices—Bribery by agents—Presumption as to candidate's intention—Gifts by candidate—Payments to canvassers.

A candidate for a municipal office, though not required by law to make his payments through a special agent, is not absolved from keeping a vigilant watch upon his expenditure; and a candidate who, on the eve of a hotly contested election, places a considerable sum of money in the hands of an agent capable of keeping part of it for himself, and spending the rest improperly or corruptly, who never asks for an account of it, gives no directions as to it, and exercises no control over it, must be held personally responsible if it is improperly expended.

And where money given to agents by the candidate was in fact used in bribery;

Held, that the presumption that the candidate intended the money to be used as it was used became conclusive in the absence of denial on his part.

Gifts by a candidate to one who is at the time exerting his influence in the candidate's behalf are naturally and properly open to suspicion; and in the absence of any explanation, such gifts must be regarded as having been made for the purpose of securing or making more secure the friendship and influence of the donee.

In the election in question every member of certain committees was paid a uniform sum of $2, nominally for his services as a canvasser, but apparently without regard to the time he devoted to the work, and without inquiry as to whether he had in fact canvassed at all.

Held, that these payments were corruptly made and constituted the offence of bribery as defined by sub-sec. 2 of sec. 209 of the Municipal Act.

Under the circumstances above referred to and other circumstances of the case, the defendant was found personally guilty of acts of bribery, and to have forfeited his seat as mayor of the city of Ottawa.

IN January, 1888, the defendant was declared to be duly elected to the office of mayor of the city of Ottawa by a majority of some 300 votes.

In February an application was made to Rose, J., in Chambers, for a summons in the nature of a quo warranto declaring the election void on the ground of bribery by Mr. Stewart and his agents, and an order was thereupon made for the issue of the summons asked for, and for the taking of the evidence *vivâ voce* before the Judge of the County Court of the county of Carleton, and for the return by him to the registrar of this Division of the evidence when taken. Application was made by the defendant to the Divisional

Court in May last to stay the proceedings under this summons upon the ground that the summons authorized by sec. 188 of the Municipal Act, ch. 184 R. S. O., was not applicable to cases where bribery was charged. This motion having been dismissed, (see 16 O. R. 5) the defendant appealed to the Court of Appeal, and his appeal was dismissed. Owing to the delay created by these motions, the evidence was not completed until November last.

Upon the statement and answer and the evidence the matter was argued in Chambers on 24th December, 1888.

Aylesworth, for the relator.
Chrysler, for the defendant.

December 31, 1888. STREET, J.—The evidence shews the expenditure of an amount of money by the defendant which it is to be hoped is unnecessary, and is certainly unusual, in municipal contests. A special effort seems to have been made on his behalf to secure the votes of the French Canadian portion of the voters in the city; this is shewn by the fact that all the money which has been proved to have been expended, with some trifling exceptions, was spent amongst the voters of that nationality, and in the localities occupied principally by them.

There are five newspapers published in Ottawa, three of which are in the English and two in the French language. The three English newspapers received $550 between them for advertisements and work during the election. The two French newspapers received between them $900: they charged for their advertisements about $100 each beyond what appears to be the ordinary charge to business men for the same class of work, but it appears that the charge made, although exceptional, is not without precedent, and I cannot hold that the payments so made were corruptly made, by the defendant, who does not appear to have known that he was paying more than the usual rate. The manner in which work of that kind is measured is not a matter of common knowledge to persons not accustomed to paying for it.

Alexander McCullough is a tanner and currier living in Ottawa; he appears for a time to have been doubtful as to whether he should support the defendant or Mr. Brown, his opponent, but he eventually became a very strong supporter of the defendant, and at the defendant's request acted as his agent, and devoted special attention to the committee rooms in the French Canadian quarter of the town. About two weeks before the polling day, the defendant gave McCullough $110 to $120 "for the purposes of paying legal expenses of the election, paying canvassers and committee rooms." McCullough is able to account for less than $40 of this money, and will not say that he spent more than $50 of it. The rest he seems to have kept for himself; he has never kept any account of his expenditure of it; he has never been asked by the defendant to account to him for it, and he has never offered to do so. The whole of that which he has accounted for in his evidence was spent in bribery more or less disguised under some other pretext.

A candidate for a municipal office, though not required by law to make his payments through a special agent, is by no means absolved from keeping a vigilant watch upon his expenditure. There appears to have been no reason why any money at all should have been placed in McCullough's hands by the defendant; the only legitimate needs of the committee rooms at that time being confined to pens, ink, and paper. A candidate who, on the eve of a hotly contested election, places a considerable sum of money in the hands of an agent capable of keeping part of it for himself, and of spending the rest improperly or corruptly; who never asks for an account of it, gives no directions as to it, and exercises no control over it, must be held personally responsible if it is improperly expended. He has let loose a dangerous element, and must be held answerable for the consequences. Why should he be absolved, any more than a farmer who sets fire to his brush heap in August, from taking reasonable precautions? *Cornwall Case*, 1 H. E. C. 552.

Of this money McCullough gave $10 to Louis Corbeille, a blacksmith, chairman of a French Canadian committee, "for election purposes." Corbeille kept it and spent it, he says, in treating and buying cigars. McCullough gave $20 to a laborer named Duval "for the purposes of the election"; $3 or $5 to Arthur Dugal, who said he was canvassing; $2 to Ouillet, who said he was canvassing; $2 to Belanger, on the polling-day to stand outside the door of the polling place, and act as outside scrutineer; and $2 he put into the pocket of Louis Gagnon on the day of the election after he had voted. Upon the evidence I find that all these payments were made corruptly by McCullough for the purpose of buying votes or influence in favor of the defendant, and in the absence of any explanation from the defendant, I think the defendant must be held to have paid this money to McCullough with the intention that it should be expended in bribery.

On the day of the polling between ten and eleven in the morning the defendant handed $10 to McCullough in St. Patrick St.: the purpose for which this payment was made is not stated, but McCullough immediately paid it over to Gustave Recard, a cab driver, who at once expended it in bribery. I must again hold that the violent presumption arising from these circumstances, that the candidate intended the money to be used in the manner in which it was in fact used, becomes conclusive in the absence of denial on his part; and I must find that the defendant paid this money to McCullough with the intention that it should be used in bribery.

Alexander H. Taylor was an active agent for the defendant: he received $100 from the defendant, of which $60 was paid to him the day after the election. He received this money to pay election bills, which he has destroyed, and he can give no account of the nature of these bills beyond the fact that $60 was paid for cab hire; that $16 was paid to Henry Pinard; and that some money was paid to Edward Desgenais, and some to Alfred Desjardins for committee room expenses. The fact that the sum paid for

cab hire corresponds with the sum received by Taylor on the day after the election, in the absence of any explanation, justifies me in finding that the cabs paid for by Taylor were used upon the day of the election, and that the money was paid by the defendant to him to liquidate the claims of the cabmen: it appears from the evidence that cabs were being driven on the polling-day in the defendant's interest; that Taylor paid $60 to cabmen; and that he received $60 from the defendant on the day after the election to pay election accounts; and I therefore find that the defendant paid Taylor $60 to pay cabmen for driving voters to the polls on the polling-day.

Henry Pinard says he received $20 from Taylor, and $10 from another man, and he paid fourteen or fifteen committeemen $2 each for their work on polling day, because they could not afford to lose their day; his account for this expenditure was handed to Taylor, who shewed it to the defendant after the election, and the defendant repaid him the amount of it. The account is destroyed, and this is the only evidence with regard to its contents. I must assume that it truly set forth the nature of the expenditure—so many committeemen at $2 a piece—and that the defendant having seen the account paid it. The defendant knew that such payments were bribery, for he told Nelson Eugene Landrian, who asked him "for some money for each man in the committee room to pay expenses," that "that would be bribery." I must therefore find that in paying this account of Pinard's the defendant knowingly repaid to Taylor money which had been expended in bribery.

Pierre Ratté, a door-keeper of the Senate, was a voter, and was chairman for two days of the committee which met at Guertin's Hall; he had opposed the defendant during the contest in the previous year, but supported him this year; he received $20 or $25 from the defendant at the Russell House on the Tuesday or Wednesday before the polling-day for the purpose, as he says, of paying scrutineers; he cannot remember what he did with the money, and will

not swear that he paid any of it away to any person. In this I think he does himself some little injustice, because Nelson Eugene Landrian, before mentioned, states that after his application to the defendant for money for the committee room, which the defendant declined to comply with on the ground that such a payment would be bribery, he received $2 from Ratté, and he thinks the other committee men also received $2 each from some one. It appears probable therefore that Ratté expended at least $2 of the $20 or $25 which he received from the defendant. Ratté, like the other recipients of money for election purposes, has kept no account, nor has he treated himself or been treated by the defendant as subject to be called upon to account for the money he received. He either received it corruptly, or retained it dishonestly. In his case I have come to the conclusion that it was paid to him by the defendant in order to procure his vote and influence, and that he was not expected to pay it out.

Alfred Desjardins received $80 before the election from the defendant for "expenses of the committee room" called Desjardins' committee room. He paid $2 each to fifteen men for canvassing; he cannot give their names, but he thinks only two or three of them were voters. He kept $20 for the hire of his room, and can give no account of the remaining $30. The sum received by this man was too large to have been intended entirely for himself; he has never been asked to account for it, however, and the defendant must be taken to have intended it partly to secure the vote and influence of Desjardins himself, and partly to be applied in the manner in which it was applied.

Joseph Desjardins drove the defendant about in his cutter, perhaps six times, during the canvas. The weather was cold and he had no robes; the defendant suggested his borrowing some, but he said he could not do so. The defendant then went to a furrier in Ottawa and purchased buffalo robes at $25 or $30. They were delivered to Joseph Desjardins, and have ever since remained in his possession. He says they are the property of the defendant still, but

he admits having tried to sell them without the defendant's authority. He had no vote, but was on a committee to which his father and two brothers (one of these brothers being Alfred Desjardins, above mentioned) belonged, and he had been canvassing for the defendant with the defendant's knowledge.

Gifts by a candidate to one who is at the time exerting his influence in the candidate's behalf, are naturally and properly open to suspicion. There does not seem to have been any reason why the defendant should have given Joseph Desjardins a set of valuable robes at this or any other time, except for the purpose of securing or making more secure his friendship and influence; and in the absence of any other explanation, I must treat this as the object with which they were given. The defendant paid to this same man, Joseph Desjardins, $10 on the day of the polling at the Russell House, which he says was for his expenses, and that he spent it in treating, and he received $2 more from his brother Alfred Desjardins.

Other charges against the defendant and his agents were strongly urged before me, but it appears unnecessary that I should go through the remainder of the list, in the view I have taken of those to which I have referred, and which are the most striking ones.

I have treated the payments made to canvassers so called, as being payments corruptly made, and as constituting the offence of bribery as defined by the 2nd sub-section of sec. 209 of the Municipal Act. They are payments made to induce the persons paid to endeavour to procure the return of the candidate, and as such are within the letter as well as the spirit of the Act. In this election it appears that every member of certain committees was paid a uniform sum of $2, nominally for his services as a canvasser, but apparently without regard to the time he devoted to the work, and without inquiry as to whether he had in fact canvassed at all. To treat such payments as anything but plain simple bribery would be to declare the bribery clauses of the Act a dead letter.

I find that the defendant, McLeod Stewart, was personally guilty of the acts of bribery which I have herein before set forth as having been committed by him, and that he has forfeited his seat as mayor.

The seat is claimed by the relator for the candidate Brown, but the evidence does not support this part of the claim, nor was it urged upon the argument.

The defendant must pay the costs of the proceedings.

[QUEEN'S BENCH DIVISION.]

REGINA v. WARREN ET UX.

Criminal law—Keeping house of ill-fame—Husband and wife—Joint conviction.

There may be a joint conviction against husband and wife for keeping a house of ill-fame; the keeping has nothing to do with the ownership of the house, but with the management of it.
Regina v. *Williams*, 10 Mod. 63, and *Rex* v. *Dixon*, *ib.* 335, followed.

AN application on behalf of the prisoner Isabella Warren for an order calling upon the superintendent of the Mercer Reformatory to shew cause why a writ of *habeas corpus* should not issue to bring up her body, she being confined in the reformatory, that she might be discharged, and also for a writ of *certiorari* in aid thereof.

The petition for the *habeas corpus* was dispensed with by the Crown, and on the motion a copy of the information, the evidence, and a note of the conviction against the prisoners were filed, from which it appeared that the prisoners, who were husband and wife, were convicted by the Police Magistrate of Toronto of keeping a house of ill-fame at 35 Teraulay street, in Toronto, and were sentenced to imprisonment—the wife in the Mercer Reformatory, as aforesaid.

The motion was argued on the 24th December, 1888.

W. G. Murdoch, for the applicant, contended: (1) That there was no evidence that the house said to have been kept by the prisoners was a house of ill-fame; and (2) that if such a house was kept, it was kept by George Warren, the husband, and that both husband and wife could not be convicted of such keeping, *i. e.*, that it was either the husband's house or the wife's house, and if the wife was at the time living with her husband, he as the head of the house, and he alone, must be regarded as the keeper.

Badgerow, for the Crown, contra.

December 31, 1888. MACMAHON, J.—(After stating the evidence). There was ample evidence as to the character of the house before the Police Magistrate on which to convict.

As to the second point argued, it came up for decision in *The Queen* v. *Williams*, 10 Mod. 63; where husband and wife were indicted for keeping a bawdy-house. A like objection was raised in arrest of judgment as was urged here. The Court said: "The indictment is good. Keeping the house does not necessarily import property, but may signify that share of government which the wife has in a family as well as the husband."

During the argument in that case reference was made by counsel to the case of *James Cook and his wife* (in Hilary Term in the second year of Queen Anne) who were jointly indicted for keeping a bawdy house, and the husband fined, and the wife set in the pillory.

In the case of *The King* v. *Dixon and his wife*, 10 Mod. 335, an indictment charging them with keeping a common gaming-house, there was a demurrer to the indictment.

The first objection taken against the indictment was, that it should not have been brought against the husband and wife but against the husband only.

The Court: "This objection would have weight in it if the property or the ownership of the house was the matter in question; but it signifies nothing here, where

not the property, but the criminal management of the house (in which the wife may probably have as great, nay a greater share than the husband) is the fact charged. This case is not to be distinguished from the case of *The Queen* v. *Williams* (*supra*), which was an indictment against husband and wife for keeping a bawdy-house, and held good; for as there the wife may be concerned in acts of bawdry, so here she may be active in promoting gaming, and furnishing the guests with all conveniences for that purpose."

There will be no order.

[QUEEN'S BENCH DIVISION.]

ANDERSON v. GLASS ET AL.

Bankruptcy and insolvency—Assignment for benefit of creditors—Assignee not a sheriff—Requisite number of creditors not assenting—R. S. O. ch. 124, sec. 3, sub-sec. 2, construction of—Chattel mortgage—Jus tertii—Costs.

The meaning of R. S. O. ch. 124, sec. 3, sub-sec. 2, is that an assignment executed without the consent of the requisite number of creditors shall have the same effect as if it had been executed with such consent until and unless it be superseded by an assignment executed with such consent; and the words which occur through the Act, "an assignment for the general benefit of creditors under this Act," are to be governed by this construction.

Held, therefore, that a sheriff who had seized goods of insolvent debtors under execution was not justified in refusing to give them up to the debtors' assignee, who was not a sheriff, and the assignment to whom had not been assented to by the number of creditors required by R. S. O. ch. 124, sec. 3; but

Held, also, that as the goods were covered by a chattel mortgage, the sheriff could set up the rights of the mortgagee in answer to an action by the assignee to restrain the sale of the goods under the execution.

The assignee having failed in the action, because the mortgagee's rights disentitled him to succeed, and the sheriff having contested the assignee's rights on the other ground, which was declared to be untenable, no costs were given to either party.

MOTION for an injunction to restrain the defendant William Glass, sheriff of Middlesex, from selling certain goods seized by him under an execution upon a judgment

obtained in an action wherein the defendant W. D. McLoghlin was plaintiff, and O. A. Dockham and Lois Dockham were defendants.

The motion was turned into a motion for judgment, and was argued 9th January, 1889.

Parkes, for the plaintiff.
Hoyles, for the defendant Glass.
W. W. Fitzgerald, for the defendant McLoghlin.

The facts and arguments appear in the judgment.

January 15, 1889. STREET, J.—The execution was placed in the sheriff's hands on 7th May, 1888, and he seized the goods in question on 9th May.

On 11th May, 1888, the judgment debtors executed an assignment to the plaintiff, who is not a sheriff; one or two of their creditors assented to the assignment, but the requisite number did not do so until some time after the commencement of this action. Immediately after the execution of the assignment, the assignee demanded that the sheriff should deliver to him the goods which he held under the execution. The sheriff refused to give them up until satisfied that the assignment was executed by the number of creditors required by the third section of ch. 124, R. S. O. The goods were covered by a chattel mortgage to one Boyd, and on or before 17th May the plaintiff's solicitors, who were also acting for Boyd, served the sheriff with a demand to give up the goods to Boyd under the chattel mortgage. On 18th May the agent of the plaintiff's solicitors, acting upon instructions from them, called upon the sheriff and asked him to give up possession to the mortgagee, to which the sheriff replied that he could not give up possession to the mortgagee, but that he thought the best course would be to give up possession to the plaintiff as assignee, though he had some doubt whether it would be right for him to do so; on the same day the plaintiff's solicitors' agent wrote to the plaintiff's solicitors

informing them of the result of his interview with the sheriff, having told the sheriff that he would do so.

On the same day, 18th May, while their agent was demanding the goods from the sheriff on behalf of the mortgagee, the plaintiff's solicitors issued the writ in this action, claiming them on behalf of the plaintiff.

On the same day the plaintiff made an affidavit that he had demanded the property from the sheriff, who had refused to deliver it to him, and he added the statement that the sheriff informed him that it was his intention to proceed at once to advertise the said property for sale under the execution, and that he, the deponent, believed that unless an injunction were granted the sheriff would proceed to sell and dispose of the property under the said execution. The sheriff in reply positively denies that he ever threatened to sell the goods: states that it was not his intention to do so, and that he had always been ready and willing to give up the goods if satisfied that the assignment was executed by the proper number of creditors, and that he had never advertised the property for sale or taken any steps towards selling it; and that he told the agent for the plaintiff's solicitors on 18th May that he would give up the goods to the assignee, though he doubted his being quite safe in doing so.

On 21st May the plaintiff applied for and obtained an interim injunction restraining the sheriff from selling the goods. This was obtained upon the plaintiff's affidavit sworn on 18th May. The material does not contain any reference to the letter of the agent of the plaintiff's solicitors of 18th May, nor to the offer of the sheriff therein, nor to the existence of the chattel mortgage.

On 22nd May the plaintiff's solicitors served notice of motion to continue the injunction. On 23rd May they telegraphed to their agent in London inquiring if the sheriff was still in possession of the property, and were informed that he was. No further request for its delivery seems to have been made in the meantime.

Upon the return of the motion for injunction the sheriff

filed an affidavit in which he insists upon his right to retain the goods until an assignment executed by the proper proportion of creditors is produced to him, but offers to submit to any order of the Court. This motion has been from time to time enlarged, and further affidavits have been filed, which do not appear to affect the substantial facts of the case; the sheriff remained in possession of the goods for fifty-two days, and then by consent of all parties handed them over to one Blackley, the agent of the mortgagee, who has been endeavouring to sell them; from his affidavit it appears extremely doubtful whether they will realize enough to pay the amount of the chattel mortgage.

The question has therefore resolved itself into one of costs and the motion for injunction is turned by consent into a motion for judgment. The judgment creditor has been added by consent as a defendant, after most of the costs have been incurred. The sheriff has not interpleaded, and must therefore stand or fall by the position he has taken in the matter by refusing to give up the goods to the plaintiff.

The plaintiff's title to the goods in question, having accrued subsequently to the seizure by the sheriff, can be sustained as against the sheriff only by virtue of the 9th sec. of the Act ch. 124, R. S. O., which provides that "An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment, &c."

The Act by sec. 2 makes void assignments made with intent to defeat or delay creditors. Sec. 3, sub-sec. 1, declares that sec. 2 shall not apply to assignments for the benefit of creditors made to the sheriff, or to another assignee resident in Ontario, with the consent of a certain proportion of the creditors.

Sec. 3, sub-sec. 2, provides that "Every assignment for the general benefit of creditors, which is not void under section 2 of this Act, but is not made to the sheriff, nor to any other person with the prescribed consent of creditors, shall be void as against a subsequent assignment which is in

conformity with this Act, *and shall be subject in other respects* to the provisions of this Act until and unless a subsequent assignment is executed in accordance with this Act."

I think the meaning of this last quoted section must be that an assignment executed without the consent of the requisite number of creditors shall have the same effect as if it had been executed with such consent, until and unless it be superseded by an assignment executed with such consent; and that the words which occur throughout the Act, "an assignment for the general benefit of creditors under this Act," are to be governed by this construction—otherwise I can place no satisfactory construction upon the Act; the alternative being the rejection of those clauses in the Act referring to assignments made "under this Act," and the retention of the clauses in which that expression does not occur. Such a distinction would be one founded upon no principle to be gathered from the Act, and cannot be taken as its true intention.

The sheriff, therefore, in his answer to the application of the plaintiff has placed what I conceive to be an erroneous construction upon the Act; and the ground he has taken for refusing to give up the goods cannot be sustained.

It appears, however, from the affidavits filed, as well by the plaintiff as by the defendant, that at the time of the seizure by the sheriff and of the demand made upon him the property was subject to a chattel mortgage to Boyd, which exceeds in amount the valuation placed upon the goods by the mortgagee's agent, Blackley, whose affidavit to this effect has been filed by the plaintiff. The plaintiff's action is brought to recover the possession of the goods from the sheriff, and to restrain him from disposing of them; the demand which he served on the sheriff claims for him the ownership and right to possession of the goods. On the previous day the plaintiff's solicitors, acting for the mortgagee, had also claimed the goods from the sheriff as being the property of the mortgagee, and the mortgagee obtained possession of them by consent pending the litigation.

The sheriff did not in his affidavits set up the right of the mortgagee; but it was stated by his counsel upon the argument, and not denied, that by arrangement with the plaintiff he had not filed any statement of defence, and that all his rights as appearing in the papers filed were open to him as if he had specially pleaded them. His right to set up the *jus tertii* in answer to such an action as this appears to be firmly established by *Richards* v. *Jenkins*, 17 Q. B. D. 544, and 18 Q. B. D. 451; and if he had set up this right of the mortgagee as an answer to the plaintiff's claim, he would have been entitled to have the action dismissed with costs and the injunction dissolved with costs; as it is, the whole contention has been upon a question which is decided adversely to him, and the costs which he has incurred in the action, apart from the injunction motion, are trifling.

I cannot give the plaintiff the costs of the injunction motion, because I decide it against him upon the ground that the mortgagee's rights disentitled him to succeed until he had got them in; in addition to which my impression from the evidence is that the grounds upon which he obtained the injunction order were far too strongly stated in the material filed. I cannot give the sheriff the costs of the injunction motion, because he has contested it upon untenable grounds. I, therefore, dismiss the action without costs; and I make no order with regard to the costs of the sheriff's possession.

[CHANCERY DIVISION.]

CLARKE V. FREEHOLD LOAN AND SAVINGS COMPANY.

Mortgage—Right of payment off to obtain partial release—Assignee of equity of redemption—Running with the land.

A mortgage on five stores, and expressed to be for $10,500, contained a provision that on payment of $2,500 the mortgagees would release the easterly store mortgaged, and anyone or more of the other four stores on payment of $2,000 each at any time, on receiving a bonus of three months' interest on the sum so paid.

Held, that the benefit of this clause passed to the assignee of the equity of redemption, who was entitled to enforce it.

It appeared that the whole $10,500 had not been advanced.

Held, that the amount required to be paid to entitle the assignee of the equity of redemption to obtain a release of any of the stores must be abated proportionately.

THIS was a motion by way of appeal from the judgment of Ferguson, J., who dismissed this action with costs on May 14th, 1888. It was brought by S. R. Clarke, against the Freehold Loan and Savings Company, for an account of what was due for the redemption of certain mortgages under circumstances which sufficiently appear for the purpose of this report from the judgment of Robertson, J.

The present motion came on for argument before Boyd, C., and Ferguson and Robertson, JJ., on June 12th, 1888.

S. R. Clarke, plaintiff in person. The clause as to payment off creates a separate mortgage on each parcel. If the defendants advance the balance of the $10,500, then I will pay the $2,000 per house. As to the contention that the agreement as to releasing does not affect an assignee of the equity of redemption, I refer to *Tulk* v. *Moxhay*, 2 Phil. 774; *Hall* v. *Ewin*, 37 Chy. D. 74; *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 409; *Webber* v. *O'Neill*, 10 Gr. 440; *Davis* v. *White*, 16 Gr. 312. I submit it is a proper case for an account: *Emmett* v. *Quinn*, 7 A. R. 306.

Hoyles, for the defendants. The action should have been brought as one to enforce the covenant or agreement. The

plaintiff does not claim in that way. The defendants are perfectly willing to release the four stores on payment of $8,000 and a bonus. Whether we have advanced the amount or not is immaterial; it is a special provision, and we should not be asked to take less. There is a proviso which derogates from the usual right of a mortgagee on payment of a specific sum. What right has the plaintiff to demand this special privilege with an abatement? If he comes under the terms of the covenant, he must perform the covenant. [BOYD, C.—Your argument is, that the $2,000 is an arbitrary sum; but it is not: it is based on the amount of the mortgage.] The benefit of the agreement does not enure to the assigns who are not named: *Re Gilchrist and Island*, 11 O. R. 537; and *Emmett* v. *Quinn*, *supra*. And besides there is a second mortgage, and the title is equitable in both parties: *Claxton* v. *Gilbert*, 24 C. P. 512. It is a mere personal privilege: *Ernest* v. *Vivian*, 33 L. J. Ch. 513.

Clarke, in reply. I am perfectly willing to pay the $8,000, if the defendants advance it, or to pay them the $8,000, and then get them to refund the balance. So in any case it comes to a question of account.

December 12th, 1888. ROBERTSON, J.—The plaintiff, as the assignee of the equity of redemption, brings this action to enforce an agreement contained in one mortgage, and a proviso contained in another, by which he claims that he has the right to redeem by reason of the said agreement and proviso. The first mortgage was made by Joseph Keep, in favour of the defendants, and bears date October 21st, 1886, on the easterly 76 feet 10 inches of lot No. 11, on the west side of Augusta Avenue, according to a plan registered as number D. 271, and is to secure the repayment of $10,500, "in four equal successive annual payments of $500 each, and one instalment of $8,500, to become due and be paid five years from the date," with interest on the whole of the unpaid principal at 7 per cent. per annum, payable yearly, not in advance, "both before and after the

payment of the said principal money, and until the whole of the said principal sum be fully paid and satisfied." And it contains the following: "And it is hereby agreed between the said mortgagor, and the company, (the defendants), that the said company will release the easterly store and dwelling upon payment of $2,500, and any one or more of the other four stores and dwellings, upon payment of $2,000 each, *at any time, upon receiving a bonus of three months interest on the sum to be paid them.*"

The second mortgage was made by Clara Ann Keep, wife of Joseph Keep, and the said Joseph Keep, who are called "mortgagors," in favour also of defendants, and bears date on October 26th, 1886, and covers the whole of the said lot No. 11, and is to secure $2,000, "at the expiration of five years from the date, with interest at 7 per cent. per annum, payable half-yearly, during said term both before and after maturity," &c. And it contains the following proviso: "Provided always, that the said mortgagors have the privilege of paying off the whole principal sum hereby secured *at any time*, upon paying a bonus of three months interest."

The plaintiff claims to have an account taken of what is due and payable for the redemption of the said mortgage of October 21st, 1886, on the terms of the agreement referred to; and also to an account of what is due and payable for the redemption on the other mortgage of October 26th, 1886.

It will be observed that the two sums together secured by these mortgages amount to $12,500, but it appears that these sums were to be advanced from time to time, according to the progress of the buildings which were being erected on the lands mentioned, and it is alleged, and not denied, that the whole of the two sums have not been advanced. The plaintiff therefore contends that he is entitled to have each separate piece of land on which the respective stores and dwellings are erected, released from the operations of the first mortgage on payment of a pro rata amount, to be divided rateably over the five parcels,

so as to put $2,500 on the easterly, and $2,000 each on the other four stores, but if the whole $10,500 is not advanced there should be a corresponding abatement on the sums or figures put upon the several parcels.

The case was not apparently launched at the trial exactly in this way; at all events there seems to have been a misunderstanding by the plaintiff's counsel as to the questions propounded by the learned Judge at the trial, but on the rehearing it appears clear enough that the plaintiff is entitled to the relief he claims for, if the objections raised by defendants do not debar him.

It was contended before the Divisional Court, and it was raised on the pleadings, that the agreement and proviso contained in the several mortgages, do not enure to the benefit of the plaintiff, who is merely the assignee of the equity of redemption; that the agreement and proviso are personal to the mortgagors, and that they do not extend to their assigns. I think this contention is not tenable. *Webber* v. *O'Neil*, 10 Gr. 440, was the case of a mortgage which contained a covenant that the mortgagee would release any portion of the mortgaged land which the mortgagor might sell during the continuance of the mortgage, upon payment of £200 for every acre to be released.

The late Vice-Chancellor Esten held that the benefits of this covenant would pass to an assignee of the equity of redemption. In my judgment this is an authority directly in favour of the plaintiff's contention, and against that of the defendants. The plaintiff is, therefore, entitled to redeem, and for that purpose to have the accounts taken, and as it is admitted that the whole of the sum total of the two mortgages has not been advanced by the defendants, on the reference it will be made to appear how much has been advanced on each, and upon the amount found due to the defendants, the plaintiff is entitled to pay the same off, and to have a release of the property.

The other matters in question are also proper for a reference, and as to the costs between the parties I concur with the Chancellor in his disposition of them.

BOYD, C.—There appears to have been some misunderstanding at the trial by the plaintiff's counsel as to the questions propounded by the Judge. At all events the matter on the rehearing was argued differently, and it does not, after this argument, seem to me proper to refuse all relief to the plaintiff. His action is framed for the purpose of taking advantage of the last clause in the mortgage of October 21st, 1886, between Keep and the defendants, by which it was agreed that the company were to release the easterly store mortgaged on payment of $2,500, and any one or more of the other four stores on payment of $2,000 each, at any time upon receiving a bonus of three months interest on the sum so paid to them. The mortgage is expressed to be for the consideration of $10,500, and by the usual clause for payment in five years, the time for redemption in its ordinary sense has not yet come. But it is admitted that the full amount of $10,500 was not advanced, and the mortgage stands as security for a lesser amount only. It is but right, in my judgment, so to interpret the last clause as to reduce correspondingly the amounts fixed therein as the price of release for the different portions.

The original $10,500 is divided virtually over the five parcels, so as to put $2,500 on the easterly, and $2,000 each on the other four stores. But if the whole $10,500 was not advanced, there should be a corresponding abatement on the values or figures put upon the several parcels. This is not to make a new contract, but so to modify or interpret the existing contract as to carry out the real intention of the parties. By previous dealings the easterly parcel has been taken out of the security, and the right claimed exists only as to the four remaining stores. The $2,000 fixed for the release of them is not an arbitrary sum, but one which represents a proper proportion of the whole sum secured, whatever that may be.

It cannot be, in my opinion, correct to say that this last clause is not operative unless the full sum of the mortgage is advanced; but if that is so, the plaintiff is willing to

receive and account for the balance if the company is willing to advance it. But this offer the company is not disposed to accept, and failing to accept it, I think the application of the principle of the decision in *Calvert* v. *Burnham*, 6 A. R. 620, shews that there should be a corresponding reduction "all round" in the mortgage in question.

The case of *Webber* v. *O'Neill*, 10 Gr. 440, is an authority that such a provision as this enures to the benefit of the assignee of the mortgage, and I am content to follow that decision of a very eminent real property Judge.

These points are the only ones necessary to decide to entitle the plaintiff to the relief he asks of paying off the company, and getting a release of the property. The proper amount to be paid, in view of the litigation and transactions referred to in the pleadings, is a matter proper for reference.

At present I think that costs should not be given directly to either party, except by saying that the defendants should have their costs as of a redemption action, and that the extra costs occasioned by their refusal to act upon the last clause for the plaintiff's benefit (as construed by the judgment), should be allowed to the plaintiff, and set off against the claim of the defendants.

A. H. F. L.

[CHANCERY DIVISION.]

RE PUBLIC SCHOOL BOARD OF THE TOWNSHIP OF TUCKERSMITH.

Public schools—By-law to disestablish—Time when same may be submitted—R. S. O. ch. 225, sec. 63.

In a case submitted by the Minister of Education under sec. 237 of the Public Schools Act.

Held, that the plain meaning of sec. 63 of the Public Schools Act, R. S. O., 1887, ch. 225, is that after the township public school board has existed for five years at least, the submission of a by-law for the repeal of the by-law under which that board was established, may be required at any time upon the presentation of a properly signed petition therefor. The by-law establishing the township board may be attacked with a view to its repeal again and again, so long as the agitation against it subsists.

THIS was a special case submitted by the Minister of Education pursuant to the provisions of section 237 of the Public Schools Act, R. S. O. 1887, ch. 225, and was as follows:

1. In the year 1875 the township of Tuckersmith adopted a by-law establishing a township board of school trustees under the provisions of the statute in that behalf then in force.

2. In the month of June, 1887, upon the petition of the requisite number of ratepayers, as provided by section 63 of the Public Schools Act, the township council submitted a by-law for the repeal of the by-law establishing the township board to the vote of the ratepayers of the township, but such by-law was not carried by the majority of votes required by the said section, and was therefore lost.

3. In the month of July, 1888, upon the petition of the requisite number of ratepayers provided for by the said section the council has provisionally passed and published a by-law for the repeal of the by-law under which the township board was established, and has directed a vote to be taken on the said by-law on the 3rd day of August next.

4. The council has been notified on behalf of the ratepayers opposed to the by-law that the council has no power to submit any further by-law for the repeal of the by-law under which the said township board was established, or at any rate has no power to do so until after the lapse of five years from the taking of the vote in June, 1887, and an injunction has been applied for to restrain the council from submitting the by-law, on the grounds that the by-law to repeal having been voted on in the year 1887 cannot again be legally submitted, or at any rate cannot again be legally submitted until the lapse of five years from the date of the last vote.

5. Under these circumstances the members of the council are unanimous in wishing for a judicial decision on these points, as provided for by section 237 of the School Act.

The questions for the opinion and decision of the Court are:

1. Can a by-law to repeal a by-law under which a township board of school trustees exists be legally submitted to the vote of the ratepayers after a by-law for such repeal has been once submitted and rejected?

2. Whether, assuming that a by-law can be again legally submitted, it can be legally submitted before the lapse of five years from the date of the last vote, and, if so, what periods must elapse between the taking of each such vote?

The Minister of Education respectfully asks for the opinion and decision of a Judge of the High Court, or (if it shall appear expedient to the said Judge to so direct) for the opinion of the Chancery Division of the said High Court upon the questions submitted.

E. F. B. JOHNSTON,
For Minister of Education.

Dated July 27th, A.D. 1888.

The case was argued before Boyd, C., and Proudfoot and Ferguson, JJ., on December 13th, 1888, having originally been brought up before MacMahon, J., in Vacation, who thought it a proper case for the Divisional Court.

Moss, Q. C., for certain ratepayers of the township of Tuckersmith, who opposed the submission of the by-law in question. The question involved arises on the facts stated in the case. In R. S. O. 1887, ch. 225, sec. 63, there is the provision that no by-law is to be submitted till after the lapse of five years from the establishment of the school board. [BOYD, C.—But all parties are not before the Court. Will the Court advise in the case, seeing that all parties will not be bound. Will our decision bind any one? The case is signed merely by the acting Minister of Education. The parties themselves do not sign it.] The section authorizes the Minister of Education to submit cases to the Court for their opinion and decisio n. [FERGUSON, J.—He himself might, after obtaining the opinion of the Court, refuse to be bound by it. BOYD, C.—Is there any objection to the parties litigating being made parties to this case? It may be proper to advise the Minister, but it should come up in

formal shape and in such a way as to bind the parties. The Court is not in the habit of giving an opinion which it cannot enforce. There is an important constitutional question involved, how far are the Courts bound to advise a Minister of the Crown even under a provincial statute?] The Court advises trustees, but the trustees are not bound further than this, that they run a risk by acting contrary to the decision of the Court. [BOYD, C.—Well, you can proceed now, and the difficulty can be got over if you undertake that the litigating parties will be bound.] On the literal reading of the statute in case the necessary number of ratepayers petition, a by-law shall be submitted, and if carried, the disestablishment takes place. If the by-law is not carried we contend the same thing cannot be done again—at all events not for another five years. The prior state of the law and legislation shews it was not intended that the ratepayers shall be perpetually vexed by such by-laws being submitted: 37 Vic. ch. 28, sec. 48; 39 Vic. ch. 7, sec. 19; 40 Vic. ch. 16, sec. 6. If the board is to be liable at any moment after the five years to be disestablished, it would entirely fetter them in making their financial and other arrangements. The intention of the Legislature was obviously only to introduce a modification in the law as it was before, by giving a power to disestablish after a lapse of five years. As a matter of parliamentary usage, no question voted on and defeated in one session can be submitted in the same session again: *Erskine May's* Law and Usage of Parliament, 9th ed., p. 328.

W. H. Blake, for the township council of Tuckersmith. We think the council have the right to submit new by-laws as often as petitioned for: *Maxwell's* Interpretation of Statutes, 2nd ed., p. 4; *Bishop* on the Written Laws, sec. 81. It is necessary to import words into the statute to arrive at the result contended for by Mr. Moss. In R. S. O. 1887, ch. 225, sec. 54, it is requisite to have a two-third vote to constitute a school board, but section 63 allows a rejection simply by a majority of the votes and of the wards. Other statutes under which it has been held there must

be a limit of time before re-submission of by-laws, have an express provision to that effect. Sec. 8, sub-sec. 1 of the Interpretation Act, R. S. O. 1887, ch. 1, forbids the construction contended for here.

December 14th, 1888. BOYD, C.—Following the principle for the construction of statutes, to which I called attention in *Dalziel* v. *Mallory*, (a) I think the plain meaning of the section now under consideration is, that after the township board has existed for five years at least, there may be at any time the submission of a by-law for the repeal of the by-law under which that board was established, upon the presentation of a properly signed petition therefor. That appears to be what is said in section 63 of the Public School Act. The argument that the effect of an adverse vote upon a by-law to repeal, is equivalent to a re-establishment of the township board for another term of five years (during which there can be no further attempt to repeal it,) may be a very desirable and salutary result, but it is not involved in the language used. The township board when first established, is so at the annual meeting of the school sections of that township upon a two-third vote of such sections: (Sec. 54.)

This annual meeting consists of the ratepayers of such section, (sec. 15) held on the last Wednesday of December, in which the majority vote governs. (Sec. 18.) If then there is such majority vote in two-thirds in number of all the school sections of the township, that determines the question as to the establishment of the township board at the instance of all the ratepayers in the annual meeting assembled. But the vote taken upon a by-law to repeal the establishment of the township board, may be had at any time of the year, and not merely at the annual meeting of ratepayers: it is initiated not at (or with reference to) such annual meeting, but upon the petition of twenty ratepayers in more than one-half of the school wards of

(a) Judgment delivered in Divisional Court December 14th, 1888, not yet reported.

the township; it is negatived not by a two-thirds vote of the sections (or wards), but by a majority of the votes of the ratepayers of the township. Such a vote and such a manner of voting is by no means equivalent to the vote and to the manner of voting, which is requisite to create or constitute a township board.

Such a vote would not suffice to establish a township board in the first instance; why is it to be deemed sufficient to re-establish it, or to give it a further term of five years from any attempt to repeal the by-law under which it was established? The result is, that after a township board has existed five years, the by-law may be attacked with a view to its repeal again and again, so long as the agitation against it subsists. If the attack is successful, the statute provides that the repeal shall not go into effect till the 1st January next following; and this period of suspense will enable the municipal authorities to provide ways and means in view of the approaching change of system, so that the confusion suggested in the argument may be readily provided against. Responsive to the first question, the decision will be in the affirmative. Responsive to the second, the decision will be, that after the first five years from the original establishment of a township board, by-laws for its repeal may be submitted and re-submitted without any limitation of time, so long as the township council is petitioned for that purpose by the proper number of ratepayers according to sec. 63 of the Public School Act.

PROUDFOOT and FERGUSON, JJ., concurred.

A. H. F. L.

NOTE.—After giving judgment the Chancellor said that the form of the statute under which the case was submitted providing for a *decision* as well as *advice*, remedied the difficulty which had been stated during the argument.—REP.

[CHANCERY DIVISION.]

WEBBER V. MCLEOD.

Malicious prosecution—Unlawful and malicious injury—Findings of jury—Reasonable and probable cause—R. S. C. ch. 168, sec. 59.

Plaintiff who was in occupation of a house on a farm of the defendant's cut off the ends of some logs used in the construction of a small building, which logs were so old and rotten that they had fallen out of their places in the building and the ends rested on the ground. Defendant had plaintiff arrested and imprisoned on a charge of "unlawful and malicious injury to his property," but the magistrate dismissed the case.

In an action for malicious prosecution the jury found in answer to questions submitted by the Judge that defendant had not reasonable ground for believing that plaintiff had unlawfully and maliciously injured the property and did not take care to inform himself as to the facts, and was actuated by other motives than the vindication of the law in laying the information, and assessed the damages at $100.

On motion to set aside the verdict the application was dismissed.

Per BOYD, C. It was open to the jury to find that the wood was of no value, and that the injury was of too trifling a character to justify the defendant in setting the criminal law in motion, and that was evidently the meaning of their answers to the questions. If there was no actual positive damage proved, the plaintiff was not chargable under R. S. C. ch. 168 sec. 59.

Held, also that it was proper to leave the whole case to the jury, and the questions were sufficient for that purpose, and the jury having found a want of reasonable care on the part of defendant to inform himself of the true state of the case was a sufficient justification for holding that there was want of reasonable and probable cause.

Per FERGUSON, J.—The jury virtually found that the property said to be injured was of no appreciable value, and that being the case such facts and circumstances did not exist as were necessary to constitute reasonable and probable cause for the prosecution.

THIS was a motion to set aside a verdict in an action for malicious prosecution, brought by William H. Webber against Phillip McLeod.

The action was tried at the Woodstock Assizes on April 20th, 1888, before MacMahon, J., and a jury.

G. T. Blackstock, for the plaintiff.

F. R. Ball, Q. C., and *R. N. Ball*, for the defendant.

It appeared that the plaintiff was in occupation of a house on a farm of the defendants: that on the premises

was a small log barn which had been built some five years before by the plaintiff, who then owned the farm, out of some logs which had been lying on the ground for four years: that this log barn had become so decayed that some of the logs had fallen out and were lying with their ends on the ground while the other ends were up in the building, and the plaintiff had cut off the ends of some of them for firewood.

The defendant had the plaintiff arrested on a charge of "unlawful and malicious injury to his property" and he was taken to Woodstock and kept in gaol all night, and brought before the Police Magistrate next morning, when the case was adjourned, bail being given when pressed for by defendant's counsel: the case came up again and the evidence was heard and judgment reserved, bail again being demanded and given in the same way, and the case again came up for judgment, when it was dismissed.

The evidence is further referred to in the judgment of the learned Chancellor.

At the trial four questions were submitted by the learned Judge to the jury, which questions and the answers thereto are set out in the judgment of Ferguson, J.

The jury assessed the damages at one hundred dollars and on this a verdict was entered for the plaintiff for that amount.

Against this verdict the defendant moved and asked for a nonsuit or judgment in favour of the defendant, or for a new trial, and the motion was argued in the Divisional Court on September 7th, 1888, before Boyd, C., and Proudfoot and Ferguson, JJ.

Moss, Q. C., for the motion. The verdict is not supported by the findings or answers to the questions. The Judge should have withdrawn the case from the jury, and entered a judgment in favor of the defendant. There was no evidence of malice or want of reasonable and probable cause. The plaintiff admitted he committed the offence charged, and even if malice had been shewn, the plaintiff being

guilty, the judgment should be for the defendant. It lay on the plaintiff to shew that there was a want of reasonable and probable cause for the prosecution, and that the proceedings were instituted in a malicious spirit, and not having done so, his action must fail: *Pollock* on Torts, 264; *Abrath* v. *The North Eastern R. W. Co.*, 11 Q. B. D. 440; aff. 11 App. Cas. 247. A dismissal by a magistrate does not prove innocence, as the record of such a judgment does not prove the circumstances under which it was given: *Pritchard* v. *Hitchcock*, 6 M. & G. 165; *Taylor* on Evidence (Bl. ed.) 140, 1422. The issue of the warrant was the magistrate's act. I refer also to *Abrath* v. *The North Eastern R. W. Co.*, *supra* at p. 455; *Webster* v. *Friedeberg*, 17 Q. B. D. 736; *Heintzman* v. *Graham*, 15 O. R. 137.

W. Nesbitt, contra. There was no crime committed, and there was no reasonable and probable cause for the arrest. The evidence does not shew that the offence committed was done unlawfully and maliciously. The defendant is responsible for the issue of a warrant instead of a summons. Even if the magistrate issued the warrant, the defendant, through his counsel, insisted on bail being furnished when the remands were granted: such action was malicious. I refer to *Regina* v. *Pembleton*, 12 Cox C. C. 607; *McPherson* v. *Daniels*, 10 B. & C. 263; *Regina* v. *Welch*, 13 C. C. C. 121; *Regina* v. *Faulkner*, *ib.* 550; *Regina* v. *Latimer*, 16 C. C. C. 70; *Fitzjohn* v. *Makinder*, 30 L. J. C. P. 257. 264.

December 14, 1888. BOYD, C.—There is evidence to shew that the logs cut by the plaintiff were in a small building built some five years before of logs which had been lying cut on the ground for about four years, and that they had rotted and fallen out of the side of the building: they were then so broken at the ends that they were of no use to put in again and the plaintiff not considering them worth anything sawed them off near the corner of the building and used the material for firewood. One end of the logs had fallen out upon the ground and

the other end was up in the building when the plaintiff cut them off, as complained of. This the plaintiff swears to, and his brother-in-law Ross corroborates him by saying that the logs were so rotten that they would not stay up; they would not stay on top of one another; that they were of no value on account of being rotten. He says that before Webber came to the place he noticed that the building was going to fall: "it was all a kind of bulged out"

One of the defendant's witnesses says that the wood cut was good enough for firewood, but he admits that the logs were partly rotten, and he does not know in what position the logs were before the plaintiff cut off the parts he used as firewood.

It was open for the jury to find on this evidence that the wood was of no value and that the injury was of too trifling a character to justify the defendant in setting the criminal law in motion. That is evidently the meaning of their answers to the second and third questions submitted for their consideration. They say in effect McLeod had no reasonable ground for believing that Webber had unlawfully and maliciously injured his property: and that he did not take reasonable care to inform himself as to the true state of facts before prosecuting. Their answers express their belief that there was "much ado about nothing" on the defendant's part.

It is more than likely that the Judge would have arrived at a different conclusion upon the facts, but having submitted certain questions in a charge most favourable to the defendant, it cannot be said that the findings are not supportable upon the whole evidence. The case in the books nearest to this which I have been able to find is *Turner* v. *Ambler*, 10 Q. B. 252, but there the L. C. J. (Denman), reserved the whole question of probable cause for himself, and left it to the jury on the question of malice merely. The jury on this found for the plaintiff, but the Judge then held in point of law that no want of reasonable and probable cause appeared in the case proved, and he directed a verdict for the defendant which the Court upheld.

In that case the plaintiff was tenant of the defendant, and had during the tenancy changed the condition of the premises, making improvements, in course of which he removed and sold certain fixtures which it was represented in his evidence were of little use or value. The charge was that he had feloniously stolen these articles consisting of a cistern, lead pipe, a patent range, &c., and it was urged that the charge was made with a view to get rid of him as a tenant and not because he was thought guilty of felony. It was plain that the articles were of value, and the Judge thought their removal amounted to a sufficient and indeed strong *primâ facie* case of felony under a statute relating to depredations by tenants, and that it was for the plaintiff to prove that the apparent probable cause was such as the defendant ought not to have acted upon, but of this there was no evidence.

In strictness it was said the case should not have gone to the jury on the question of malice, because as expressed by Patteson, J., the most express malice would not be sufficient (*i. e.* to make the defendant liable) if there were probable cause (p. 257). See *Mitchell* v. *Jenkins*, 5 B. & Ad. at p. 594.

However, in the action in hand, the learned Judge did not adopt what the latest author on the subject of Malicious Prosecution calls "the old fashioned way" (*Stephen's* Malicious Prosecution, p. 83) but left to the jury questions framed upon the model of those propounded by Cave, J., in *Abrath* v. *North Eastern R. W. Co.*, 11 Q. B. D. 79, and commended by the House of Lords as a proper way to commit the whole matter to the jury: 11 App. Cas. 247.

It is not needful now to consider, whether the effect of *Abrath's Case* is to abolish the distinction between malice and want of reasonable and probable cause in this class of actions, as is suggested by Mr. Stephens in his book above cited, p. 35, though I am inclined to think he puts the matter too broadly, because here the jury have found that the prosecutor was actuated by some other motive than

the vindication of the law. To this conclusion the jury might well come, as the result of their other answers, because as put by Bowen, L. J., *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. at p. 694, "If any jury should find that the act of the defendant * * was wholly unreasonable, that would be a matter to be considered by them in coming to the conclusion whether there was malice or not on the part of the defendant in acting as he did." And to the same effect by Brett, M. R., in the same case: "There was evidence of malice to be considered by the jury, even if it consisted only in the want of reasonable and probable cause" (p. 687.)

Here the jury having found a want of reasonable care on the part of the prosecutor to inform himself of the true state of the case, the learned Judge appears to have adopted that as a sufficient justification to hold that there was a want of reasonable and probable cause, and this accords with the way in which the point is put by Brett, M. R., in 11 Q. B. D. 451.

It was argued by Mr. Moss that the verdict could not stand because the plaintiff proved himself to be not innocent of the charge. But his evidence shews, that while he did the act complained of, he did not intend to injure the property, and he further shews that no tangible or appreciable damage resulted therefrom. That was for the jury to determine upon the conflicting evidence, and if there was no actual positive damage proved, the plaintiff was not chargeable under R. S. C. ch. 168, sec. 59: *Buller* v. *Turley*, 2 C. & P. 585, 591.

Upon the best consideration I can give to the case it does not appear to me that the verdict should be disturbed, and the appeal should be dismissed, with costs.

FERGUSON, J.—Apart from the question as to whether or not the plaintiff had liberty or a license to occupy the place temporarily, which at present does not appear to me to be material, there does not seem to be any disputed fact except the one as to whether the logs that were cut and

used by the plaintiff were of any appreciable value, either in themselves or with reference to the structure or building of which they had formed a part, and the learned Judge declined, I do not say improperly or erroneously, to leave this question to the jury directly as a question to be answered by them.

The questions that were left to the jury to be answered by them were as follows:

1. Did McLeod, when he represented to the Police Magistrate that Webber had unlawfully and maliciously injured the property, really believe that such was the case? And they answered by saying: "We do not know."

2. Had McLeod reasonable ground for believing as in the first question? They answer: "No."

3. Did McLeod take reasonable care to inform himself as to the true state of facts? The jury answer: "No."

4. Was McLeod actuated by any other motive than a vindication of the law in laying the information before the Magistrate? The answer is: "Yes."

The evidence bearing upon the question as to whether or not the logs that were cut and used by the plaintiff were of any value, either in themselves, or with reference to the rest of the structure or building of which they, in a way, formed a part (I say "in a way," because there is evidence shewing that these logs had "rotted off" at one end, and fallen partly out of the wall of the building,) is not all one way: the witnesses seeming not to have the same opinion on the subject. It may, I think, be said that this was a question that was a peculiarly fit one to be considered by a jury of farmers.

It can scarcely be contended, and I do not understand that it was contended, that a malicious injury can be done to a thing called "property," when that thing is of no value whatever, or of such trifling value that it would be commonly said to be and considered of no value.

The jury found that the present defendant had not reasonable ground for believing that the plaintiff had unlawfully and maliciously injured his property: and looking

at the admitted and undisputed facts that appear, I am unable to perceive how the jury arrived at this finding without considering the question as to the value or not of the property said to have been so injured by the plaintiff, and virtually finding that it was of no appreciable value, for if it was of value it was property belonging to the defendant which was admittedly cut and taken by the plaintiff for his own convenience to its destruction, and the partial destruction of the building of which it in a way formed a portion, and this without any excuse whatever on the part of the plaintiff. And I am of the opinion that in this finding is involved a finding that the so called property was of no value, or appreciable value.

Then assuming this to be so, and considering the finding so involved as a direct finding, is it contrary to the evidence, or so contrary to, or unsupported by evidence that it should be disturbed, there being no fault found, or to be found, so far as I can see, with the charge of the learned Judge. I am of the opinion that such a finding would rest upon and be supported by substantial evidence, and would not be disturbed.

"Reasonable and probable cause" has been defined, and I think well defined, as being *the existence of such facts and circumstances as would excite in the mind of a reasonable man a belief of guilt*, and taking the finding that the so called property was not of appreciable value to be (as it should now be taken, I think) one of the facts, and a most important one, it is plain I think, that such facts and circumstances did not exist as are necessary to constitute reasonable and probable cause for the prosecution of the plaintiff by the defendant.

Then the act of the defendant now complained of by the plaintiff, was a wrongful act injurious to the plaintiff done by the defendant without lawful excuse, there being no probable cause to repel the inference of malice—an inference that the jury might draw, were not bound to draw, but which they did draw—and, besides, the jury

have found that the defendant was actuated by motives other than the vindication of the law.

No question was raised as to the amount of the damages assessed, and I do not see that the verdict should be disturbed.

Motion refused.

G. A. B.

[CHANCERY DIVISION.]

JONES V. MCGRATH (2).

Husband and wife—Deed direct to wife—Consideration—Vendor and purchaser—49 Vic. ch. 20, sec. 10, (O.)—Action for recovery of land—Equitable title—Evidence.

The defendant being the owner of the equity of redemption in certain lands, executed a deed on October 18th, 1884, purporting to convey them directly to his wife for a consideration of $100, the receipt of which was acknowledged in the margin and in the body of the deed. The plaintiff, who claimed by conveyance from the wife brought this action to recover possession from the defendant, who contended that the deed to his wife had been made without consideration, and was, therefore void. The plaintiff purchased *bonâ fide* without notice of there having been no consideration.

Held, that under 49 Vic. ch. 20, sec. 10, (O.) the acknowledgement of the consideration in the deed authorized the plaintiff to deal on the footing of its having been paid upon execution of it, and the defendant could not now dispute the consideration

49 Vic. ch. 20, sec. 10, (O.) is not to be restricted to claims upon alleged vendors' liens and the like.

Semble, that even if the deed in question were to be considered voluntary and without consideration, the authorities, though not at all in unison, were sufficient to support a judgment in the plaintiff's favour, inasmuch as he had at all events a good title in equity, which was now sufficient.

THIS was a motion by way of appeal from the finding and judgment of Street, J., at the trial of this action before him at the Toronto Spring Assizes, 1888, which finding and judgment were in favour of the plaintiff.

The facts of the case are set out in the judgment of Ferguson, J.

This motion came on for argument on June 20th, 1888.

McGregor, for the defendant. When there is consideration the Court will relieve from the rigour of the common law. In the case before Boyd, C., (15 O. R. 189,) the plaintiff's counsel referred to several American cases, but in all of them there was consideration for the deed, and therefore the Court enforced it. *White* v. *Wager*, 25 N. Y. 328, *Winans* v. *Peebles*, 32 N. Y. 423, are cases shewing that the true principle is that the matter turns on consideration. Where there is no consideration, the Court will not enforce the deed for the volunteer. The wife being a volunteer, will not get the Court's assistance which she requires to declare her husband a trustee: *Re Breton's Estate*, 17 Ch. D. 416, and the cases there cited; *Ogden* v. *McArthur*, 36 U. C. R. 246; *West* v. *West*, 9 L. R. Ir. Ch. 121; *Cross* v. *Cross*, 3 L. R. Ir. Ch. 342; *Glass* v. *Burt*, 8 O. R. 391; *Ellison* v. *Ellison, White and Tudor's* Leading Cases, 16th ed., at p. 308 and 313; *Edwards* v. *Jones*, 1 M. & Cr. 226; *Warriner* v. *Rogers*, L. R. 16 Eq. 340.

E. Taylour English, for the plaintiff. A conveyance of land from a husband to wife direct, without the intervention of a trustee, is effectual, if not to pass the legal estate, to constitute the husband a trustee for his wife: *Davison* v. *Sage*, 20 Gr. 115; *Sanders* v. *Malsburg*, 1 O. R. 178; *Whitehead* v. *Whitehead*, 14 O. R. 621; *Jones* v. *Magrath*, 15 O. R. 189; *Fox* v. *Hawks*, 13 Ch. D. 822, and cases there cited; *Lush* on Husband and Wife, 1st ed., p. 186; *Grant* v. *Grant*, 34 Beav. 623. The reason why such a conveyance did not pass the legal estate at law, was on account of the wife's inability to take. In this case, however, this objection was cured by the Married Woman's Act of 1859, R. S. O. ch. 132, sec. 4, the parties having been married prior thereto. Further, the evidence in this case shews the husband's title to have been purely equitable, and it would therefore pass: *Adams* v. *Loomis*, 24 Gr. 242; *Pride* v. *Bubb*, L. R. 7 Ch. 64. The deed in question purports to be made for a valuable consideration, viz., $100, which sum the evidence shews, was in fact paid by the wife. In any event there being a receipt in the body of the

deed for the $100, it must be treated in so far as the plaintiff is concerned (who is a sub-purchaser for value, *bona fide* and without notice) as if actually paid: R. S. O. ch. 100, sec. 6. An imperfect conveyance for value will be aided in equity, and is binding even between husband and wife; *Snell's* Equity Jurisp. 8th ed., p. 64, and cases cited; *Lady Arundell* v. *Phipps*, 10 Ves. pp. 146, 149. The defendant having now the power to convey, is estopped from disputing this deed which contained covenants for title and further assurance: R. S. O. ch. 100, sec. 5; *Doe d. Irvine* v. *Webster*, 2 U. C. R. 224; *Trust and Loan Co.* v. *Ruttan*, 1 S. C. R. 564; *Everest and Strode's* Law of Estoppel, p. 225.

December 15th, 1888. FERGUSON, J.—The action is for the possession of land in this city of Toronto. At the first trial the learned Chief Justice of the Common Pleas Division, held that nothing passed by the conveyance from the defendant McGrath to his wife, which was an essential link in the plaintiff's title, and on this ground dismissed the action.

The case came before this Division upon a motion to set aside the judgment and for a new trial, which was granted. The judgment is reported in 15 O. R. 189.

The second trial took place before my brother Street, who found that the plaintiff is entitled to the possession of the lands, and directed judgment to be entered in his favour for the possession with full costs of the action from the beginning, and the entry of judgment was stayed till this sittings.

The present motion is against this finding and judgment, and the case has been argued at great length.

The defendant McGrath and his wife were married in the year 1857. At that time McGrath was the owner of the whole of the lot or parcel of land, the one half of which is in question here. There was upon that marriage no marriage contract of settlement. This is admitted before us.

On the 18th day of October, 1884, McGrath by deed conveyed the undivided half interest in this land to Susan McGrath his wife. The conveyance was made directly to her without the intervention of a trustee. The conveyance purports to be for the consideration of one hundred dollars, the receipt of which is duly acknowledged; and there is, besides, a receipt for the same sum in the margin of the deed, signed by the defendant McGrath. The land about which the dispute is, is the one-half of a parcel having a frontage of fifty-nine feet and ten inches. For convenience this half has been called thirty feet of land, that is land having a frontage of thirty feet.

On the 29th day of March, 1876, the defendant McGrath, for the consideration of natural love and affection and of one dollar, conveyed the other undivided one-half interest in this fifty-nine feet ten inches frontage to his son Thomas McGrath.

On November 2nd, 1883, the defendant mortgaged the lands to Edwin Crickmore for securing the payment of a small sum, $75. This mortgage had not fallen due, and was not paid at the time of the conveyance from McGrath to his wife on the 18th of October, 1884.

On November 4th, 1884, Susan McGrath and her husband, the defendant, executed a mortgage upon the lands, the fifty-nine feet ten inches, in favor of the Union Loan and Savings Company, to secure the sum of $600, and a part of this money was applied in paying off the Crickmore mortgage, as was said. To this mortgage of the 4th of November, 1884, is attached a statutory declaration of the defendant James McGrath, in which it is stated amongst other things, that he had by the conveyance of October 18th, 1884, conveyed an undivided interest in the lands to his wife Susan McGrath; that he and his wife were in actual peaceable possession as owners, &c. It appears that, although the mortgage was put in as evidence at the trial, this declaration attached to it was not put in, or rather not specially mentioned as having been put in. Mr. English applied, when the objection was taken

as to this, to have it admitted and put in before the Divisional Court as evidence, and seeing that the mortgage to which it is attached, was put in by the defendant, and that it cannot occasion surprise, I am individually disposed to admitted it as a piece of evidence, although perhaps nothing will turn upon it.

After the conveyance of the undivided half of the lands to the son Thomas McGrath, Susan McGrath commenced a suit for the partition of the lands between her and Thomas, and an order for such partition was made the 23rd day of December, 1886. Soon thereafter, and on the 5th day of January, 1887, a deed of partition, in which is recited the proceedings for partition, was executed by Susan McGrath and Thomas McGrath, whereby the lands (the 29 feet 10 inches) now in question were allotted and conveyed to Susan McGrath, by Thomas McGrath, and on March 28th, 1887, Susan McGrath for the consideration of $3,000, all of which was paid in cash conveyed this land to the plaintiff, J. Gordon Jones.

Under this state of facts the plaintiff contends that he has a good title, and should have as against the defendant the possession of the lands. The contention of the defendant is that the conveyance of the 18th of October, 1884, from him to his wife was and is void, and that nothing passed by it.

It was stated and conceded on the argument before us, that the single question is, whether or not this conveyance from the husband to the wife had any effect, Mr. McGregor conceding that if any thing passed by it the plaintiff is entitled to succeed. It was further conceded upon the argument that if there was a consideration for the conveyance it would be good, as in that case the Court would declare a trust in favor of the grantee who had paid the consideration. On this subject we were referred to a large number of English cases, ancient and modern, many of which I have perused, and I find at least difficulty in reconciling them; some of them I think to be contradictory to one another.

If the deed from the husband to his wife is to be considered as a deed of conveyance made for good consideration, the argument as to what would have been the effect if there had been no consideration need not be weighed.

In the case *Whitehead* v. *Whitehead*, 14 O. R. 621, Mr. Justice Proudfoot considered a very considerable number of the authorities on the subject. In that case it was admitted that the deed was voluntary though it purported to be for the consideration of "natural love, and affection, and $5," and the learned Judge arrived at the conclusion that the evident intention of the donor, the husband, might be given effect to so far at least as the beneficial interest in the property was concerned.

When the present case was formerly before this Division, the same learned Judge said: "Were I to act upon some cases that have come before individual members of the Court upon voluntary deeds, I would say that the plaintiff is entitled to recover; and if that be the case in regard to voluntary deeds, much more would it be the case upon a deed for value:" 15 O. R. at p. 192. The Chancellor said, "Nearly all the cases were collected by my brother Proudfoot in *Whitehead* v. *Whitehead*, 14 O. R. 621, and I agree with his view of the law as to deeds such as this. This reading of the law as between husband and wife, (leaving creditors out of the question,) is in harmony with the view of very able jurists in the United States as well as in England;" referring to *Shepherd* v. *Shepherd*, 7 Johns. Ch. 57; *Putnan* v. *Bicknell*, 18 Wisc. 331, and *Wellingsford* v. *Allen*, 10 Pet. S. C. 583.

This deed was executed before the passing of 49 Vic. ch. 20, sec. 6 (O.), and I suppose the provisions of that section are not to be made available in support of the conveyance. There is, however, another section of the same Act that does not appear to me to stand in the same position. The conveyance to the plaintiff was made after the passing of the Act, and the 10th section is, "a receipt for consideration money, or securities contained in the body of the conveyance, shall be a sufficient discharge for the same to

the person paying or delivering the same without any further receipt for the same being indorsed on the conveyance, and shall, in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received, was not in fact paid or given wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof." The plaintiff is such subsequent purchaser, not having the notice mentioned in this section; and it appears to me that the latter part of this section says that the acknowledgment in the deed was sufficient evidence to him that the consideration so acknowledged, was in fact paid, that is to say, he was by law authorized to deal on the footing of that consideration having been paid upon the execution of the conveyance. I am not aware that this latter part of this section has been the subject of any decision. It might be suggested that the provision is confined to claims that might be made upon alleged vendors' liens for unpaid purchase money and the like; but I do not see any good reason for so confining the operation of this part of the section.

What is by positive enactment declared to be sufficient evidence of a fact at the important time that a purchaser is making his transaction, and paying away his money should not surely be held to be insufficient evidence in his favour of the same fact at any subsequent time when it is out of his power to regain his former position. On this subject counsel for the defendant, after the argument, sent in authorities going to prove the proposition that there can be no estoppel upon a void deed, but that is not I think the point. The evidence referred to was certainly evidence made by the defendant, and the enactment declares it sufficient evidence for the subsequent purchaser without notice to act upon and pay away his money; and I think it cannot now be held that the evidence is insufficient; or in other words, it must be held that so far as the plaintiff is concerned, this consideration was paid, no matter what the actual fact was, and I think this is a matter arising wholly upon the statute, and apart from the ordin-

ary law of estoppel referred to by defendant's counsel in submitting his authorities on the subject. If then the conveyance must be taken as a deed for consideration as far as the plaintiff is concerned, this upon the concessions of the defendant's counsel (which I think were very properly made) determines the case in favor of the plaintiff.

But even if the deed were taken, as against the plaintiff to be voluntary, and without consideration, the authorities though not at all in unison, are I think, sufficient to support a judgment in the plaintiff's favor, and I further think the circumstances such that the plaintiff should recover unless the law is clearly against him.

All that the plaintiff is now obliged to show is a good title in equity, and I am of the opinion that he has shewn this.

It may be further remarked that in any view of the matter in contention the plaintiff is entitled to an undivided interest in the land, being the one-half interest. This, however, is technically of no importance here.

I am of the opinion that the judgment for the plaintiff should be affirmed, and the motion dismissed, with costs.

ROBERTSON, J.—I have had the advantage of reading my brother Ferguson's judgment in this case, and I concur in the same.

A. F. H. L.

[QUEEN'S BENCH DIVISION.]

HANDS v. LAW SOCIETY OF UPPER CANADA.

Barrister and solicitor—Professional misconduct—Exercise of disciplinary jurisdiction by Law Society—R. S. O. ch. 145, secs. 36, 44—Constitution of discipline committee—Evidence under oath—Action at law by complainant—Question whether wrongful acts done in professional character—Restitution—Waiver

The plaintiff, a barrister and solicitor, was charged before the Benchers of the Law Society with professional misconduct in his dealings with certain shares of bank stock entrusted to him by a young woman. The charges were referred to the standing committee of the Benchers on discipline, who inquired and reported to the Convocation of Benchers. Convocation adopted the report, and resolved that the plaintiff "is unworthy to practise as a solicitor, and that he be disbarred as a barrister." This action was brought to have the resolution declared void, and to restrain the defendants from taking further proceedings under it, the plaintiff objecting to the proceedings of the committee and of Convocation as illegal, defective, and improper.

Held, per BOYD, C., at the trial, that the discipline committee was properly constituted, a quorum being present, without notice of its meetings being given to the treasurer of the Law Society, who was an *ex-officio* member of all standing committees, but who was absent from Canada at the time; and that no valid objection arose from the fact that the other members of the committee, though notified of the meetings, were not advised of the particular business they were called to transact; and at all events any cause of complaint as to procedure was removed by the fair and just conduct of the final proceedings before Convocation at large, where the plaintiff had ample opportunity to explain and defend himself.

2. It is not essential to the jurisdiction of domestic tribunals that they should have the powers of ordinary Courts of justice in the trial of litigated matters. R. S. O. ch. 145, sec. 36, is not imperative; it confers the power to examine witnesses under oath, which may or may not be employed according to the sound discretion of the particular tribunal. Where there is or is likely to be any conflict in the evidence, the witnesses should be sworn. But in this case the salient facts were not controverted by the plaintiff; his counsel having stated in his presence that he did not know that he could differ from the conclusions which the committee had come to; and the evidence derived from admissions of a party unsworn is sufficient to found even a decree of the Court. The objection that the Discipline Committee had taken evidence without oath, therefore, failed.

3. The intervention of the Law Society upon the solicitation of the person aggrieved was quite warrantable, notwithstanding that such person had brought an action for pecuniary redress.

4. The jurisdiction of the Law Society should not be less than that of the Court; and the latter is exercised not merely in cases arising out of purely professional employment, but whenever the transaction is so connected with the professional character of the solicitor as to afford a presumption that that character formed a ground and reason of the employment. It is for the Benchers to determine and adjudge what is and what is not becoming conduct in a member of the Society, under R. S. O. ch. 145, sec. 44; and any act of any member that will seriously

compromise the body of the profession in public estimation is within the province of this law. Any misconduct which would prevent a person from being admitted to the Society justifies his removal; and the conduct which unfits a man to be a solicitor should *a fortiori* preclude his being a barrister. The plaintiff, according to his own statements before the Committee, was acting as a solicitor in the transactions complained of; and the objection that he was not engaged in that capacity, or in the capacity of barrister, failed.

5. The fact that the plaintiff prior to the resolution of the Benchers had made restitution to the complainant did not oust the jurisdiction to discipline.

AN action to have a certain resolution of the Benchers of the defendant Society declared void, and to restrain them from taking further proceedings under it.

The trial took place before Boyd, C., at Toronto, on the 5th November, 1888.

C. J. Holman, for the plaintiff.

Reeve, Q. C., and *Walter Read*, for the defendants.

The facts are fully set out in the judgment.

November 19, 1888. BOYD, C.—A professional man (barrister and solicitor) obtains from a young woman, aged 23, a power of attorney to sell $1,500 worth of bank stock, which represented about half of her worldly substance. This power of attorney is used to transfer the stock to the solicitor in trust for her and afterwards to the solicitor absolutely. One-third of this stock is then sold, and the proceeds paid to the credit of the solicitor's wife in another bank, and the remaining two-thirds are held under lien by the bank for advances obtained by the solicitor as such stockholder. The young woman is an orphan, without experience and without advice, and being a guest in the solicitor's house, she relied upon him as a friend and as a member of the legal profession. After some months, getting no satisfaction as to what was being done with her property, she brought an action for its recovery, and was met by defences denying all liability.

Such is the bare and undisputed outline of the transaction between J. B. Hands, the plaintiff, and Miss Craine,

which was brought before the Benchers, and which the plaintiff was unable to explain to their satisfaction. The Convocation thereupon proceeded to exercise their penal powers; have disbarred the plaintiff, and have declared him unworthy to practise as a solicitor.

From this judgment the plaintiff has appealed to this Court. He has given evidence in addition to that before the Law Society; yet upon the merits he has failed to convince me that the Benchers were wrong in their estimate of his conduct. It is needless to go through all the minutiæ of this tale of abused confidence. In strictness it was not open for the plaintiff to adduce further evidence in order to undo the action of the governors of the Society. He appeals from what they did, and his appeal should stand or fall upon the evidence and materials before them. If there is important evidence not brought forward in that original investigation, it is the plaintiff's business to apply for a further hearing before the Benchers.

From the importance and novelty of this case, and the very able and elaborate manner in which it was argued, it is befitting that I should deal somewhat in detail with the various aspects in which it was discussed. Assuming (what was not disputed before me) that there is the right to resort to the Court, as distinguished from the visitatorial intervention of the Judges, I shall advert to the legal aspect of this litigation, having regard to the issues raised in the pleadings and the particulars furnished by the plaintiff.

A narrative of the proceedings before the Law Society answers a great many of the objections raised by the solicitor. The inquiry was initiated by the presentation of a petition drawn and verified on behalf of Miss Craine by her solicitor, Mr. Rae. In that the facts are briefly stated as to the power of attorney to sell the stock—the transfer of the stock to Mr. Hands—the sale of the five shares and the over-draft of $273, in respect of which the bank claimed to hold the other ten shares. Then as a conclusion from these premises, it states: "Your peti-

tioner is advised that the conduct of the said Hands is improper and unprofessional, quite apart from any question of pecuniary obligation, and prays that the same may be inquired into and adjudicated upon by the Society." The petition thus contains the charges, not exactly formulated, it is true, but still plainly and substantially made, with reference to which all subsequent proceedings were shaped.

This petition, brought before Convocation on 21st May, was referred to the Standing Committee on Discipline, consisting of nine members, three of whom form a quorum. On the 1st June four members of that committee reported a *primâ facie* case, and recommended an investigation; whereupon, and for this purpose, Convocation referred it again to the said Discipline Committee.

Up to this point, the steps taken were *ex parte*, and rightly so, because they were of a merely preliminary character, to satisfy the governors of the Society that the matter was proper to be entertained.

On the 9th June the Discipline Committee was called pursuant to notice given to all the members, and four being present, it was directed that a copy of the petition be sent to the solicitor, Mr. Hands, and that he and Mr. Rae be notified of the time and place of investigation.

Mr. Hands was accordingly duly notified as directed, and was also informed in the notice that he was required to attend at the time and place appointed with his witnesses and evidence for the purpose of such investigation. On 16th June (the day fixed) a quorum of the committee was present (all being notified, however, of the meeting), and entered upon the inquiry in presence of Mr. Hands, Mr. Rae, and others. Evidence was taken, not under oath; the solicitor was fully heard in his answer and defence, and the case argued by both parties. All these proceedings were fully reported by an official stenographer present for that purpose. The solicitor was recommended to make good his pecuniary obligations to Miss Craine, though no inducement was held out that his so doing would end the

investigation. The committee then adjourned to the 23rd June, and upon that day the same quorum, after private consideration and discussion, made the following report:

The Discipline Committee, to whom the complaint of Miss Jametta Craine against Mr. John Baldwin Hands, a barrister and solicitor practising in Toronto, was sent by Convocation for investigation, beg leave to report that they caused to be sent to the said Hands a copy of the complaint in question, and notified him and the complainant in writing of the time and place appointed for proceeding with the said investigation, and at the time and place appointed for that purpose your Committee, in the presence of both of said parties, proceeded with the said investigation, upon which the complainant was represented by counsel, the said Hands conducting his defence in person.

Your Committee heard the statements of both said parties, and reduced them and the evidence to writing, and beg to submit the same and the documents adduced to Convocation.

Your Committee find that the complaint has been fully established, that the said John Baldwin Hands has been guilty of conduct unbecoming a barrister and solicitor; and they recommend that he be disbarred, and that his name be erased from the roll of solicitors.

This final report of the Discipline Committee was presented to Convocation on the 26th June; it was then read; all the evidence, papers, and materials on which it was based were laid before the Benchers, and Convocation ordered that the report should be considered on the 4th September. Before this meeting of June the solicitor had paid Miss Craine the proceeds of the shares he had sold, and had freed the remaining shares from the lien of the bank, and these facts were duly brought to the notice of Convocation. About the 23rd of August copies of the report of the Discipline Committee and of the evidence were furnished to the solicitor.

Notice of the September meeting was sent to all members of Convocation by postal card, underwritten, "*to consider report of Discipline Committee, Re J. B. Hands,*" and an unusually large meeting assembled.

It appears that the evidence and proceedings were read aloud to Convocation (some immaterial parts being omitted) before the solicitor was called in. He and his counsel appeared before the meeting of Convocation, and were invited to shew cause against the finding of the Commit-

tee. The result was, the adoption of the following resolution:

"On hearing the report of the Discipline Committee, and having considered the evidence adduced, and Mr. Hands having been duly called upon to shew cause why the report of said Committee should not be acted upon by Convocation, and Mr. Hands having thereupon attended before Convocation, upon hearing what was alleged by Mr. Hands, by himself and through his counsel, and it having been found after due inquiry that John Baldwin Hands has been guilty of conduct unbecoming a barrister or solicitor: It is resolved that the report of the said Committee be adopted, and it is further resolved that John Baldwin Hands is unworthy to practise as a solicitor, and that he be disbarred as a barrister."

During the pendency of these proceedings the Treasurer of Convocation was absent from Canada; and in such a case rule 17 of the Society provides for the appointing of a chairman who shall preside in his absence. The chairman so appointed, and who "officiates as Treasurer," is not a member of the Discipline Committee within the meaning of the rule which provides that the Treasurer shall be *ex officio* a member of all Standing Committees. Such a chairman is not the Treasurer by virtue of office, but only officiates as Treasurer by virtue of being chosen for a temporary purpose. The office of Treasurer is not vacant, but, the Treasurer being absent, another member takes his place in Convocation. The form of objection made during the argument was that notice of the meetings of the Discipline Committee was not served upon the Treasurer, Mr. Blake; but his absence from Canada was a sufficient dispensation, and without this notice being sent the Committee was properly constituted. There is no valid objection arising from the fact that the members of the Discipline Committee were not notified of the particular business before them. Convocation had but one case of discipline at that time, and the members of this Committee, attending to matters of discipline only, upon getting notice of this meeting would be sufficiently apprised of the nature of the business: *Richardson-Gardner* v. *Fremantle*, 24 L. T. N. S. 81 and 86.

It is objected that the witnesses before the committee were not examined under oath. Neither of the parties

called attention to this, although taking part in questioning and cross-questioning. There appears also to have been some misapprehension as to the right to administer an oath, though this passed *sub silentio*. It cannot be denied, however, that the Benchers and their committees are now clothed with this power. Yet it was bestowed in such a peculiar manner that it might well have escaped observation during this investigation. The power to examine witnesses under oath, and to enforce their attendance, was introduced into the Act respecting the Law Society by the revisers pending the last revision of the Ontario Statutes, and it was subsequently ratified by the Legislature in 50 Vic. ch. 2, sec. 9, sub-sec. 2, and 51 Vic. ch. 2, sec. 1.

Where there is or is likely to be any conflict in the evidence, the witnesses should no doubt be sworn. But in the present case the salient facts were not controverted by the solicitor. His counsel stated in his presence that he did not know that he could differ from the conclusions which the Committee had come to—that is, as I understand, so far as the effect of the evidence was concerned. It is not essential to the jurisdiction of domestic tribunals that they should have the powers of ordinary Courts of Justice in the trial of litigated matters. To this day, I believe, the disciplinary jurisdiction of the Inns of Court in England is exercised for the disbarring of their members without any means of enforcing the attendance of witnesses, or of administering an oath to those who are willing to testify. In *Hudson* v. *Slade*, 3 F. & F. at p. 403, Cockburn, C. J., defines the Parliament of the Benchers as "a species of domestic tribunal, having a lawful jurisdiction to pursue a certain inquiry, although not having the compulsory powers of a regular Court of Justice."

At greater length, in a subsequent page, he refers thus to this same matter in charging the jury: "It is true that the 'Parliament' of an Inn of Court, sitting on a question like this, (one of inquiry as to professional misconduct) is not a Court armed with the powers which a

Court of Justice possesses for compelling persons to attend as witnesses, or to produce documents essential to the investigation of the truth. But when it is said that the Benchers of an Inn of Court, sitting on the trial of alleged delinquencies on the part of a member of the bar, is a merely 'friendly tribunal,' I cannot assent to that description of it. It is a good deal more than a mere 'friendly tribunal,' though it is not armed with powers of procedure co-extensive with its jurisdiction. That, no doubt, is an inherent defect in its nature and constitution:" p. 410.

Such is, indeed, the condition, as a rule, of all these private societies and corporations in the exercise of the power of expulsion. But it has always been considered sufficient, if upon notice to the accused they take such steps as they can to satisfy themselves of the truth of the charge, and this though the evidence may not be admissible in the legal sense of the term: *Labouchere* v. *Wharncliffe*, 13 Ch. D. at p. 352. These bodies may be well content to proceed upon what has been happily called "human evidence," *i. e.*, the evidence on which men transact the ordinary business of life. But even without oath, the evidence derived from the admissions of a party is sufficient to found a decree of the Court; *Bousquet* v. *Bent*, 21 W. R. 749. And in matters of arbitration the Court will not interfere, because of the administration or non-administration of an oath to the witnesses, where the parties have consented to the course adopted: *Re Severn*, 2 U. C. L. J. N. S. 11.

The manner of taking the evidence before the Benchers or any of their committees, is not imperatively prescribed by the statute R. S. O. ch. 145, sec. 36; it confers the power to examine under oath, which may or may not be employed according to the sound discretion of the particular tribunal.

The fact that an action was pending in the High Court for the recovery of the moneys and bank stock did not oust the summary jurisdiction of the Society. There is

now by virtue of the late statutes concurrent jurisdiction in the Courts and in the Benchers of the Law Society over solicitors; and as to barristers the Law Society has had that power from very early colonial days. In some cases the Judges have, no doubt, refused to deal with solicitors in a punitive manner, where the client as plaintiff has elected to seek first his remedy in ordinary litigation as against a defendant. But this is only a discretionary rule, one that bends to circumstances. Thus in *Re Wright*, 12 C. B. N. S. 705, it was held to be no answer to an affidavit based on the misconduct of a solicitor that a decree in equity had been obtained against him in respect of the transactions complained of. See also *Re A. B.*, 4 Jur. 630. The intervention of the Law Society upon the solicitation of the person aggrieved was quite warrantable here, notwithstanding the action brought for pecuniary redress.

The next particular is, that the petition was referred to a committee of nine, and only three of them met and investigated. But there was no deviation from the ordinary course of procedure in such cases, and this procedure was also reasonable and just in itself. Notice was sent to all, as I have already adverted to, and three attended; these three formed a quorum and were competent to prepare the matter for the consideration of the larger body, when met in Convocation.

It is next objected that the Committee recommended that the plaintiff should be disbarred and struck off the rolls, instead of reporting the specific acts of misconduct. But the answer is that the acts complained of are set forth in the young lady's petition, which is made a part of and incorporated into the report of the Committee and the resolution of Convocation.

It is further objected that the report was signed by the chairman only, and not by all present. The rules of the Society are silent as to the shape in which reports of committees are to be presented, except it be that the direction applies which provides that the proceedings shall be conducted as much as may be according to the ordinary parliamen-

ary mode. The usage in Parliament is, I believe, that reports should be authenticated by the signature of the chairman only. But, however that may be, I see no merit or force in the objection.

We now come to an objection which goes to the jurisdiction of the Benchers, in asserting that it was not proved that the plaintiff acted in his capacity as barrister or solicitor in the matters complained of. True it may be, he did not act as barrister, but as solicitor he was acting, even according to his own statements before the Committee. At p. 30, he says: "I offered to pay over (*i.e.* to Mr. Rae) the proceeds of the first sale, less whatever might be coming to me for the services I had performed and the few dollars I had paid out in connection with the letters of administration." Again at p. 2 Mr. Hands says: "I have claimed a lien on these shares for the amount due, $50.75, and I claim to be entitled to hold that until my lien is paid." Dr. McMichael asks, "For solicitor's services?" and is answered by Mr. Hands, "Partly, and partly for moneys paid in connection with the property." But the test proposed is not correct, even when the matter is brought before the Court as to the conduct of a solicitor. The jurisdiction of the Court will be exercised not merely in cases arising out of purely professional employment, but whenever the transaction is so connected with the professional character of the solicitor as to afford a presumption that that character formed the ground and reason, or a ground and reason of the employment. In the text-books on solicitors the jurisdiction is put broadly as extending to all cases where the solicitor's conduct is such as to render him unfit to be an officer of the Court: *Cordery*, 2nd ed. 152. A case is cited, arising in 1885, where the gravamen of the offence consisted in a loan transaction, by which the solicitor obtained moneys from three sisters by concealing from them his impecunious condition. In that case the solicitor was struck of the rolls by Mr. Justice Kay: *Re Strong*, 20 L. J. No. Ca. 190. See also *Re Hill*, L. R. 3 Q. B. 543. The jurisdiction of the Law Society should not be less than this—should be, if anything, greater.

Consider for a moment the position which this Society occupies, and the responsibilities which are properly and safely cast upon it. Established in 1797 by 37 Geo. III. ch. 13, the Law Society of Upper Canada was in 1822 by 2 Geo. IV. ch. 5 organized with an incorporated governing body, composed of the Treasurer and Benchers. By more recent amendments, which need not be followed in detail, that Society is now under the control of a corporation largely elective in character, and possessing disciplinary powers over all members of the Society, whether barristers or solicitors, students at law or articled clerks. The result of all this progressive legislation now is, that the profession represented by the Benchers is clothed with plenary powers of self-government and self-discipline. So far as regards admission to the Bar, the jurisdiction exerciseable in early days by the Judges has been transferred to the Law Society: *Re Mitchell*, 2 Atk. 173; *Re Justices of Antigua*, 1 Knapp P. C. C. 267; and *Re De Sousa*, 9 O. R. 39, which last case was in effect affirmed by the Privy Council in 1 Times L. R. 597. In like manner all preliminaries necessary to the granting of the certificate of fitness which entitles the holder to admission to practise in the Courts, are under the statutory control of the Law Society, and the Benchers have their own corrective jurisdiction over solicitors as members of the Society, in addition to that possessed by the Judges over solicitors as officers of the Court. The statute now in force provides that whenever a member of the society has been found by the Benchers, after due inquiry by a committee of their number or otherwise, guilty of professional misconduct, or of conduct unbecoming a barrister, solicitor, &c., it shall be lawful for them to disbar such barrister, and to resolve that any such solicitor is unworthy to practise: R. S. O. ch. 145, sec. 44. These large powers of professional supervision and control are bestowed upon the persons chiefly interested — the profession itself, as organized under the representative government of the Benchers.

It is for the Benchers, representing what is best in the

profession, to determine and adjudge what is and what is not becoming conduct in a member of the Society. The body itself is practically constituted the custodian and judge and vindicator of its own integrity and honour.

Any act of any member that will seriously compromise the body of the profession in public estimation, is surely within the province of this law. It is not for the well-being of the Society itself that any limited construction should be placed upon the extent of the powers delegated to Convocation. Speaking generally, any misconduct which would prevent a person from being admitted to the Society, justifies his removal, because it indicates that he is unsafe and unfit to be entrusted with the powers and privileges of an honourable profession and a confidential office. The conduct which unfits a man to be a solicitor should *a fortiori* preclude his being a barrister, a degree of greater rank and honour in the law; and where practitioners, as in this Province, usually combine the functions of both branches of the profession, it is impracticable to discipline the solicitor and let the barrister go free. In the case in hand the broad question presented itself: was the solicitor's conduct unbecoming and unprofessional? Convocation, consisting of twenty-two Benchers, has unanimously voted "yea;" and in such a matter no better judges can be found. Having for this reason rejected Mr. Hands the solicitor, they cannot retain Mr. Hands the barrister.

The next particular, that all the members of the Discipline Committee were not notified of the meeting thereof, or of its object, I have already disposed of. I may, however, in connection with another later objection (No. 9, that the plaintiff had no proper opportunity of shewing cause before the Benchers), again advert to this. I do not attach so much importance to the minutiæ of the proceedings before the members of the Discipline Committee as I do to that before the Benchers at large. These last were, in Convocation duly convened, the real judges, and before them the plaintiff had the most ample opportunity to explain and defend himself as best he and his counsel could. Whatever

errors in procedure occurred at an earlier stage (but I do not acknowledge any), these would be of little moment compared with the due regulation of proceedings before Convocation, when judgment was to be passed upon the whole case. The conduct of these final proceedings, tested by the rules recognized by the Lords Justices of Appeal in *Dawkins* v. *Antrobus*, 17 Ch. D. 615, was scrupulously fair and just, and all cause of complaint as to procedure was thereby effectually removed.

Other matters of form were urged before me, such as that the plaintiff was ordered to be forthwith disbarred, instead of one or three months' time being given; that the resolution does not disbar the plaintiff, but only orders him to be disbarred; and that the motion was not properly put to the members of Convocation. Language used by the Master of the Rolls in the *Labouchere Case*, 13 Ch. D. 346, gives some support to the last objection, which is not, however, in the particulars. But it is well answered by Cotton, L. J., in *Dawkins* v. *Antrobus*, 17 Ch. D. 636, where he rules: "I think that we have no right to interfere with the exercise of the power (if fairly and honestly exercised) simply because something was not put in the formal way that might have been required upon demurrer." As to the other points, I answer by adapting the language of the same Lord Justice: "We are dealing not with matters of form, but of substance:" p. 635.

The plaintiff seeks to justify his conduct by saying that he had a lien on the property in question. This alleged lien for $50 consists in great part of charges made in nursing Miss Craine while she was sick, a guest at the solicitor's house, and cannot be claimed against her as administratrix. But even if there was a valid lien for $50, how that could justify the retention of $1,500 is a question not susceptible of discussion.

Lastly, the solicitor urges that he had made complete restitution prior to the resolution of the Benchers. This is a matter which may or may not be regarded according to circumstances. It may have its effect in modifying

the punishment, but payment does not oust the jurisdiction to discipline. The rule of the Court is well stated by Mr. Justice Grove in *Re a Solicitor*, 62 L. T. 446, (1877): "An immediate payment, when first asked, may be something upon which to appeal to the consideration of the Court; but merely raising money at the last moment, when being struck of the rolls is imminent, does not alter the question." See also *Re H.*, 31 L. T. N. S. 730, and 19 Sol. J. 218.

The fact that the solicitor guilty of misconduct has made reparation to the client may satisfy that particular individual, but it does not deprive the general public of its claim for protection against an unsafe member of a privileged class, nor the Law Society of its claim to expel an unworthy member. The professional man who does what is right because he is in jeopardy of degradation has ceased to act uprightly. This honesty of compulsion is not the kind of honest demeanour to which the solicitor pledges himself in his oath of office. Mischief more or less must result to the good repute of the whole profession by the indulgence of mistaken lenity in cases where the payment of money, unjustly and dishonestly withheld by an officer of the law, is allowed to purchase immunity from wholesome discipline. I merely put into words what the vote of the Benchers implies. Their sentence of excision commends itself, and it becomes now my duty to dismiss this action, which I do without doubt, though not without regret that such an occasion has arisen.

[This decision was moved against in the Queen's Bench Divisional Court, and judgment was given on the 4th February, 1889, reversing it, and finding in favour of the plaintiff, FALCONBRIDGE, J., dissenting. The defendants have carried the case to the Court of Appeal.—REP.]

[QUEEN'S BENCH DIVISION.]

CONMEE ET AL. V. CANADIAN PACIFIC RAILWAY COMPANY.

[FOUR ACTIONS.]

Arbitration and award—Disqualification of arbitrator—Offer by party of solicitorship pending reference—Subsequent acceptance—Order of reference, construction of—Judicature Act, 1881, sec. 48—C. L. P. Act, secs. 189, 209—9 and 10 Wm. III. ch. 15—Interim finding of facts—Time for moving against—Waiver of objections to.

By an order made at *nisi prius* on the 4th November, 1886, upon the application of the defendants and without the consent of the plaintiffs, the actions and all matters in question therein were referred to the award of the persons named, who were given all the powers therein of a Judge of the High Court of Justice sitting for the trial of an action. By clause 2 of the order the referees were directed to make and publish their award in writing on or before the 3rd January, 1887, or such other day as they should appoint. By clause 6 it was provided that there should be the right of appeal in the same way as if the order was made under sec. 189 of the C. L. P. Act; and by clause 8, that the reference should be considered as made in pursuance of sec. 48 of the Judicature Act, 1881; and also, in so far as the same was applicable, as under the provisions of sec. 189 of the C. L. P. Act.

Held, that the reference was a compulsory one, so far as the plaintiffs were concerned, and that it was not a reference under 9 & 10 Wm. III. ch. 15, but under sec. 48 of the Judicature Act and sec. 189 of the C. L. P. Act.

During the reference it was agreed between the parties that the arbitrators should proceed to the ground and ascertain by their own examination the quantities of material moved, (as to which the dispute was), and certify their findings, and all other questions in the actions and reference were to remain open; and pursuant to this agreement the arbitrators proceeded to the ground, and ascertained certain facts, and on 23rd August, 1887, reported "we do hereby find and certify that the plaintiffs moved the respective quantities hereinafter mentioned," &c.

Held, that this finding and certificate was not the award which clause 2 of the order of reference directed the referees to publish; nor was it an award within the meaning of sec. 209 of the C. L. P. Act; but was merely a finding of facts pending the reference, to enable the arbitrators to make their award; and apart from the question of waiver, the parties were not bound to make any motion as to the finding until the making of the award; and therefore the objection that a motion against the finding made on the 29th May, 1888, was too late, failed.

Held, also, upon the evidence, that there was no waiver of the objections to the finding; and that, although the finding was not an award, the motion made against it by the plaintiffs was a convenient and proper one.

The finding and certificate was set aside, because, pending the reference and before the finding, one of the arbitrators had received an offer of the solicitorship of the defendants' company, and had after the finding accepted it, and was thus disqualified from acting.

MOTION by the plaintiffs to set aside the orders of reference and all proceedings thereunder, or for an order declaring that the references had lapsed, or for an order setting aside all proceedings had under the orders, or for such other order as the plaintiffs might be entitled to.

The grounds set out in the notice were:

1. That the time for making the award had lapsed.

2. That two of the arbitrators, viz., Walter Shanly and George M. Clark, had resigned their positions as arbitrators.

3. And upon the further grounds disclosed in the affidavits filed in support of the motion, and the affidavits therein referred to, and by the pleadings and proceedings in the said actions and reference.

The affidavits referred to were those of the plaintiffs.

The notice of motion was dated 23rd, May, 1888, and was made returnable on the 29th May.

Rose, J., heard the motion in Court, part of the evidence being taken orally before him upon several days, and adjournments being had from time to time. The evidence and argument were finally closed on the 24th December, 1888.

McCarthy, Q. C., and *Wallace Nesbitt*, for the plaintiffs.

Robinson, Q. C., and *S. H. Blake*, Q. C., for the defendants.

December 31, 1888. ROSE, J.—The defendants' counsel objected that the time for moving had elapsed prior to the motion being made, relying upon 9 & 10 Wm. III. ch. 15, sec. 2, which limits the time for moving against an award under that Act to the last day of the next term after the arbitration or umpirage made and published to the parties. That Act may be conveniently referred to at p. 381 of *Redman's* Law of Awards, 2nd ed.

If the reference was under that statute, the time for moving had expired prior to the motion.

The action was brought on for trial at the Toronto

Sittings, on the 4th of November, 1886, before Cameron, C. J., and a jury. The plaintiffs gave the notice for a jury. On motion of the defendants the learned Chief Justice ordered a reference, the plaintiffs "consenting unto the appointment of the referees named in the order."

The reference was of the action and all matters in question therein, to the award, arbitrament, and final determination of the persons named, who were given all the powers therein of a Judge of the High Court of Justice sitting for the trial of an action, including the powers of amending, directing the entry of judgment, and of certifying as to costs.

By clause 2 the referees were directed to make and publish their award in writing on or before the 3rd of January, 1887, or such other day as they should appoint.

By clause 6 of the order it was provided, "That there shall be the right of appeal in the same way as if this order was made under section 189 of the C. L. P. Act." And by clause 8, "That this reference shall be considered as made in pursuance of section 48 of the Supreme Court of Judicature Act; and also, in so far as the same is applicable, as under the provisions of section 189 of the C. L. P. Act."

This order by its terms shews clearly:

1. That it was compulsory, so far at least as the plaintiffs were concerned. Their consent was given not to the order but merely to the referees named. If the consent had been to the order it would not have been so limited. The Court ordered the reference, the parties named the referees, as they might under secs. 48 and 189. If they had not, then a referee would have been named by the Court, as provided by those sections.

2. That the reference was not under the 9 & 10 Wm. III., but under the above sections.

Section 48 empowers the Court or a Judge, without consent in any cause requiring scientific or local investigation which cannot conveniently be made before a jury, to at any time, on such terms as may be thought proper, order

any question or issue of fact, or any question of account arising in the cause or matter, to be tried either before a Judge of a County Court, or before an official referee, or (if the parties so agree) before a special referee.

The trials are directed to be "conducted in such manner as may be prescribed by rules of Court, and subject thereto in such manner as the Court or Judge ordering the same shall direct."

By section 49, "the referees shall be deemed to be officers of the Court * * and the report of any referee upon any question of fact on any such trial shall (unless set aside by the Court) be equivalent to the verdict of a jury."

By sec. 50 it is enacted, "With respect to all such proceedings before referees and to their reports, the Court or Judge shall have, in addition to any other powers, the same or the like powers as by the C. L. P. Act and other Acts are given to any Court whose jurisdiction is hereby vested in the said High Court with respect to references to arbitration and proceedings before arbitrators and their awards and appeals therefrom respectively."

In *Luney* v. *Essery*, 10 P. R. 285, I endeavoured to collect the cases as to procedure under secs. 47, 48, so far as necessary to determine the question then before me; and by referring to the authorities there cited it would seem as if this reference could not have been made under sec. 48 alone, as according to *Longman* v. *East*, 3 C. P. D. 142, there is no power under that section to refer the action, but only questions or issues of fact.

The understood practice under sec. 48 is that there is no limit of time for moving against the report, but that the motion may be made whenever the party in whose favor it is seeks to enforce it. See 2nd ed. of *Maclennan's* Jud. Act, p. 70, notes to sec. 49. See, however, Con. Rule 111, introducing Chy. O. 252.

Clause 8 of the order of reference above quoted provided that "this reference shall be considered as made in pursuance of section 48." If so, can the time for moving

be said to have expired, or if expired, have I not the power to enlarge the time under Rule 462, O. J. A?

What force or meaning is to be given to the words, "and also, in so far as the same is applicable, as under the provisions of section 189 of the C. L. P. Act?" Does that mean, "in so far as the same are not in conflict with the provisions of section 48"?

What is the effect or meaning of clause 6 of the order, above set out? Is this an appeal?

Section 189 provides for a reference, "at any time after the writ has issued, and *before the record has been entered for trial.*" This record had been entered for trial, so that section was not in terms applicable. It, however, provides that all the matters in dispute may be referred, but the decision is to be in the form of a report, which is to be confirmed as provided by section 191, and when confirmed may be enforced as the finding of a jury.

Section 191 provides that, "Such report or certificate shall, without an order confirming the same, become absolute at the expiration of fourteen days from the filing thereof unless appealed from, but the Court or Judge may under special circumstances allow an appeal after the fourteen days." If this is an appeal, and the report was filed fourteen days prior to the motion, and if clause 6 of the order of reference is to govern, then the appeal is too late, unless I may now allow the appeal after the fourteen days.

As neither sec. 48 nor sec. 189 is in terms applicable to this reference, and as the order is placed under both, I think I must read clause 8 as meaning that, wherever in either section power is given to the Court to order the reference, such power is to to invoked; that primarily the procedure is that provided by section 48 and the Judicature Act and Rules thereunder; and that wherever that section or the Rules fail to provide for any steps or proceeding, or to give any power that is to be found in section 189, then reference may be had to that section for such additional procedure or power, but not so as to conflict with any thing

that may be provided for by section 48 and the Judicature Act and Rules.

Section 209 was referred to. It provides that, "All applications, *otherwise than by way of appeal*, to set aside any award made on a compulsory reference under this Act, shall be made within the first six days of the Term next following the publication of the award to the parties, whether the award be made in Vacation or in Term; and if no such application is made or if no rule is granted thereon, or if any rule granted thereon is afterwards discharged, such award shall be final between the parties."

That section was amended at the last revision, so as to introduce the provision found in section 191 as to enlarging the time.

Does section 209 apply? Is what is moved against an award within its meaning? Are the provisions of section 47 and the Judicature Act and Rules silent as to such motions?

After the making of the order, the proceedings were carried on and much evidence given, when it became apparent to the parties that great loss of time and expense would ensue unless some other mode of informing the referees as to the facts was adopted, when the following agreement was come to.

"It is agreed between the parties as follows:

"1. That the arbitrators are to proceed to the ground and endeavour to ascertain for themselves, in such method as they may deem proper, the quantities in each class of material moved by the plaintiffs, covered by the contract between the parties herein.

"2. Should the arbitrators or a majority of them determine the quantities in each class of the materials moved by the plaintiffs as aforesaid, they or a majority of them are *to certify their findings*, and the parties agree to accept their findings as to the quantities and classification, whether supported or not by the evidence of witnesses called before them, as conclusive, subject to the conditions hereinafter contained.

"3. Should the quantities so found give, at the respective contract rates, an aggregate sum less than is given by the quantities stated in the certificates relied on by the plaintiffs as proper and final certificates, the plaintiffs nevertheless may claim that the certificates should govern, and the relevancy of the quantities so found to the matters in dispute between the parties *and all other questions in the cause and reference remain open for trial and argument as at present.*

"4. Should the quantities so found give, at the respective contract rates, an aggregate sum more than is given by the quantities stated in the said certificates, then the plaintiffs shall be entitled to such aggregate sum unless they are precluded by the said certificates or on any other legal ground.

"5. Provided that it shall be in the power of the arbitrators at any time to notify the parties that they are unable to proceed as in the first clause provided, in which case the provisions of this agreement at once terminate, and the reference proceeds as before.

"6. * * *

"Dated the 2nd day of March, A.D. 1887."

The referees went upon the ground and ascertained certain facts, which they reported as follows:

"We, the undersigned James Shaw Sinclair, Judge of the County Court of the county of Wentworth, G. M. Clarke, Esq., Judge of the County Court of the united counties of Northumberland and Durham, and Walter Shanly, of the city of Ottawa, civil engineer, arbitrators named in the order of reference herein dated 4th November, 1886, and made by the Hon. Chief Justice Cameron, having taken upon ourselves the burden of the reference contained in the agreement between the parties hereto, dated 2nd March, 1887, and of which a copy is hereto attached, and having proceeded to the ground and endeavoured to ascertain for ourselves in such method as we deemed proper the quantities in each class of material moved by the plaintiffs, covered by the contract between the parties herein,

and having determined such quantities, do hereby *find and certify* that the plaintiffs moved under the said contract the respective quantities hereinafter mentioned in each class, and not in any other class, that is to say: * *

"Witness our hands this 23rd day of August, 1887."

In my judgment this finding and certificate is not the award which clause 2 of the order of reference directed the referees to publish in writing on or before the 3rd of January, 1887, nor is it an award within the meaning of sec. 209, but is merely a finding of a fact or of facts pending the reference and in the proceeding towards a determination of all the matters referred, so as to enable the arbitrators to make their award.

It does not appear to me to be more than if, after a certain line of evidence had been closed, the arbitrators had found upon such evidence, noted their findings, and announced it to the parties.

I read the agreement of the 2nd of March as merely an agreement to a mode of procuring evidence, by which the parties agreed to accept what the referees saw themselves and certified as a finding of fact upon evidence—substituting for sworn testimony the evidence obtained by the referees on a personal investigation.

Apart from the question of waiving any right to raise objections by not at once coming to the Court, which will be considered later, I do not think the parties were bound to make any motion as to the finding until the making of the award, which has not yet been made.

One ground of the plaintiff's motion was that Mr. Clark, one of the referees, pending the investigation and before the findings above certified, had received, and subsequently after the findings accepted, an offer of the solicitorship of the defendants, the Canadian Pacific R. W. Co., and that he was thus disqualified from acting.

Mr. Clark was examined.

The effect of his evidence is that some time pending the reference Mr. Shaughnessy, of the defendants, the Canadian Pacific R. W. Co., said to him in Toronto, "I wish you

were with us," alluding, as Mr. Clark believes, looking at what followed, to the solicitorship.

2. During the summer of 1887, being engaged in getting rid of certain engagements to enable him to accept an office then in the gift of the Government, and which had been offered to him, he (Mr. Clark) was in Ottawa, when the Hon. Mr. Pope, Minister of Railways, said to him: "From what Sir George Stephen tells me I think it likely you will get a letter in the course of time, when they come to make the appointment of solicitor, offering you the place." This was some weeks prior to the meeting of the referees to make the findings and certificate above set out.

3. After that, and before the making of the findings, Mr. Clark, being in Montreal, met Mr. Van Horne, Vice-President of the company, at the Windsor Hotel. To him Clark said: "I am getting rid of all engagements; I have got views of another place; I don't know that I will go on with that, or how it will be." "That" referred to what was known as the British Columbia arbitration. "He then said to me (the substance of it, I can't remember the words) that he wished me not to commit myself to the other position until the time came to discuss whether or not I could be persuaded to accept the solicitorship." * * "Did you make any response to that?" "I took care not to commit myself. As I say, my mind was for the other place. Anything that occurred before the 10th of September as to the solicitorship I did not treat as important at all." "Did you understand from what took place that you had the offer?" "Not exactly the offer. I think he said distinctly—I know I got the impression—that he was not authorized to make any proposition of the kind, but it was his opinion the offer would be made. It was his opinion as Mr. Van Horne, the vice-president." "Did anything further take place then?" "I can't remember of that fully; that was the substance of the arrangement. From that time forward I know I had the impression that was possible as well as the other—from

that time my preference was altogether for the other, and I didn't treat it as likely to result."

About the 9th or 10th of September Clark saw Van Horne at Ottawa. To quote again from the evidence: "And in fact my seeing him then was because he had previously asked me not to close any arrangement about the other matter until I gave them an opportunity of discussing the thing further with me."

The result was, a discussion as to terms, ending in a formal written offer of the office about the 10th of September, which was accepted about the 14th.

What is the principle to be drawn from the decisions, for no case exactly in point has been cited?

In *Morgan* v. *Mather*, 2 Ves. Jun. 15, decided in 1792, Lord Loughborough stated three grounds for setting aside awards, viz.: "Corruption, misbehaviour, or excess of power."

Lord Commissioner Wilson said that there were only three grounds: "First, that the arbitrators have awarded what was out of their power; secondly, corruption, *or that they have proceeded contrary to the principles of natural justice, though there is no corruption*, as if without reason they will not hear a witness; thirdly, that they have proceeded upon mere mistake, which they themselves admit."

In *Walker* v. *Frobisher*, 6 Ves. 70 (1801), an award was set aside for hearing witnesses in the absence of the solicitors, notice having been given that no further evidence would be received.

Lord Chancellor Eldon said: "This award cannot be supported. The arbitrator, having been named by the late Lord Chancellor (Loughborough), is, I am well assured, a most respectable man: but he has been surprised into a conduct which upon general principles must be fatal to the award * * the arbitrator swears it had no effect upon his award. I believe him. He is a most respectable man. But I cannot from respect for any man do that which I cannot reconcile to general principles. A Judge must not

take it upon himself to say whether evidence improperly admitted had or had not an effect upon his mind. *The award may have done perfect justice:* but upon general principles it cannot be supported."

In *Dobson* v. *Groves*, 6 Q. B. (A. & E., N. S., 1844) 637, an award was set aside upon a similar ground.

Lord Denman, C. J., referred to Lord Eldon's observations in *Walker* v. *Frobisher*, and added (p. 648): "*When once the case is brought within the general principle by a possibility that the arbitrator's mind may have been biassed, there is a sufficient objection.*"

In the same volume at p. 852, Lord Denman, C. J., said in *Plews* v. *Middleton*: "An award is procured by 'undue means,' if it is arrived at by a departure from natural justice in ascertaining the facts, as Wilson, J., suggests in *Morgan* v. *Mather*."

Kemp v. *Rose*, 1 Giff. 258, was decided in 1858. There a builder by his contract bound himself to abide by the decision and certificates of an architect as to the amounts to be paid for the work, not knowing that the architect had given an assurance to the employer that the costs of the building should not exceed a certain specified amount; although he refused to guarantee that amount. The Court did not consider the decision of the architect made under such a bias as binding.

The Vice-Chancellor, Sir John Stuart, in giving judgment, said, "The plaintiffs' case is not put on the ground of fraud. It depends on considerations of another kind. The duties to be performed by Mr. Lamb as regarded the plaintiff were of a judicial character. According to the language of the written contract the plaintiff bound himself in the strongest way to abide by the decision of Mr. Lamb, in an absolute confidence that his decision would be that of a wholly unbiassed man.

"A perfectly even and unbiassed mind is essential to the validity of every judicial proceeding. Therefore, where it turns out that, unknown to one or both of the persons who submit to be bound by the decision of another, there was

some circumstance in the situation of him to whom the decision was intrusted *which tended to produce a bias in his mind*, the existence of that circumstance will justify the interference of this Court.

"Whether in fact the circumstance had any operation in the mind of the arbitrator must, for the most part, be incapable of evidence * * being, perhaps, even unknown to himself. It is enough that such a circumstance did exist. * * Although an assurance is much less strong than a guarantee, and *may not, in fact, have biassed* the judgment of Mr. Lamb, *yet it was calculated to have that effect.* Without imputing corruption to Mr. Lamb, it is enough if there was a circumstance *tending to bias his judgment* which was unknown to the plaintiff. * * *So, if there was the smallest speck or circumstance which might unfairly bias his judgment*, his decision cannot be absolutely binding upon the contracting party."

In *Proctor* v. *Williams*, 8 C. B. N. S. 386, Erle, C. J., said: "It is of the essence of these transactions that the parties should be satisfied that they come before an impartial tribunal."

Re Hopper, L. R. 2 Q. B. 367, is a decision that the fact that the arbitrators, umpire, and attorney for one of the parties dined at the invitation of that party at an inn kept by him—much wine being drunk, many allusions being made to the reference, and the umpire, in consequence of excess, obliged to sleep at the inn, did not afford, in the language of Chief Justice Cockburn, "the slightest reason for supposing that the umpire was in any way influenced by the hospitality he had received." The umpire made an award, after the dining, for the innkeeper for £1020. And in view of the earlier cases, I suppose it is also a decision that such conduct could not by possibility have tended to produce a bias in the mind of the umpire in favour of the inn-keeper.

In *Moseley* v. *Simpson*, L. R. 16 Eq. 226, V. C. Malins, followed *In re Hopper*, saying however, at p. 234: "I have had a great deal of difficulty on the subject, and I must confess

that my first impression was, that it would be better on general principles, considering that what passed at the luncheon table might by possibility have influenced the minds of the arbitrators, to set aside the award as a lesson to all persons in future not to adopt that line of conduct."

These last two decisions do not profess to overrule the prior decisions, and if in any wise they can be taken as opposed to them, I am glad to find a decision in our own Court of Appeal which is in the line of the older authorities commencing with *Walker* v. *Frobisher*. I refer to *Race* v *Anderson*, 14 A. R. 213, the head-note of which is as follows: "In the conduct of arbitrations the rule is inflexible that the arbitrators must be scrupulously guarded against *any possible charge* of unfair dealing towards either party; therefore where one of the parties to a reference, who had been examined as a witness, after the evidence had been closed and the matter argued, sent by mail his affidavit explaining some portion of his evidence to the arbitrator, but which was not received by him until after he had written out the view in accordance with which he subsequently made his award; the Court affirmed the judgment of the Court below setting aside the award."

In *The Queen* v. *The Justices of Great Yarmouth*, 8 Q. B. D. 525, where the orders of the Justices were held bad on account of bias, Field, J., said at p. 527: "The administration of justice ought not only to be pure in itself, and capable of being demonstrated to be so, but nothing should be done by those who are administering it to throw on it a substantial doubt. It is not enough that the conclusion aimed at was right, and that it has been arrived at on right principles, for every person * * should abstain from putting himself in such a position as that, unconsciously to himself, a bias adverse to the due administration of justice might take possession of his mind." Extending the principle to dealings between principal and agent, he adds: "It is not necessary to shew any damage resulting, nor any bias in point of fact; it is enough to shew that he has put himself in a position that is inconsistent with the fair

and unbiassed discharge of his duties. The reason for this is plain, for it is impossible to measure the effect, great or little, that such a bias may produce."

On the same page, 528, we find these words: "But it is impossible not to see that there was a relation produced between the mayor and the other justices which would tend to induce in their minds a bias from which the judicial mind should be kept free."

Now what have we here? A gentleman nominated as arbitrator by the company and accepted by the plaintiffs, he being at the time a Judge in active work—chosen, it is said, by plaintiffs' counsel because he was a Judge and free from all business connection with the parties—during the arbitration approached by that company, a large and wealthy corporation, and negotiations opened which end in his accepting the solicitorship of the company, an office with an income attached to it of so considerable a sum that, as Mr. Clark himself tells us, it induced him to decline another office which had been previously offered to him with a comfortable income and a retiring allowance.

I am not asked to find any corrupt motive or conduct on the part of Mr. Clark, but I am asked to say, in the language of Lord Denman, C. J., that "the case is brought within the general principle," because "by a possibility the arbitrator's mind may have been biassed;" or, in the language of Stuart, V. C., that the offer and its consideration "tended to produce a bias in his mind;" or that although it "may not in fact have biassed the judgment * * yet it was calculated to have that effect;" that it "was a circumstance tending to bias his judgment;" that at least there existed "the smallest speck or circumstance which might unfairly bias his judgment;" and that in any event it being, according to Erle, C. J., "of the essence of these transactions that the parties should be satisfied that they come before an impartial tribunal," the facts fairly raise a doubt in the minds of the plaintiffs as to the impartiality of the tribunal making the finding complained of.

Were it not for the very high standing and reputation

of Mr. Clark, I confess that to my mind the matter would not be arguable.

Were the arbitrator a man to whom the offer of an office with a large salary would be a temptation—say a young and struggling solicitor—would not his mind be affected in favor of a person who might make him the offer?

Those who have struggled up from very small beginnings in the profession will not soon forget the feelings of gratitude, almost emotional, towards those clients who early entrusted them with business; of course, that influence becomes much less potent as place and power cease to be a mere dream. Are the Courts to say in the case of a young and struggling solicitor, that for a wealthy corporation to offer him a retainer while he is acting as an arbitrator in a cause to which it is a party, would be wrong, but not objectionable in a case like the present?

Mr. Robinson put the case of a leading counsel accepting the position of arbitrator, and asked if that would preclude him from accepting retainers from the parties or their solicitors. The ready answer to that question here is, that, admitting for the sake of argument that the acceptance of such retainer would not be objectionable, this is not that case; for while possibly—I only say possibly—the parties choosing a counsel to act as arbitrator run the risk that he may, in the ordinary course of business, receive retainers from the parties, and so bring the case within the principle of *Re An Arbitration between Clout and Metropolitan, &c., R. W. Co.*, 46 L. T. 141; in this case no such risk was run, for it could not have been apprehended that a Judge would receive from one of the parties litigant the offer of a solicitorship.

Mr. Clark says that he did not treat as important anything that occurred with reference to the solicitorship. While that may be so, the offer remained present to his mind. He was "not to commit himself to the other position until the time came to discuss whether or not" he "could be persuaded to accept the solicitorship;" and

his interview with Van Horne in September "was because he had previously asked" him "not to close any arrangement about the other matter until" he "gave them an opportunity of discussing the matter with" him.

It was argued that what was done here was quite defensible. Mr. McCarthy answered that if so then it would be quite proper for the company during the pendency of this motion to open negotiations with the presiding Judge with a view to his accepting some office with emolument.

I confess I see no distinction, and the statement of the latter proposition affords an answer to the first.

To quote from *Redman's* Law of Awards a passage founded upon *Harvey* v. *Shelton*, 7 Beav. 455, and *Morris* v. *Reynolds*, 2 Ld. Raym. 857: "It cannot be too strongly impressed upon arbitrators that the first great requisite in persons occupying that post is a judicial impartiality and freedom from bias. They should regard themselves as Judges, and bound by the same rigid necessity as the Judges of Her Majesty's Courts, not only of not being actuated by corrupt and fraudulent motives or partiality, but even of so deporting themselves in every way as to be above the suspicion of being so actuated. 'In a matter of so tender a nature,' says Lord Hardwicke, 'even the appearance of evil is to be avoided.'"

In *Harvey* v. *Shelton*, at p. 462, Lord Langdale, M. R., said: "You must not, in the administration of justice, in whatever form, whether in the regularly constituted Courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decisions of the Judge, which means are not known to the other side." And at page 464: "This is not a matter of mere private consideration between two adverse parties, but a matter concerning the due administration of justice, in which all persons who may ever chance to be litigant in Courts of justice or before arbitrators, have the strongest interest in maintaining that the principles of justice shall be carefully adhered to in every case."

It will never do to allow it to go abroad that the Courts treat lightly and as of little moment that one of two litigants may approach a judicial officer, pending the litigation, to open negotiations for any profit or advantage to such Judge. It is better that they should know that such conduct when complained of before the Court will lead to the setting aside of the award, "as a lesson to all persons in future not to adopt that line of conduct."

It would have been quite possible for the company to have accomplished its object in a proper way: viz., by first informing the plaintiffs or their solicitors of the desire to obtain Mr. Clark's services, and if an immediate appointment had been necessary, some arrangement might have been come to for his retiring from the office of arbitrator.

I must find in favor of the plaintiff's contention as above summarized, for it has been shewn, to adopt the language of Mr. Justice Field above quoted, "that the arbitrator put himself in a position that is inconsistent with the fair and unbiassed discharge of his duties;" and "it is impossible not to see that there was a relation produced between" him and the defendants the Canadian Pacific Railway Company, "which would tend to induce in his mind a bias from which the judicial mind should be kept free."

That such a bias existed is quite possible, I should say probable, but I do not believe and could not find that Mr. Clark consciously acted under its influence; but, to use the language of Lord Chancellor Eldon above quoted: "The award may have done perfect justice, but upon general principles it cannot be supported."

It is not the case suggested by Mr. Robinson of a mere offer. It is one where an offer was made, considered, and subsequently accepted.

If the motion has been well made, it must, in my judgment, succeed upon this ground.

It has been objected that no notice was given of this ground of objection; and in answer reference is made to the third ground of appeal, and sec. 33 of the plaintiff Conmee's affidavit, which reads as follows:

"The findings of the said arbitrators are grossly wrong and absolutely unjust, and have been obtained, as we believe, under circumstances and by ways and means which, as we submit, should induce this Honourable Court to set the same aside, and it would be a great injustice to us if such findings were allowed to stand."

The notice is not specific, but it was apparent to me that the defendants were in a position to make answer, and were not taken by surprise. Indeed, Mr. Wells, (*a*) in his examination the other day, said that he expected the plaintiffs to move against the award on this ground.

As the matter has been fully heard, I cannot give effect to this objection.

It was further urged that the plaintiffs had waived the objection. I cannot see any evidence of any conduct which would amount to a waiver.

When the agreement was arrived at on the 31st of October, 1887, under which Mr. Clarke retired from the board of referees, all existing objections were reserved.

Having reference to the evidence of Mr. Osler (*b*) and Mr. Wells, and the correspondence between the offices, and believing that each of these gentlemen truly stated his impression of what had taken place, I am of the opinion that the correspondence is in favor of Mr. Osler's recollection of what took place, viz., that negotiations for settlement were opened and continued. and that proceedings were stayed in consequence, and so I find the fact.

I think, moreover, the agreement of 31st October shews that it was understood that the defendant, the Canadian Pacific R. W. Co., would apply to appoint a new arbitrator, when the plaintiffs would have a right to raise all existing objections. And it further seems to me that, apart from any agreement, it would not have been proper for the said defendant company to withdraw the motion launched for such appointment. If such notice was with-

(*a*) One of the solicitors for the defendants.

(*b*) One of the firm of McCarthy & Co., solicitors for the plaintiffs.

drawn without any agreement, it seems to me it was so withdrawn in violation of the spirit of the agreement of the 31st of October, but I am of the opinion that Mr. Wells' telegram to his firm shews that he has forgotten what was the fact, viz., that such motion was withdrawn in accordance with the agreement, and that such agreement is evidenced by the letter from McCarthy & Co. to Wells & Co., viz., "that nothing should be done until the negotiations for settlement had been concluded."

If it is necessary in any view to enlarge the time for making the motion, and I have the power so to do, I enlarge the time accordingly.

Although, as I have stated, in my opinion this is not a motion against the award, yet it is a convenient and proper motion; see *Drew* v. *Drew*, 2 Macq. 1; *Malmesbury R. W. Co.* v. *Budd*, 2 Ch. D. 113; and saves the plaintiffs from the objection, if they had waited until the award, that they had waived their objection. See *Allen* v. *Francis*, 9 Jur. 691. See also *Hart* v. *Duke*, 32 L. J. Q. B. 55.

In the view I have taken, it does not become necessary to say anything as to the other grounds urged.

If an application is made for the appointment of a third arbitrator, it will, no doubt, be necessary to consider whether the proceedings have lapsed.

The findings and certificate of the 23rd August must be set aside, and the plaintiffs must have their costs of this motion.

[QUEEN'S BENCH DIVISION.]

TOWNSHIP OF NORTH DORCHESTER v. COUNTY OF MIDDLESEX.

Municipal corporations—Duty of erecting and maintaining "bridges over rivers"—"Stream"—"River"—R. S. O. ch. 184, sec. 535.

Section 535 of the Municipal Act, R. S. O. ch. 184, provides that "It shall be the duty of councils to erect and maintain bridges over rivers forming and crossing boundary lines between two municipalities (other than in the case of a city or separated town) within the county."

The question in this action was whether the bridges over Doty's Creek, Kettle Creek, and Caddy's Creek, each of which is a stream crossing a boundary line between two township municipalities, were "bridges over rivers" within the meaning of the enactment.

At Doty's Creek the span of the bridge was 67 feet; at Kettle Creek 31 feet 9 inches; and at Caddy's Creek 9 feet. The evidence shewed that at Caddy's Creek a culvert would have been sufficient, while to cross the two other creeks bridges were necessary.

Held, that the bridges over Doty's and Kettle Creeks were "bridges over rivers" within the meaning and intention of the statute, and that the duty of erecting and maintaining them rested upon the county council, but that the bridge over Caddy's Creek was not such a bridge.

McHardy v. *Ellice*, 1 A. R. 628, applied, notwithstanding changes in the statute, and followed.

THIS was an action tried before Ferguson, J., at St. Thomas, at the Autumn Sittings, 1888.

The facts and arguments are fully set out in the judgment.

W. R. Meredith, Q. C., for the plaintiffs.
Purdom, for the defendants.

January 4, 1889. FERGUSON, J.—The plaintiffs are a township municipal corporation. The defendants are the corporation of the county of Middlesex.

The action is brought for a declaration that the defendants are bound to maintain and keep in repair three bridges and each of them; and for a mandamus to compel the defendants to put these three bridges and each of them in a proper and sufficient state of repair. General relief is also asked.

In respect of one of these bridges the plaintiffs' statement is: Upon the road allowance between the township of London, in the county of Middlesex, and the township of North Dorchester, in the same county, there has been for many years past erected and maintained a bridge over a river called "Doty's Creek," which said river crosses the said road allowance.

In respect of another of the bridges the plaintiffs' statement is: Upon the road allowance between the township of North Dorchester and the township of South Dorchester there has been for many years past erected and maintained a bridge over a river called "Kettle Creek," which said river crosses the said road allowance.

In respect of another of these bridges the plaintiffs' statement is: "Upon the road allowance between the township of North Dorchester and the township of Nissouri West, in the county of Middlesex, there has been for many years past erected and maintained a bridge over a river called "Caddy's Creek," which said river crosses the said road allowance.

And in respect of the three bridges the plaintiffs say that it was the duty of the defendants, under the provisions of the Municipal Act, to maintain and keep in repair the said three bridges and each of them; that the said three bridges are and each of them is out of repair, and have so remained for a long time past; that each of the said bridges forms a part of one continuous road or highway vested in the plaintiffs, and which cannot be used unless the bridge thereon is maintained and kept in repair; and that the defendants deny their liability to maintain and keep them or either of them in repair, and refuse to put or keep them or either of them in repair.

The defendants answer shortly by admitting that each of these bridges has been for many years erected and maintained, but denying that either Doty's Creek or Kettle Creek or Caddy's Creek is a river; and denying also that it was or is the duty of the defendants to maintain and keep in repair these three bridges or any of them.

The enactment imposing upon the defendants the alleged duty is found in the early part of sec. 535 of ch. 184 R. S. O. 1887. This provision is: "It shall be the duty of county councils to erect and maintain bridges over rivers forming or crossing boundary lines between two municipalities (other than in the case of a city or separated town) within the county."

The parties have not in their pleadings disagreed, nor did counsel at the argument, as I understood them, differ in respect of any matter excepting the question as to whether or not these streams, named as above, or any one or more of them are or is rivers or a river within the meaning of the provisions of the clause of the statute above set forth. Counsel were agreed as to all the facts except such facts as had or have a tendency to shew that these streams or any of them are or is a river, or the reverse of this—the substantial question for determination being whether these streams or any one or more of them are or is rivers or a river within the meaning of the enactment above referred to.

The contending parties have, so far as I can perceive, afforded every facility and aid by means of charts, photographs, and descriptions, for the determination of this question, which, simple though it may appear at first view, is, owing to various enactments of the Legislature and decisions of the Courts, as well as the natural difficulty that arises in considering questions of degree in regard to the size and volume of streams, and arriving at a conclusion as to whether, in any given case, the stream should properly be called a river, or only a creek, brook, or rivulet, regard being always had, of course, to the statutory provisions and judicial decisions that bear upon the subject, one of no small difficulty, and I am not at all surprised that in the present case these differences of opinion exist.

The plaintiffs called a Provincial land surveyor and civil engineer (Mr. Moore), who had examined the places in question and prepared descriptions of them in writing, and who also proved the photographs and charts. After having given evidence touching the descriptions that he had

prepared, he also gave some verbal testimony on the subject.

In regard to the stream called "Doty's Creek," his description in writing, which he proved to be correct, is:

"The watercourse called "Doty's Creek" crosses the roadway used in lieu of the road allowance forming the boundary line between the townships of London and North Dorchester, on lot No. 1 in the 3rd concession of North Dorchester, north of the river Thames, flowing in a southerly direction from the township of North Dorchester into the township of London. The stream is crossed by a bridge sixty-seven feet in length between supports. The top of the floor of the bridge was fifteen feet over the water level on September 10th, 1888. High water rises to about eleven feet from the top of the floor of the bridge. The average width is sixty feet between banks, measured at level of lower or 'flats' banks. The general height of lower or 'flats' banks was ten feet below the top of the floor of the bridge, the top of the floor of the bridge being fifteen feet over bottom of stream at bridge. Very little water in stream at time."

In regard to this stream the witness said in the witness box: "In 'Doty's Creek' the water generally runs. It does not dry up to my knowledge. It could not be used for boating or floating logs. It is a private stream. What I mean is that the public do not make any use of it by boating or floating logs. A culvert would not suffice at this place."

Respecting the stream called "Kettle's Creek" the written description of the witness is:

"The watercourse called 'Kettle Creek' crosses the road allowance forming the boundary line between the township of North Dorchester and South Dorchester at lot No. 22 in the 6th concession of the township of North Dorchester south of the river Thames, flowing in a northwesterly direction from the township of North Dorchester into the township of South Dorchester. The stream is crossed by a bridge thirty-one feet nine inches in length

between supports. The top of the floor of the bridge was nine feet four inches over the water level on September 10th, 1888. High water rises to about four feet six inches from the floor of the bridge. The average width is twenty-eight feet between banks measured at level of lower or 'flats' bank. The general height of lower or 'flats' banks was three feet below the top of floor of bridge, or six feet four inches over bottom of stream at bridge. The top of the floor of bridge is nine feet four inches over bottom of stream at bridge. Very little water in the stream at the time."

In regard to this stream the witness said in the witness box: "Kettle Creek at the place is small. The water flows constantly from the bridge to the mouth. The creek could not at this part be used for boating or floating logs. The bed at this place is grown over with grass and weeds. This is the case for several rods below the bridge. A culvert would not suffice in this place."

Respecting the stream called "Caddy's Creek," the written description of the witness is:

"The watercourse called 'Caddy's Creek' crosses the Governor's road, being the road allowance forming the boundary line between the township of Nissouri West and North Dorchester, at lot No. 14 in the first concession of North Dorchester, north of the river Thames, or at the south-east angle of lot No. 1 in the sixth concession of Nissouri West, flowing in a south-westerly direction from Nissouri West into North Dorchester. The stream is crossed by a bridge nine feet in length between supports. The top of the floor of the bridge was three feet nine inches above water level on the 17th of April, 1888. Depth of water one foot six inches. High water rises to about one foot six inches from the top of the floor of the bridge. The roadway at a point about three hundred and ninety feet west of the bridge was flooded by high water in this year. This point is two feet below the top of the floor of the bridge. A considerable area of low land on each side of the roadway is also flooded by high water to a width in

places of three hundred feet, and to a depth of from one foot six inches to nothing. The average width is twelve feet between top of well defined banks, and five feet three inches between banks at water level. Depth of water one foot six inches. Depth below banks to bottom of stream three feet."

In regard to this stream the oral evidence of the witness is:

"Caddy's Creek is a small continuous stream. It could not be used for boating or floating logs. It is grassy down to the water's edge, and in some places there is gravel in the bottom; in this place muck. A culvert would be sufficient here. Anything having a water-way of fifteen feet would be sufficient. It is crossed by a culvert about one mile below the place. In some places it is swampy, but there is a well defined channel all the way. There are places below where it loses the character of a stream. There are places where the roots of trees have grown over the stream and it flows under the roots of the trees. When I took my measurements it was in April, and there was about an average state of the water then. The water was then eighteen inches deep and five feet nine inches wide. *Where it empties into the river it is eighteen feet wide and one foot deep.*"

In most cases in which it is necessary to obtain an accurate idea of the existing condition of things or objects upon the ground, in any particular location, without actually seeing the place, difficulty is experienced. In the present case, however, I feel called upon to say that counsel seem to have left nothing undone, so far as I can perceive, to make an intelligible and accurate representation of the facts of the case; and I have, in this respect, nothing to complain of.

Counsel for the plaintiffs called attention to 51 Vic. ch. 28, sec. 30, amending sec. 532 of ch. 184, R. S. O., 1887. That sec. 532 now reads as follows:

"532. The county council shall have exclusive jurisdiction over all roads and bridges lying within any township,

town, or village in the county, and which the council by by-law assumes with the assent of such township, town, or village municipality, as a county road, or bridge, until the by-law has been repealed by the council, and over all bridges across streams or ponds or lakes separating two townships in the county, and over all bridges crossing streams or rivers over 100 feet in width, within the limits of any incorporated village in the county, and connecting any main highway leading through the county, and over all bridges over rivers or ponds or lakes forming or crossing boundary lines between two municipalities."

The parts of this section sought to be made available in the contention would seem to read: The county council shall have exclusive jurisdiction over all *bridges across streams or ponds or lakes separating two townships in the county, and over all bridges over rivers or ponds or lakes forming or crossing boundary lines* between two municipalities.

The contention was, that the Legislature used the word "rivers," and the word "streams," indifferently and as synonymous terms or expressions; and I think it does so appear in this instance.

One does not readily perceive a difference between the description "streams, ponds, or lakes" separating two townships, and the description "rivers, ponds, or lakes" forming boundary lines between two municipalities, if it is assumed that two townships are the two municipalities; and it is not, I think, too much to assume this, as in most cases such is the actual fact.

In the case *McHardy* v. *Ellice*, 1 A. R. 628, in appeal from the judgment of the Court of Queen's Bench, 37 U. C. R. 580, a case which the counsel for the plaintiffs contended is decisive of this case and binding upon me, the learned Chief Justice pointed out that the Legislature seems to have used the words "stream" and "river," as synonymous terms, referring to many Acts, and amongst them to sections 410 and 413 of the then Municipal Act. Some of the learned Judges in that case referred to the unsatisfactory state of some of

the provisions of the Act; and there has since been legislation on the subject, and the revision of the statutes; and after having, as well as I have been able, examined the various changes and enactments, I think there is as strong reason for saying now that these two words are so used by the legislature, as there was for saying so when *McHardy* v. *Ellice* was decided.

In that case the stream in question was called "Black Creek." It crossed a road running between the townships of Ellice and Downie, and was crossed by a bridge on that road. It was a stream from 30 to 40 feet in width, with clearly defined banks. The Court of Appeal, as I understand the judgment, were unanimous in holding that the stream was a river within the meaning of the word "river" in the then section 413 of the Municipal Act, which, so far as material here, was the same as the present section 535, that is to say, the parts of each section material to the question are the same.

In the present case each of the streams in question is a stream crossing a boundary line between two municipalities (townships), and each such crossing is, I think, clearly a crossing within the meaning of the word "crossing" in the 535th section of the Act.

The questions here are virtually the same as was the single question in *McHardy* v. *Ellice*. Counsel for the defendants referred to many authoritative definitions of the word "river." These I have examined as well as I have been able with the view of ascertaining whether or not I could apply some of them, notwithstanding the manner in which the word has apparently been used in the sections of the statute to which I have referred, and the decisions on the subject; but I think the case is such and the circumstances such that I cannot apply the ordinary definitions of the word given in books of general learning, and, notwithstanding all that has been said or may be said in regard to the manner in which the Legislature has employed or used these two words "rivers" and "streams," and whether they have in this and in other statutes used them as

synonymous terms or not, I am of the opinion that the effect of the statute is the same as it was when *McHardy* v. *Ellice* was decided, and that the true reason for the use of the word "rivers" in this 535th section is the one so clearly and well expressed and stated by Mr. Justice Patterson in the case *McHardy* v. *Ellice*, at pp. 643 and 644. The learned Judge said:

"We must give the Legislature credit for having in view something more practical than to leave an important duty like the building of a bridge to fall upon one municipality or another * * as opinions happen to vary in according or denying to the particular stream the dignity of a river. The word 'river' is used for another purpose than merely designating a stream which has a certain minimum volume of water, or height of bank or width of bed."

A direction to build and maintain all necessary bridges would have been too vague. It would have left room for the contention that whenever the convenience of travel required a bridge over a ravine or a railway, or even a corduroy causeway through a swamp, the county must make one. This vagueness is avoided by confining the duty to bridges over rivers. It is in this sense and for this purpose that, in my opinion, the word 'rivers" is used. I think the duty, while confined to what is not improperly called a river, attaches wherever the road is crossed by a stream which requires a *bridge*, as distinguished from a mere *culvert*, in order to make the road fit for ordinary travel."

The learned Judge then proceeds to deal with the matter that was before the Court, and says: "There can be no question that the structure with a span of fifty feet, shewn to us by the photographs and described by the evidence, is a bridge, and that the Black Creek is a stream which requires a bridge to carry the road across it. I think it is clear that it is a bridge over a river within the meaning and intention of the statute."

I have before given as full a description of the streams and bridges in question here as the evidence permits, and

I need not repeat this for the purpose of comparison. At Doty's Creek the span of the bridge is sixty-seven feet; at Kettle Creek the span of the bridge is thirty-one feet nine inches; and adopting the view so clearly stated by Mr. Justice Patterson above referred to, which, as I have said, is, in my opinion, the correct one, I am of the opinion that the bridge over each of these streams is a bridge over a river within the meaning and intention of the statute, and that the duty of erecting and maintaining each of these bridges rests upon the county council under the provision in section 535 before referred to.

As to the Caddy Creek bridge, the span is said to be nine feet only. The witness said that a *culvert* would be sufficient in this place. It is true that a culvert may mean a larger or a smaller waterway, but the line must be drawn somewhere. I apprehend that Mr. Justice Patterson used the word and intended to use it according to its ordinary signification, and with reference to culverts as commonly used in the construction of roads, &c.

The witness, who is a skilled and practical person, and in whom both parties to this contention relied, used the word, I have no doubt, in the same way. It is true that nine feet seems a large space for a culvert. The witness also speaks of a water-way of fifteen feet being necessary, but he at the same time says that the stream is crossed by a culvert about a mile below this place, that there are places below this place where it loses the character of a stream, that the roots of trees have grown over it, &c., that it is swampy in some places. True, he says that where it empties into the river it is eighteen feet wide and one foot deep; but at the place in question the water is only five feet nine inches wide. In the written description he points out that the road was flooded last year at a point nearly four hundred feet from the bridge, that this point was two feet below the floor of the bridge, that a very considerable area of land on each side of the road was also flooded, and this to a width of three hundred feet and a depth from six inches to nothing, pointing I

think to the conclusion that there is here a wide flat area of land lying comparatively low; and, looking at all that has been proved and shown with respect to this creek and bridge, with the best light I have been able to gather on the subject, I am of the opinion that the bridge over this stream is not a bridge over a river within the meaning and intention of the statute, and that the duty of erecting and maintaining a bridge in this place over Caddy's Creek is not imposed upon the county council.

My conclusion then is in favor of the plaintiffs' contention in regard to the respective bridges over Doty's Creek, and Kettle Creek, and in favor of the defendants' contention in regard to the bridge over Caddy's Creek.

Council stated that it had been agreed that the defendants would pay the costs of the litigation in any event.

It will not be necessary, I fancy, to ask for the order in the nature of a mandamus, as the parties seem willing to do what is right in the matter. If there should be any such necessity, the matter may be spoken to on settling the judgment.

[CHANCERY DIVISION.]

RE PONTON ET AL. AND SWANSTON.

Vendor and purchaser—R. S. O. 1887, ch. 112—Production of deeds—Evidence of trusts by recital in memorial 20 years old—Discharge of mortgage—Mortgage in fee by tenant for life—Necessity of discharge after death of life tenant.

A contract of sale of land provided that the vendors should not be bound to produce any deeds or evidence of title except such as they might have in their possession, but should show a good title, &c. It appeared that A. P., by an indenture of January 16th, 1858, conveyed the lands in question to trustees on certain trusts, which deed was registered by memorial not containing the trusts. By deed of appointment dated July 4th, 1862, made in pursuance of the deed of 1858, also registered by memorial which purported to contain a full copy of the deed in which were recitals which set out what purported to be the trusts of the former deed and showed a life estate in A. P., with a power of appointment in him, A. P. duly appointed to trustees who were represented by the vendors, with directions to sell after his death, which had recently occurred; neither of these deeds was in the possession or power of the vendors, the trustees. On an application under the Vendor and Purchaser Act,

Held, that the vendors were not bound to produce these two deeds, and that the production of the memorial of the deed of appointment twenty years old, reciting the trusts of the trust deed, was sufficient evidence of what those trusts were; and as there was an absolute trust for sale the purchaser should take the title.

A. P. in 1873 assumed to mortgage the lands in fee, and died in 1887.

Held, that the mortgage only bound his life estate, and that the vendors were not bound to procure a discharge thereof.

THIS was an application under the Vendor and Purchaser Act, R. S. O. 1887, ch. 112, in the matter of a contract of sale between Archibald William Ponton and Edward Douglas Armour, trustees, as vendors, and Alexander Swanston, as purchaser.

The petition set out the contract of sale, one term of which was, that the vendors should not be bound to produce any deeds, copies of deeds, or any other evidence of title except such as they might have in their possession; but should shew a good title and a right to convey.

It appeared that one Archibald Ponton who was the owner in fee, subject to a mortgage to one Ockerman, conveyed the lands in question, by indenture, dated January 16th, 1858, to trustees upon certain trusts, which

was registered by a memorial declaring that there were certain trusts but did not set them out; and that the indenture itself was lost: and that by deed of appointment, made in pursuance of the former indenture, dated July 4th, 1862, and registered by a memorial purporting to contain a copy thereof, the indenture of January 16th, 1858, was recited and what purported to be the trusts thereof were set out in full, shewing the said Archibald Ponton entitled to a life estate with power of appointment; that the said Archibald Ponton appointed the said premises to be sold by his trustees after his death and the moneys invested: that on April 1st, 1873, the said Archibald Ponton had assumed to convey the said lands to one Fearnley, by way of mortgage for $3,000, and professed to convey the fee simple therein: and that the said Archibald Ponton died on or about December 17th, 1887. It also appeared that prior to both said deeds there was an outstanding mortgage in fee, of which the trustees had taken an assignment and they offered to assign it to the purchaser.

The petition was argued on January 9th, 1889, before Boyd, C.

E. D. Armour, for the vendors, stated the case to the Court. The purchaser claims that the vendors should produce the original deed of trust of January 16th, 1858, to show what the trusts are, and the deed of appointment of July 4th, 1862. The vendors contend that as neither of those deeds are in their custody or control, they are not bound to produce them under the contract of sale, and at any rate the effect of the Vendor and Purchaser Act, in such a case, is to make the registered memorials sufficient evidence of the contents of the deeds, and to shift on to the purchaser the onus of shewing that the contents are not truly stated in the memorials. As the memorial reciting the trusts is over twenty years old, the recital is sufficient to prove the trusts; and as there is a trust for

sale the purchaser must accept this title. The mortgage in fee by Archibald Ponton was a mistake and did not bind the premises to any greater extent than his life estate, but the trustees have proved that it was paid off and a statutory discharge or reconveyance is not only unnecessary but would be improper, as the life has dropped and there is nothing to reconvey.

No one appeared for the purchaser.

January 9th, 1889. BOYD, C.—It seems to me that the vendors have sufficiently answered the objections and are not bound to produce the deed of trust and the deed of appointment, and that the production of the memorial of the latter, which is now over twenty years old, reciting the trusts of the former, is sufficient evidence of what those trusts were, and was sufficient to answer the objection as to its non-production.

Then, as to the mortgage to Fearnley, Mr. Ponton only had a life estate: if he undertook to mortgage in fee, the mortgage could not bind to a greater extent than his interest which ceased with his life. However, the vendors have proved payment of the mortgage; this should be satisfactory.

The vendors have power to sell under the deed of appointment. I therefore hold that the vendors have made a good title, and that the purchaser is bound to accept it.

See *In re Marsh and Earl Granville*, 24 Ch. D. 11.—REP.

G. A. B.

[CHANCERY DIVISION.]

YOUNG ET AL. v. SPIERS ET AL.

Bankruptcy and insolvency—Assignment for creditors—Filing of claim—Collateral securities—Mortgage debt—Open account—Tacking—Accommodation paper—Right to rank.

W. made an assignment to trustees for the benefit of his creditors prior to 1884. In July, 1884, H. filed a claim against the estate, claiming (1) upon two mortgages on land; (2) upon an open account and certain notes made by W.; (3) upon certain notes made by T. in favour and for the accommodation of W. and endorsed and delivered by W. to H. as a general collateral security for W.'s indebtedness to H. After filing the claim the mortgage debts were paid to H., who had thereupon assigned the mortgages, and the T. notes were also paid by T. to H., and T. had thereupon filed a claim in respect to them against W.'s estate, and received a dividend thereon. The mortgages had been given to secure payment of entirely separate and isolated debts from W. to H. H. afterwards made an assignment to trustees for his creditors, and these latter brought this action, claiming that notwithstand all the above circumstances, they were still entitled to rank on and receive a dividend from the W. estate on the whole of the above indebtedness, and on H.'s claim as originally filed.

Held, that as to the mortgage debts they were not entitled to receive a dividend, these being separate and distinct debts, but that as to the other indebtedness, they were still entitled to rank for the full amount, notwithstanding the payment in full of the T. notes, on the authority of *Eastman* v. *Bank of Montreal*, 10 O. R. 79, provided that they did not in all receive more than 100 cents on the dollar; and this did not prevent T. also ranking in respect to the sum he had paid as accommodation maker.

When a mortgagee is also a creditor in respect to a simple contract debt, he cannot tack the simple contract debt to the mortgage debt, and the creditor does not by reason of his creditor having made an assignment for the benefit of his creditors, acquire any higher position in this respect than he occupied at the time of or immediately prior to the assignment.

THIS was a motion by way of appeal to the Divisional Court against the judgment of Rose, J., in a certain action brought by John B. Young and W. F. Findlay, who were assignees in trust for the benefit of the creditors of John Harvey against David Spiers, Hugh McCullock, and John Hallam, assignees in trust for the benefit of the creditors of John Wardlaw, to recover a dividend from the estate of Wardlaw, under the circumstances which are fully set out in the judgments.

The action came on for trial before Rose, J., at Hamilton, on April 26th, 1888, who on the same day gave judgment as set out in the judgment of Robertson, J., *infra*.

The present motion came up for argument before Ferguson and Robertson, JJ., on June 15th, 1888, and the the argument was continued and completed on June 22nd, 1888.

J. Crerar for the plaintiffs. The case of *Eastman* v. *Bank of Montreal*, 10 O. R. 79, shews the law. See also *Re Rochette*, 3 Que. L. R. 97. We are here under the law without any Insolvent Act or Act as to assignments for creditors. As to mortgages, if I hold a mortgage on a piece of property for $2,000, which property is valued at $10,000, and the mortgagor owes me $8,000 on an open account, surely he cannot redeem the mortgage without paying the $8,000. [FERGUSON, J.—Can a debtor redeem a mortgage on paying what is due on the mortgage without paying other debts?] Yes, if he comes to pay when the money falls due; but it is different if he allows the mortgage to fall into default. Then if he asks for equity, he must do equity. The same reasoning that applies to the consolidation of mortgages ought much more to apply to an open account, and more especially now in the state of law as to counterclaim. Owing to this new doctrine of counterclaim an element not to be found in the old cases is introduced. If the doctrine laid down by Rose, J., is sound, then the judgment in *Eastman* v. *Bank of Montreal*, 10 O. R. 79, must be qualified in a way that does not appear in the judgment, namely, "provided these securities are securities for the general debt." The Turnbull notes were held as collateral security for the whole debt, and whether they were for accommodation or value makes no difference. We say both Harvey and Turnbull can rank on these notes. Harvey will rank on the original notes. Turnbull will rank for so much as he has paid.

A. R. Creelman, contra. We do not propose to question the judgment of Boyd, C., in *Eastman* v. *Bank of Montreal*, *supra*, or that of Ferguson, J., in *Beaty* v. *Samuel*, 29 Gr. 105. This claim of Harvey's of $23,000 consists of four distinct

parts. I propose to point out a clear distinction between this case and the *Eastman Case*, and in doing so refer to the unreported manuscript judgment of the Court of Appeal in that case. The foundation case is *Rhodes* v. *Moxhay*, 10 W. R. 103; it is referred to in the *Eastman Case*. I propose to shew that the particular debts for which the mortgage securities were given have been paid off at 100 cents on the dollar. The question is, whether a creditor can tack on his unsecured claim to his secured claim. On this point I refer to *Ferguson* v. *Frontenac*, 21 Gr. 188.

Crerar, in reply. The authorities as to tacking have no application, because they all have reference to third parties, and there are none here. The equitable doctrine is, that when a debtor ranks on an estate he is to get his dividend, and then make the most of his securities until he gets 100 cents on the dollar.

December 22nd, 1888. FERGUSON, J.—The defendants are assignees in trust of the estate of John Wardlaw under a deed of assignment for the benefit of creditors made some time prior to the year 1884.

John Harvey was a creditor of Wardlaw, and in July, 1884, filed his claim with the defendants. This claim amounted to $23,684.11. The plaintiffs are assignees in trust for the benefit of the creditors of John Harvey, and they bring this action to recover from the defendants the amount of the dividends to which Harvey was entitled as a creditor of Wardlaw, whose estate, as it is said, is paying 15 cents on the dollar.

Harvey, in making his claim against the estate of Wardlaw, put it into three statements, the sum of which was the $23.684.11. One of these statements seems to be principal and interest upon a mortgage, which amount to $8,216.87, with a credit apparently given in this way: "By Turnbull note indorsed by Wardlaw, due September 4th, 1884, as collateral for payment due May 1st, 1884, $750 instalment of principal."

Another statement is made up of notes and interest, an acceptance for accommodation of Wardlaw, a Turnbull note endorsed by Wardlaw, a solicitor's account and some other small items, the whole being $3,414.37. The other statement is made up of notes of Wardlaw, and three notes made by Turnbull, guaranteed and endorsed by Wardlaw, which, with a small deduction having reference to bank interest, amount to $12,052.87, these three sums making the $23,684.11. The mortgage mentioned in the statement firstly above mentioned, was taken as security for purchase money of a mill which was sold by Harvey to Wardlaw. It appears that it was dated May 1st, 1880, and that one of the notes made by Turnbull and endorsed by Wardlaw to Harvey, was so endorsed as a security for the payment of one of the instalments of this mortgage. This mortgage is called by counsel and in the correspondence, "the first mortgage." Afterwards, and on January 2nd, 1883, another mortgage was given by Wardlaw to Harvey to secure moneys that Harvey had (as is stated in the mortgage) advanced for the purpose of making improvements, &c., in the same mill, amounting to the sum of $8,500. This was called "the second mortgage."

The first mortgage was to secure unpaid purchase money of the mill, and appears to have been for $7,800, though in the argument it was spoken of as being for $7,500. The second mortgage was to secure the $8,500 for improvements, &c., of the mill. Neither one nor the other appear to have been given or taken as security for any other indebtedness, and each secured an indebtedness distinct from that secured by the other, and both these debts are included in the claim filed by Harvey with the defendants, which has been before mentioned, the $23,684.11. And counsel agree in saying that both these mortgages were fully paid, and were assigned by Harvey before he made the assignment to the plaintiffs. The mortgages appear to have been assigned to one Buchanan, whom the defendants procured to make an advance upon them. This advance and the moneys paid

by the defendants out of the Wardlaw estate paid the amounts of the respective debts secured by these mortgages, and the property in the mortgages became, as I understand the evidence, vested in Buchanan.

The evidence shews, I think, that the notes made by Turnbull and transferred by Wardlaw to Harvey (that is, apart from the one for $750, which was a security for the payment of an instalment of the first mortgage,) were given and received, and held as a general collateral security for the indebtedness of Wardlaw to Harvey, and that Turnbull paid Harvey the amount of them in full. Harvey says that when he took these notes he was not aware that they were made by Turnbull for the accommodation of Wardlaw (although Harvey does not seem very firm in his denial that he was aware of this). Turnbull when he paid these notes, filed his claim, and ranked on the Wardlaw estate for the amount of them on the ground that they were accommodation notes given to Wardlaw and paid by him (Turnbull). This ranking by Turnbull on the estate was not a surprise to Harvey or a thing not expected or anticipated by him for, in his letter to the trustees of the estate (the defendants) of November 26th, 1885, written "without prejudice," but with other letters marked in the same manner admitted and used in evidence by consent, this one being read by plaintiffs' counsel in the argument before us, Mr. Harvey says: "As if we ranked Turnbull could not, which would be hard on Turnbull, which neither of us wish." This letter indicates to me, in some degree, that Harvey was at that date aware that Turnbull had made these notes for the accommodation of Wardlaw, for how otherwise could he have the right to rank upon the Wardlaw estate for the amount of them in any case; that is to say, if he had given Wardlaw the notes for a consideration, he would, when paying them, be simply paying his own debt. The evidence is clear that Turnbull did rank upon the estate for the amount of those notes, and received the dividend from the defendants, and I apprehend the fact is that they were really accommodation

notes given by him to Wardlaw. Harvey, in his evidence, (when re-called) says that the first mortgage debt amounted on June 29th, 1884, to $8,216,87, that the second mortgage debt at that date amounted to $9,513.47: that the Turnbull notes at the same date (that is apart from the $750 before referred to as being a security for the instalment of the first mortage) amounted to $2,233.29, the sum of these being $19,963.63: that his total claim filed was $23,686.11, and that the difference was $3.722.48. The result of the defendant's calculation on the same subject was that the difference was only $3,693.84. This small discrepancy was cast aside by the defendants' counsel with some remarks to the effect that there was an error in the plaintiffs' calculation, and that his not contending about a small sum should not make any difference in considering the question of costs.

For the sum of $3,722.48, the defendants are willing that the plaintiffs should rank upon the estate that they represent. They brought into Court a sum equal to 15 cents in the $ on $3,693.84, and plead that this is enough to satisfy the plaintiffs' claim. The plaintiffs deny this. If it were assumed that the defendants were right in their contention upon the larger question or questions the small discrepancy here, even if there is such a discrepancy against the defendants, should not, I think, under the circumstances, make a difference in the matter of costs.

The plaintiffs' counsel in his contention that they (the plaintiffs) were entitled to rank upon the estate and receive dividends in respect of the whole claim of Harvey, and to collect and receive money upon the securities held by Harvey until they should have received 100 cents in the dollar of the whole claim, relied upon the case, amongst others, *Eastman* v. *Bank of Montreal*, 10 O. R. 79. In that case the whole claim of the bank was manifestly treated as one debt secured by the paper held as collaterals, and the rule adopted was applied to this as the state of the facts. In the same case in the Court of Appeal, the question as to whether or not the whole claim had been

rightly considered as one debt was distinctly raised. I have had an opportunity of perusing the manuscript judgments of the learned Judges of that Court. They do not all agree in saying that the whole claim was one debt. The judgment of the Court below was, however, affirmed. Mr. Justice Burton who differed on the question as to whether the whole claim was one debt took occasion to make this remark: "But if each discount is an isolated and separate transaction, in the event of a dividend upon one of the notes discounted followed shortly by the payment in full of that note, the bank would be bound not only to reduce their claim to future dividends by striking out the note thus paid, but to credit the dividend which has been thus received in excess of the face of the note," and it appears to me that the principle embodied or contained in this statement, which I think is a correct one, and not at variance with any of the views of the other Judges in that case, applies in the present case to the respective debts secured respectively by the first and second mortgages above mentioned.

Counsel for the plaintiffs also contended that they (the plaintiffs) had the right (so to speak) to tack the simple contract debt owing to Harvey to these debts secured by the mortgages, and so to work out the same result. All I can say is, that this proposition is, as it appears to me, against authority, I may say against all the authority I have seen, and no authority was cited in favour of it: 4 *Kent's* Com., 12th ed., sec. 175; *Ram* on Assets, p. 476; *Heams* v. *Bance*, 3 Atk. 630, referring to Amb. 685. There was here no agreement such as is mentioned in *Ram* on Assets.

My conclusion is, that the plaintiffs' contention cannot be sustained so far as the respective debts secured by these mortgages, respectively, are concerned.

Then as to the Turnbull notes. These must now, I think, be assumed to have been made by Turnbull for the accommodation of Wardlaw. When they were paid by Turnbull to Harvey there was certainly a debt from Wardlaw

to Turnbull, for which Turnbull could properly rank upon the estate in the hands of the defendants. He did rank upon the estate for the amount of the notes, and was paid the amount of the dividends in full. Harvey had filed his claim partly upon these notes; and upon the authority of the case *Re Oriental Commercial Bank*, L. R 7 Ch. 99, it was contended that there could not be a ranking twice on the estate for the same debt. I fail to see that Harvey properly ranked upon the estate for these notes as such, for he says he held them as collateral security. There was, however, the obligation or liability in favor of Harvey by reason of Wardlaw's endorsing and guaranteeing these notes. Yet when the notes were paid by Turnbull the money received by Harvey was received by him upon collaterals held by him, and it is admitted by the 4th paragraph of the defence that there was an indebtedness for which these notes were collateral, so that Harvey's claim could not properly be reduced by the amount of these notes, if my view in this respect is correct, and besides, it was stated on the argument, without denial, that the amount of this claim had been admitted.

As to the agreement alleged in the fifth paragraph of the defence about which there was so much contention. The learned Judge did not find upon the evidence. Two witnesses say that such an agreement was made, and that they acted in pursuance of it in being instrumental in raising the money or part of it by way of a loan on the mortgages and paying the debts respectively secured by the mortgages. Mr. Harvey says most positively that these witnesses are mistaken, that there was a conversation on the subject, but that it did not amount to this agreement at all. It is not contended that there is ground for suspecting the veracity of any of the witnesses. The learned Judge says that he has no remarks to make respecting any of them. The witnesses who say that the agreement was made, do not speak as definitely as one would like in order to find the existence of a verbal agreement of so great importance as this alleged one when there is a positive

denial. No consideration in fact passed at the time unless perhaps the mutual promise. Such an agreement was not acted upon immediately. What is said to have been done in pursuance of the alleged agreement, was not promptly done, and is capable of being referred to other causes. We are referred to a large volume of correspondence, and to subsequent conduct as to probabilities and inferences, and all that, I am able to say is, that in my opinion the alleged agreement is not sufficiently proved in the face of the denial of it to enable a Court properly to act upon it as an established agreement. It is most probable that there was a misunderstanding and the absence of consensus.

For the defence it was contended that the indebtedness to Harvey consisted of four distinct debts or claims—namely: the debt secured by the first mortgage; the debt secured by the second mortgage; a debt secured by the Turnbull notes (apart from the one securing an instalment of the first mortgage), and a remaining balance. I do not perceive that this contention can be sustained except as to the debts for which the mortgages were respectively held as collateral security, and I think the claim for the purposes of ranking under the circumstances, is divisible into three parts only.

The case then appears to me to stand thus: Each of the debts secured respectively by the mortgages was a distinct debt secured by a mortgage. Each of these debts has been paid and satisfied and the respective securities for them assigned and transferred as securities for part of the moneys to make such payment. The claim should I think be diminished by the sum of these two debts. After making this deduction there will be left the balance of the indebtedness of Wardlaw to Harvey which, so far as I can see, must be considered as one debt. Then collateral securities held generally by Harvey for the whole of Wardlaw's indebtedness originally to him but not securing specifically any portion of it apart from this balance or any distinct or isolated debt will, as well as any security (if any there is) held for the payment of it (the balance)

specifically be available as a collateral security for this balance, and the Turnbull notes are thus comprehended—so that they were a collateral security for the payment of this balance. These notes have been paid, and as I have already said the money was money received upon collaterals.

After the payment and satisfaction of the respective debts secured respectively by the mortgages above mentioned, Harvey's right I think was and the plaintiff's right is to rank upon the estate for the amount of this balance (that is the amount of the whole indebtedness after deducting the amount of the two debts respectively secured by the mortgages) and to receive all dividends thereon and all moneys arising from collaterals held generally in respect of the whole indebtedness, or to secure this balance until the sum of such moneys amounts to 100 cents on the dollar of such balance. The debts respectively secured by the two mortgages were distinct and isolated debts and the mortgages were distinct and isolated securities for their debts respectively. These debts have been paid and satisfied and both they and the mortgages securing them are now in my opinion out of the case and are things with which the plaintiffs have no concern

Taking the figures then as of the 29th day of June, 1884, the whole indebtedness was $23,684.11. The sum of the amounts of the two mortgages was $17,730.34. The difference is $5,953.77, and for this difference or balance I think the plaintiffs are entitled to rank upon the estate. The amount of the Turnbull notes paid to Harvey (apart from the one that was a security for the instalment of the first mortgage,) was $2,233.29. This wa spaid to Harvey. It is not shewn or pretended that any other moneys were received from collaterals to diminish the balance, for which the plaintiffs are, as I have said, entitled to rank for to a sum less than 15 cents in the dollar of such balance. It seems admitted that the dividend is 15 cents, the contention being as to the amount for which under the circumstances the plaintiffs should rank. The dividend to which

the plaintiffs appear to be entitled is $893.36 if the 15 cents in the dollar is to be paid them. The sum brought into Court is much less than this sum, and the issue should be found in favour of the plaintiffs, and I think there should be costs to the plaintiffs against the defendants, to be paid out of the estate in their hands.

I have taken the figures from Mr. Harvey's evidence. The plaintiffs' counsel said there was a small error in this. Perhaps on this account, or on account of interest, or possibly on account of the necessity of striking a new dividend, these may be varied more or less.

This matter can be alluded to perhaps on the settling of the judgment.

ROBERTSON, J.—This is a creditor's action to recover a dividend where there is a dispute as to the valuation of securities. The plaintiffs are the assignees in trust for the benefit of the creditors of the estate of one John Harvey; and the defendants are assignees in trust of the estate of one John Wardlaw, under an assignment for the benefit of creditors executed some time prior to the year 1884. At the date of his assignment by Wardlaw to the defendants, he was indebted to Harvey as the latter claimed, in the total sum of $23,766.51, made up in this way:

1st, on a mortgage security	$8,216 87
2nd, on another mortgage security	8,500 00
3rd, on an open account for goods, money, &c.	7,049 64
Total	$23,766 51

To the extent of $2,233.29, Harvey held as collateral security for the open account the promissory notes of one Turnbull. Harvey claimed to be entitled to rank on the estate for this sum of $23,766.51, and filed his claim accordingly in July, 1884. The defendants objected to this, and contended that Harvey should value his securities; but Harvey, although contending to the contrary, had offered the

defendants before action, without prejudice, to deduct from his claim the amount of the 2nd mortgage $8,500, and the sum of $2,255, being the amount of the liability of Turnbull to him for Wardlaw, making a total of $10.755, leaving $12,929.11 for collation in the dividend sheet, but the defendants refused to recognize that a dividend should be paid on any larger sum than $3,693.84; and the plaintiffs as assignees of Harvey claim a dividend of 15 cents on the dollar on the said sum of $12,929.

The defendants also set up an agreement made with them by Harvey in December, 1884, whereby the latter agreed that if the defendants would raise moneys to pay off these portions of the indebtedness of Wardlaw to him secured as above set forth, then he Harvey would accept the same as payment in full of his secured claims, and would rank with the other creditors upon the unsecured balance only, and the defendants say in pursuance of such agreement, that they in consideration thereof did raise the said moneys, and paid the same over to Harvey in performance thereof on their part; and the defendants further claim that in any case and independently of the said agreement the plaintiffs are not entitled to a dividend on any greater sum than the unsecured and unpaid balance of $3693.84, and they pay the sum of $587.09, into Court; this being a dividend of fifteen per cent. on the said sum of $3693.84; that is to say, $554.08, and $33.01 interest allowed by the bank with which the business of the said estate is done, from April 10th, 1886, at which date the dividend sheet was prepared, and they say this sum is sufficient to answer the plaintiffs' claim, and being trustees and having no other interest, they submit their interest to and are willing to abide by the direction of the Court: and the plaintiffs say that the amount paid into Court is not sufficient.

The action was tried at Hamilton in April last, before Rose, J., without a jury, when he found a general verdict for and gave judgment in favour of the defendants, with costs, and the following are his reasons therefor, given at the trial:

I think I am safer in expressing no opinion as to the agreement. If I adopted the defendant's view I would probably adopt it in entirety. If I adopt Mr. Harvey's I might adopt his in entirety, and I do not know how that would be without further consideration. I think that I must at present decide nothing as to whether there was or was not an agreement come to between the parties in December, 1884, such as is set up by the defendant, or is alleged by Harvey. I say nothing as to that. I rule as a matter of law that where there are specific securities given for specific debts on property in respect of which the debts were incurred, and where there is an open merchandize account having no reference whatever to the mortgages, and the mortgages having no reference to the account, that the creditor cannot by reason of the assignment of his debtor acquire any higher position than he occupied at the time of or immediately prior to the assignment. That if prior to the assignment the debtor might have redeemed the property without payment of the unsecured account, I see no reason why the assignment should give the creditor the right to require the payment of the open account, unsecured account, before the estate could redeem the property, and authority not having been shewn, and I not having at present any in mind which would enable the creditor to take the position claimed before the assignment, I shall hold in this case he cannot take it after the assignment. On that branch of the case there is a difficulty in the way of the plaintiff which may be added to that which I have stated. He claims the right to have the benefit of the dividend upon the debts secured by the mortgage for the purpose of adding to the dividend on the unsecured claim by reason of being owner of those debts. Subsequently to the filing of his claim I suppose it is, but I am not sure about that, he assigned the mortgages, and the mortgage indebtedness, and has been paid this mortgage indebtedness, or the sum secured by these mortgages so that he is not at the time he claims the dividend, owner of the mortgage debt, or entitled to be paid the mortgage debt because he has already been paid that mortgage debt, and has assigned both the property and the debt so that as between him and the debtor, apart from the assignment, all that the has owing to him now is the open account. He has that difficulty to face in his contention which may distinguish this case from other cases that may be found in the books.

I would further rule as a matter of law that the estate is only bound to pay one dividend, a single dividend upon the Turnbull note; and if it paid Harvey it would not be bound to pay Turnbull. If it has paid Turnbull, I see no injury done, Turnbull having already paid Harvey 100 cents on the dollar. For these reasons I decide as I have suggested and the accounts may be made up on that footing.

And as to the alleged agreement between Harvey and the defendants he expressed himself as follows:

"About the alleged agreement nothing turns in arriving at a conclusion, with reference to that agreement, upon the appearance or conduct of the parties in the witness box. They all gave their evidence with the

same appearance of credit or appearance of deserving credit, as far as I could judge; therefore any Judge in review would have equally as good an opportunity of coming to a conclusion upon their evidence and upon the documents now before the Court, as I have; and if I should delay judgment for the purpose of perusing all the correspondence and documents it might be some time before, in the course of business, I would be able to reach the case again, and I would be doing the parties no good. I have not been able to form an opinion as to the alleged agreement because I think before forming an opinion one would have to scan the correspondence, and I think that can be done on review. I state *for the information of the Court that I would derive no assistance from the conduct of the parties in the witness box.*"

From this judgment Mr. Crerar, as of counsel for the plaintiffs, appealed to the Divisional Court, and the motion was heard in June last before my brother Ferguson and myself, and it was contended that Harvey was entitled to prove for the whole amount of his claim, and in support of that contention he cited and relied on *Eastman* v. *Bank of Montreal*, 10 O. R. 79, and the cases therein cited.

Creelman, for the defendants, supported the judgment of Rose, J.

In order to clear the way for a full consideration of the different points argued before us, apart from the alleged agreement, I will dispose of that question first.

There being no advantage, then, in hearing and seeing the several witnesses, I am obliged to form my judgment from the correspondence, taking into account that Harvey in his evidence does deny most emphatically that any such agreement was ever come to between him and the defendants, and the fact that neither Spiers or his co-defendant assert the contrary in such positive terms as would enable one to say as between them and Harvey that they are entitled to belief against Harvey. But I have formed an opinion from reading the correspondence, and I cannot refrain from stating that the letters written by the defendants do not impress me with the fact that any such agreement was ever come to. There runs through the whole of the defendants' letters a want of candour, which one would not expect to find, was it clearly understood between the parties that any such understanding had been arrived at, as the defendants now allege.

Without going further, I may say that in my opinion the defendants have wholly failed to establish that agreement. This being the case, the matter to be disposed of rests entirely upon the right of the parties, apart from the alleged agreement. The first mortgage was given for unpaid purchase money of a mill property sold and conveyed by Harvey to Wardlaw, amounting to $7,800, and not as collateral to any other claim which Harvey then, or thereafter, might have; and the second mortgage was given three years thereafter, and recites the first, and "that since the date of that mortgage (May 1st, 1880) the mortgagee had advanced further sums of money to the mortgagor for the purpose of adding to, improving, and extending the said mill property, and that the mortgagor for said other advances is in addition to his indebtedness yet unpaid on the said first mortgage, indebted to the mortgagee in the further sum of $8,500, which this second mortgage is intended to secure." So that it is quite plain that neither of these mortgages were given or intended to be taken as security for any other indebtedness, and each secured only the indebtedness for which each was expressed to be given; and both these debts are claimed for by Harvey in his statement of claim filed with the defendants; and it is admitted by all parties that Harvey had assigned these mortgages to one Buchanan, and was paid the whole amount due to him on both by the amount received from Buchanan, whom the defendants had procured to make an advance upon them, and with other moneys belonging to the Wardlaw estate, were paid by defendants to Harvey in satisfaction and payment thereof before he, Harvey, had made his assignment for the benefit of creditors to the plaintiffs. Before this assignment however of the mortgages to Buchanan, Harvey had received by endorsation of Wardlaw, a note made by one Turnbull for payment of $750, as a further security for the payment of an instalment due on the first mortgage, which note is not taken into account in this action; and besides this note, Harvey also held other notes made by Turn-

bull and endorsed by Wardlaw to Harvey, which he held as collateral security generally for the other indebtedness of Wardlaw to Harvey all of which notes were paid in full to Harvey, after he had filed his claim against the Wardlaw estate. After the payment of these notes Turnbull also filed his claim and ranked on the Wardlaw estate, for the amount of them, claiming as he did, and which I think was a fact, that these notes were made by him for the accommodation of Wardlaw, and for the making and payment of which he had not received any value. Harvey says at the time he received these notes he was not aware that they were accommodation paper, but if one can judge from an expression in the letter of November 26th, 1885, from him to the defendants, it is pretty clear if he did not know the fact, at the time he received the notes, he certainly must have known it when he wrote that letter, because he there refers to Turnbull ranking for the amount paid by him to Harvey, in these words: "*as if he* (Harvey) *ranked, Turnbull could not, which would be hard on Turnbull, which neither of us want.*" The inference is, that the only grounds on which Turnbull could rank on the Wardlaw estate, for the amounts paid by him to retire promissory notes, was that the notes had been made for the accommodation of Wardlaw, (and here I may remark, in passing, that Harvey did not express the law as it is, as I will subsequently show). Turnbull, however, did rank and received a dividend thereon, and I think it must be presumed that the trustees (the defendants) took care that Turnbull established his claim before they paid a dividend upon it. These notes, on July 29th, 1884, the date to which Harvey made up his claim, amounted to $2,233.29: the first mortgage debt to $8,216.87, and the second mortgage debt to $9,513.47, making a total of $19,963.63; so that the difference between this sum and the total amount of his claim filed, was $3,722.48, and it is for this sum that the defendants say the plaintiffs are entitled to rank upon the Wardlaw estate, and it is upon this sum that they have

paid into Court 15 per cent. as being the whole amount which the plaintiffs are entitled to recover. As before stated, the plaintiffs, on the other hand, contend that they are entitled to rank for the whole of the indebtedness of Wardlaw to Harvey, including the two mortgage debts, up to the date of the assignment of Wardlaw. In my opinion both contentions are erroneous. *Eastman* v. *The Bank of Montreal*, 10 O. R. 79, cited by the plaintiffs' counsel, does not support his proposition, nor does it support that of the defendants' counsel, but it does support the plaintiffs in so far as Harvey's claim is concerned, less the amounts of the two mortgage debts. In other words, I think Harvey has a right to be paid a dividend on the amount of his claim, after deducting the amount received by him in payment and satisfaction of these mortgages; they formed separate and specific transactions, originally and always, and were securities for the payment of the respective debts mentioned in them, and for nothing else; there was no agreement in writing, or otherwise, that they should be held by Harvey as and for collateral to any other claim or debt which he might have against Wardlaw, other than those mentioned in them; and therefore when he assigned them to Buchanan he parted with them; the debts secured by them were paid, so far as Harvey was concerned, and all interest in the property on which they were given was parted with by Harvey, and became vested in his assignee, Buchanan. But so far as the Turnbull notes (apart from the $750 note given as security for payment of the instalment on the first mortgage) are concerned, a different state of things exists, and as regards them *Eastman* v. *Bank of Montreal*, *supra*, is an authority in favour of the plaintiffs. In my judgment Harvey had the right, 1st, to rank on the estate for the full amount of Wardlaw's other indebtedness to him (he did not rank for the Turnbull notes). But he had a clear right to collect all collaterals which he held as security for that indebtedness, be it much or little, and so long as he did not receive more from the two sources, viz., the estate of the

principal debtor and the collaterals, than would pay 100 cents on the $ on his claims, he was within his strict right, and in this respect I find myself obliged to dissent from my learned brother who tried the action. He states his view of the law on this point in these words: "I would further rule as a matter of law, that the estate is only bound to pay one dividend, a single dividend, upon the Turnbull notes; and if it paid Harvey it would not be bound to pay Turnbull. If it has paid Turnbull, I see no injury done, Turnbull having already paid Harvey 100 cents on the dollar. For these reasons I decide, as I have suggested, and the accounts may be made upon that footing." Now, the fallacy in this statement is in the suggestion that the estate had paid, or that Harvey was seeking to make it pay him a dividend on "the Turnbull notes." That is not the fact. The dividend paid Harvey, or that which his assignees now claims to be entitled to, is a dividend on the amount of *his claim against Wardlaw. not his claim on "the Turnbull notes."* He has made no claim on Wardlaw's estate for these notes; but what he has done or his assignees are claiming the right to do is to collect all of his indebtedness against Wardlaw's estate, if they can; to the extent of their failure, they claim to look to those collaterals, the Turnbull notes. As a fact it has been ascertained that the estate, can and will pay only 15 per cent of that indebtedness, per consequence Harvey's assignees have the right to look to his collaterals to the full amount thereof, unless they exceed in value 85 per cent of his claim against Wardlaw in this case. They come far short of that. This rule has been adopted in this Province for a number of years. The Chancellor in his judgment in *Eastman* v. *Bank of Montreal*, 10 O. R. 79, says: "The rule in Chancery for the administration of assets, first placed on a firm footing by Lord Cottenham in *Mason* v. *Bogg*, 2 My. & C. at p. 451, and recognized by Lord Lyndhurst in *Re Plummer*, 1 Ph. 56, has been adopted as that which is to prevail in this Province: *Re Baker, Bray's Claim*, 3 Ch. Ch. 499; *Beaty* v.

Samuel, 29 Gr. 105. It is thus well defined by Stuart, V. C., in *Rhodes* v. *Moxhay*, 10 W. R. 103. The creditor is entitled to prove for the whole amount of his debt, and to take a dividend upon the whole, without prejudice to his rights against securities he may hold, subject of course to this qualification, that he must not ultimately receive more than twenty shillings on the pound. To hold otherwise would be virtually to deprive the secured creditor of any advantage from his security; such is the rule affirmed also in *Kellock's Case*, L. R. 3 Ch. 769, as applicable to winding up proceedings."

A different state of things would have existed had Harvey realized on these Turnbull notes, before the assignment of Wardlaw to these defendants; in that case he would not be allowed to rank for more than the amount of his debt at the time of the assignment, and as that debt had been diminished by the payment of the notes, Harvey would only be entitled to a dividend on his claim as it then stood. So that by the operation of this rule Harvey is really in a better position, in consequence of Wardlaw's assignment, before the payment by Turnbull, than he would have been had the payment been made at a date previous thereto,

This (in my opinion) being the law, how does the matter stand between the parties?

On July 29th, 1884, the whole indebtedness was	$23,686 11
The total of the two mortgages was	17,730 34
Leaving a balance of	$5,955 77

on which, in my judgment, the plaintiffs, as assignees of Harvey, are entitled to the dividend, admitted to be 15 cents on the $, which amounts to $893.36, so that Harvey having secured from his collaterals the Turnbull notes $2,333.29, and being entitled to the dividend of 15 per cent. which amounts as above to $893,36, he will only have received $3,126.65 for his debt of $5,955.77, his estate therefore will not have received 100 cents on the $, but will come short of that $2,829.12.

The plaintiffs therefore are entitled to receive over and above the amount brought into Court by the defendants, $306.27, besides the interest allowed by the bank thereon, and the issue should have been found in favour of the plaintiffs, and I think with full costs of suit, to be paid out of the estate in the defendants' hands. Neither party presented this view to the Court at the trial, nor was it done on the re-hearing, but in my judgment it is the only way in which the case should be disposed of.

A. H. F. L.

[CHANCERY DIVISION.]

COURSOLLES V. FOOKES.

Fraudulent conveyance—Prior mortgage set aside by creditor—Priority of subsequent bonâ fide mortgage—Subrogation—Costs—Salvage.

As a general rule the doctrine of subrogation does not apply in favour of a party who has not paid money or given something in satisfaction or extinguishment of a security, claim, or demand, or partly so, or who has not paid something by way of getting in a security, or the like.

The plaintiff, an execution creditor against lands, brought an action to set aside as fraudulent, two mortgages of real estate made by his execution debtor and succeeded as to the first, the action being dismissed as to the second mortgage. The lands were sold but did not realize enough to pay the plaintiff and the second mortgagee. The plaintiff then claimed to be entitled by his diligence to priority for his execution over the second mortgage to the extent of the mortgage so set aside as fraudulent.

Held, that he was not entitled to any such priority as to his execution, but that his costs as between solicitor and client over and above his costs as between party and party, and such of the latter costs as might not be realized from the defendants (other than the second mortgagee) were a first charge on the fund as in the nature of salvage.

THIS was an application to the Court to decide a question of priority.

The action was brought by T. G. Coursolles against Amelia F. Fookes, Frederick Fookes, Harry Fookes, and John Hendry.

The plaintiff was an execution creditor of the defendants Amelia F. Fookes and Frederick Fookes (husband and wife), who were the owners of certain lands, and brought the action to set aside two mortgages to the other two defendants, Harry Fookes, a son of the owners, and one John Hendry, respectively, on the ground that they were fraudulent and void as against creditors.

The action was tried at the Spring Assizes of 1888, held at Ottawa, before Falconbridge, J., when the mortgage to Harry Fookes was declared fraudulent and void, and was set aside, but the case was dismissed as against the defendant John Hendry.

The question sought to be decided on this application was, whether the plaintiff was entitled to priority over the mortgage of Hendry to the extent of the mortgage to Harry Fookes, which had been removed out of the way by his exertions in the suit.

The motion was argued on January 22nd, 1889, before Ferguson, J.

Shepley for the motion. The plaintiff should get the benefit of the expense and trouble he has been at. As between the fraudulent mortgagor and the fraudulent mortgagee, the mortgagor could not complain, and if the transaction was binding on the mortgagor it should be on his assignee, the second mortgagee: *Warren* v. *Taylor*, 9 Gr. 59. The second mortgagee is not injured, and the execution creditor should get the benefit of his exertions. In *Shaw* v. *Neale*, 20 Beav. 157, it was decided that if a judgment creditor neglected to re-register within the five years those registering subsequently would obtain priority. Then *Beavan* v. *The Earl of Oxford*, 6 DeG. M. & G. 492, decided that although the judgment creditor omitting to re-register would lose priority as regards purchasers, mortgagees and creditors, whose rights arose after the omission to re-register, the omission did not alter the position as to purchasers, mortgagees and creditors whose rights arose

after the original registration but before re-registration. The position, therefore, of such a mortgagee or creditor was analogous to that of a subsequent mortgagee who cannot dispute the validity of a prior mortgage. But in *Benham* v. *Keane*, 1 J. & H. 685, in app. 3 DeG. F. & J. 318, A, B, and C were incumbrances in the order named, A and B having judgments and C a mortgage. B got priority over A by registry, and C got priority over B by the latter's neglect to re-register. A being prior to C as between themselves it was held, notwithstanding such priority, that if B's judgment would exhaust the property, C to the extent of B's judgment, must be paid in priority to A, and that A being behind B, could not complain. That is this case. Plaintiff got rid of the Fookes mortgage, which had priority over Hendry, and so he should take priority to the extent of the mortgage got rid of. An execution creditor is entitled to redeem a prior mortgagee: *Bloor* v. *The Bank of Upper Canada*, 2 O. S. 31; *Gilmour* v. *Cameron*, 6 Gr. 290. The plaintiff is entitled to be subrogated to the rights of Fookes against Hendry. Subrogation arises by operation of law whenever the mortgage debt has been extinguished by one, other than the debtor, entitled to redeem; *Jones* on Mortgages, 3rd ed., sec. 874. There is no reason why the extinguishment spoken of should be interpreted so narrowly as to be limited to the case of payment. Anything done by the person entitled to redeem (not being the debtor) to get rid, for the benefit of the subsequent title, of a prior incumbrance, should confer the right of subrogation.

S. H. Blake, Q.C. The doctrine of subrogation does not apply here. The extent of the right in subrogation is the amount of money that has been put into the matter. No money was put in here. To the extent of the money paid there might be the right: *Fleming* v. *Palmer*, 12 Gr. 226. In all cases where fraudulent conveyances are set aside no one diligent creditor has any priority. The property freed from the conveyance is divided among the creditors. The plaintiff's right or remedy was under the Statute of Eliza-

beth to remove the mortgage as invalid and have the property freed from it. The statute is in favor of "all others:" *Reese River Silver Mining Co.* v. *Atwell*, L. R. 7 Eq. 347. The judgment here orders that the mortgage should be delivered up to be cancelled, and so does not leave it good as against anyone. In *Merchants Bank* v. *Morrison*, 18 Gr. 382, at the hearing the diligent party was held entitled to what was got by his diligence, but on the re-hearing, 19 Gr. 1, the Court held that although his diligence got in the estate the prior charge had priority. In *Masuret* v. *Mitchell*, 26 Gr. 435, a property freed from a charge was held available for all the creditors. The defendant Hendry was not fully secured, and so is a creditor, and the plaintiff cannot take his right from him by proceeding first. The cases on re-registry and notice cited by my learned friend are dealt with in *Coote* on Mortgages, 5th ed. 55, 57 and 102.

Shepley in reply. Even if Hendry is not secured in full he cannot attack a prior mortgage or conveyance on the same property, subject to which he took his own security: *Warren* v. *Taylor*, *supra*. The judgment should be read as a mere declaration of the invalidity of the Fookes mortgage against creditors, which is all the plaintiff was entitled to under *Macdonald* v. *McCall*, 9 O. R. 185. The direction that it should be delivered up to be cancelled is *brutum fulmen*.

February 2nd, 1889. FERGUSON, J.—The plaintiff is an execution creditor who placed his writ against lands in the hands of the proper sheriff on the 18th day of October, 1886. The amount of his claim is about $400.

There was a mortgage upon the land in favor of one Harry Fookes for $1,000, which was registered on the 14th September, 1886; also another mortgage on the same lands in favor of the defendant Hendry for $250, which was registered on the 12th day of October, 1886, about six days before the plaintiff placed his writ against lands in the sheriff's hands.

Both of these mortgages had thus apparent priority over the plaintiff's demand upon his judgment and writ.

The plaintiff brought this action, which upon the pleadings does not differ much from the action usually brought in such cases, asking that both these mortgages should be declared to have been made without consideration, and that they were respectively fraudulent and void, and further asking that they should be delivered up to be cancelled, and the registrations thereof vacated.

The plaintiff further asked, amongst other things, that the lands should be sold under the direction of the Court (subject to a prior mortgage in favour of one Howell for $800 or thereabouts, which was undisputed), and the proceeds of the sale applied in payment of his debt and costs of the action.

The action was tried before my brother Falconbridge. By the judgment it was declared that the mortgage for $1,000 in favor of Henry Fookes had been made without consideration, and that it was fraudulent and void as against the creditors of the mortgagor. The judgment, however, further orders (in accordance with the prayer of the plaintiff) that this mortgage in favor of Harry Fookes for the $1,000 be delivered up to be cancelled and the registration thereof vacated.

It was by the judgment further ordered that the action should be dismissed as against the defendant Hendry, without costs, and in this way the mortgage in his favor for the $250 was in effect declared to be good.

There was a motion for an injunction in the case, and the order was granted.

The lands were sold, and there is a balance after paying the mortgage in favour of Howell for the $800, which balance has been paid into Court or is by consent in the hands of one of the solicitors, I do not now recollect which, but the difference is not material. This balance has proved insufficient, as I understand, to satisfy both the plaintiff and the defendant Hendry.

There was an appeal from the decision of my brother

Falconbridge to the Divisional Court, in which the decision was affirmed. The question of priority as between the plaintiff's execution and the mortgage in favor of the defendant Hendry in respect of the fund, the balance of purchase money of the lands above mentioned, was, however, left to be disposed of by a Judge, and so also was the question as to the costs of the motion for the injunction, which injunction was then continued meantime. The The question of priority as above has been much argued before me sitting in Court, but I do not know that counsel made any special mention of the costs of the motion for the injunction.

As before stated, the priority which is the subject of the contention, looking at the order of time only, is in favour of the defendant Hendry and against the plaintiff, and the question for me to determine is whether or not there is any reason or sufficient reason appearing to enable or compel me to say that such order of priority should be reversed.

Counsel for the plaintiff contended that he was, or rather is, in a position to avail himself of the benefits arising under the doctrine of subrogation. It does not appear that the plaintiff paid any sum of money in satisfaction or part satisfaction of the $1,000 mortgage that has been removed out of the way of the honest claimants. The contrary of this appears, and the Court has declared that mortgage to have been without consideration, and fraudulent and void as against creditors, and apparently following the plaintiff's prayer in his statement of claim, has ordered it to be cancelled and the registration of it vacated. It has not been allowed to stand as between the parties to it for whatever it might have been worth; but is cancelled and rendered non-existing and as if it had never been.

I do not understand that the doctrine of subrogation applies in favour of a party who has not paid any sum of money or given any other thing in satisfaction or extinguishment of a security, claim or demand, or partly so, or paid anything by way of purchasing in a security or the

like. I think this view is sustained by what is said in *Jones* on Mortgages, 3rd ed., commencing at sec. 874. That is speaking in a general way. There may be exceptions, but it was not pointed out that the plaintiff's case is an exception, and I do not perceive any reason for saying that it is, and my opinion is against the plaintiff on this contention. The plaintiff also relied upon a number of decisions under the Registration of Judgments Acts in England, but I am unable to perceive how these decisions apply to a case like the present one.

It was further contended for the plaintiff that a second or subsequent mortgagee necessarily takes his security upon the title that the mortgagor has at the time, and that he obtains no higher right than his mortgagor had, and that the declaration that the $1,000 mortgage was void therefore enured to the benefit of the plaintiff and not to the benefit of Hendry. This, I think, is answered by saying that Hendry took his mortgage upon the lands free from encumbrances, and not upon an equity of redemption in the land, that is to say: the mortgage is so drawn as stated by the plaintiff, and the prior mortgage for the $1,000 has been declared to have been made without consideration, and has been ordered to be cancelled. It has ceased to exist as a mortgage, and is, as I think, as if it had never been. I cannot but think that under such circumstances the defendant Hendry was or became a chargee by virtue of his mortgage upon the land disencumbered of the $1,000 mortgage, that is, as if such mortgage had never been a charge.

A further question was argued as to the defendant Hendry being a creditor, and having himself the right to attack this $1,000 mortgage on that footing, and therefore standing in a position to claim in this action as a creditor even if the mortgage for the $1,000 had only have been declared void as against creditors and not cancelled.

It is laid down in *May* on Fraudulent Conveyances, 2nd ed., 164, that if the property mortgaged is not sufficient to satisfy the debt, the mortgagee of course will be a creditor

for the balance. This proposition was not disputed, although the authorities referred to by the author do not seem to make the truth of the proposition as clear as is sometimes the case. What was really contended was, that it was not shewn that the defendant Hendry was not otherwise fully secured for his debt. As to this immediate point, I think that when it appears that the property is insufficient to satisfy the mortgage, and nothing more appears, it rests upon the party claiming against the mortgagee to shew that he is fully secured in respect of his debt. I need not, however, decide anything as to this, as I think that upon the other elements of the case presented the defendant Hendry is entitled to priority over the plaintiff.

I am, however, of the opinion that the plaintiff is entitled to have his costs, charges, expenses and disbursements, as between solicitor and client, over and above his costs as between party and party, and such of his costs as between party and party as may not be realized from the defendants other than the defendant Hendry (inclusive of his costs of the injunction motion) paid out of the fund first and before any distribution thereof, as was done in *Macdonald* v. *McCall*, 9 O. R. at p. 197. See also the case *Pegg* v. *Eastman*, 12 Gr. 137, referred to by counsel for defendant Hendry.

Such costs appear to me to be somewhat in the nature of salvage, and I think it just to give this direction in regard to them.

The order will be accordingly.

G. A. B.

[QUEEN'S BENCH DIVISION.]

PURDOM V. NICHOL ET AL.

Principal and surety—Promissory note—Collateral security—Novation—Partnership.

The plaintiff in 1875 indorsed a promissory note for the accommodation of the defendant N., and the latter delivered it as collateral security to mortgagees of his freehold.

The mortgagees procured the defendant B. to enter into partnership with N. and threw off $1,000 of their mortgage debt, releasing their original securities and taking a new mortgage from both defendants for $1,000 less than the amount of their claim. This was in 1876. In 1879, when the note fell due, the plaintiff paid the amount to the mortgagees, who applied it in reduction of their mortgage debt. At the time the plaintiff paid he did not know of B.'s connection with the matter.

Held, that the plaintiff was entitled to recover against both defendants for the amount paid, as money paid at their request.

THE judgment of the Court of Appeal in this case is reported in 15 A. R. at page 244, where the facts are stated at length.

The judgment of the Court of Appeal was reversed by the Supreme Court of Canada on 14th December, 1888, and the judgment of this Court restored.

The action was tried at the London Spring Sittings, 1885, before Cameron, C. J., who dismissed the action as against the defendant Baechler.

On the 16th January, 1886, *Moss*, Q. C., for the plaintiff, moved before the Divisional Court to set aside the judgment and enter it for the plaintiff.

S. H. Blake, Q. C., for the defendant Baechler, shewed cause.

March 8, 1886. WILSON, C. J.—Action on a promissory note. The evidence has occasioned a great deal of trouble in discovering the real facts of the case, and the rights of the parties, but they are very simple when once found out. They are: That the plaintiff indorsed a note dated on the 14th of April, 1875, for the accommodation of Nichol for $500, the note now sued upon. Nichol not long after that

delivered it to one Barton as collateral security upon a mortgage, which had been made by him to Barton on the 19th of January, 1872, for $1,000.

Barton and one Redford had assisted Nichol in business, and Nichol owed them on the 4th of April, 1876, $7,323, including the former mortgage for $1,000, which was then discharged.

Redford and Barton procured Baechler, the other defendant, to take an equal interest in all the property which Nichol had, and to join him in partnership, and as an inducement to Baechler to do so they threw off $1,000 from their debt, and upon that Nichol and Baechler, on the day next before mentioned, gave a mortgage to Redford and Barton for $6,323.

The note now sued upon was held from its delivery to Barton by Mr. McPherson, who was acting for both Nichol and Barton; and upon the giving of the mortgage for $6,323, he continued to hold it as collateral security for the payment of so much of that debt for the benefit of Redford and Barton. Redford afterwards became an insolvent, and all his estate passed to Mr. Hossie, as his assignee. It appeared that Baechler did not know of the note being a collateral security upon the mortgage he had joined in for $6,323.

But the fact that he did not know it shews that he was not worse off without that knowledge than with it; for his rights or position were in no way affected by it one way or the other. The plaintiff paid the note in 1879, when it fell due, and the proceeds of it were applied in reduction of the joint mortgage of the defendants, and he now claims to be repaid the amount of the note, which he paid for the defendants in the reduction of their mortgage debt.

It appears to me to be quite clear that he is entitled to recover against them for so much money paid by him for them at their request. He cannot recover properly upon the note itself, for Baechler is in no way a party to it, and if his statement of claim requires amendment in any way

to meet the actual facts of the case, an amendment must be allowed.

The recovery may be had against Baechler, although he did not know that the note was held as a collateral security for the joint debt; for what his partner Nichol did and knew, and what their professional adviser did and knew, in and about their partnership business, must be taken to have been known by him as well as his co-partner, and therefore in law the payment may well be averred to have been made at *his request*, for it was made clearly at the request of Nichol, the co-partner, and in discharge of a partnership debt, and the plaintiff did not make himself a voluntary creditor of the defendants or of either of them.

The judgment dismissing the action must be set aside, and a judgment for the amount of the note and interest, as directed by my brother Armour, must be given for the plaintiff with costs.

ARMOUR, J.—I do not see how it can well be doubted that the note in question was delivered by the defendant Nichol to Redford and Barton as collateral security for the debt which he then owed them; this debt was secured upon his lands, and there was no other debt owing by him to them, and it was in respect of this debt that the note was delivered by him to them; it must therefore have been so delivered either as collateral security or as payment; and as neither Redford and Barton nor the defendant Nichol ever treated it as payment, the conclusion is irresistible that it was delivered to them by the defendant Nichol as collateral security.

Then, how was the plaintiff's liability upon this note affected by the transaction of the 4th April, 1876, when Redford and Barton conveyed the said lands to the defendants and took back from them the mortgage payable in two years thereafter? The debt represented by the defendants' mortgage was the same debt which the defendant Nichol owed to Redford and Barton, less $1,000.00, which they had thrown off, and for the payment of it they obtained

the additional security of the defendant Baechler's covenant, but they extended the time for the payment of it for two years. The plaintiff was not prejudiced by this transaction unless the giving of time for two years prejudiced him, and it is difficult to see how this prejudiced him, for the note did not fall due till long after the expiry of the two years given by the mortgage.

If the effect of this transaction was to release the plaintiff from his liability upon this note, it would be questionable whether upon his subsequently paying it he could maintain an action against the defendants for the amount so paid as for money paid at their request, although perhaps the fact that the plaintiff did not know that anything had happened which had the effect of releasing him might make a difference in this respect.

In *Sleigh* v. *Sleigh*, 5 Ex. 514, it was held that the drawer of an accommodation bill which was dishonoured, but of which dishonour the drawer had no notice, could not maintain an action against the acceptor for money paid by him in respect of the bill, because it could not be said to be paid at his request, although he might have paid the bill and maintained an action against the acceptor upon it. Parke, B., in giving the judgment of the Court said:

"Whether it is so in cases in which the legal obligation has been discharged by circumstances unknown to him, as for instance, by the creditor having given time to the principal debtor without his knowledge, it is unnecessary to determine; but where a payment is made, as in this case, with the knowledge on the part of the plaintiff that he was not bound to pay for the want of a notice of dishonour, to which he was unquestionably entitled, we think the payment is not made with the implied authority of the defendant."

But I do not think that upon the evidence in this case, we could hold that the plaintiff was released by that transaction from his liability upon the note; for I think the true inference to be drawn from the evidence is that when

the plaintiff indorsed this note and delivered it to the defendant Nichol he impliedly authorized him to make such use of the note as he thought proper, and the defendant Nichol had full power, therefore, to deliver it to Redford and Barton as collateral security for the debt he owed, and he did so deliver it; that afterwards when the transaction of the 4th of April, 1876, took place, the defendant Nichol had the like power to authorize Redford and Barton to still retain the note as collateral security for the debt in its altered form, and this he did, as all the circumstances of the case clearly shew.

If this is the true inference to be drawn from the evidence, the plaintiff was compellable by law to pay this note, and being so compellable and having paid it, he is entitled to recover from the defendants, who ought to have paid it, the amount so paid, as money paid at their request.

In *Moule* v. *Garrett*, L. R. 7 Ex., Cockburn, C. J., said at p. 104: "This doctrine, as applicable to cases like the present, is well stated by Mr. *Leake* in his work on Contracts, p. 41: 'Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount.'"

In my opinion, this case is entirely within the doctrine above stated, and the plaintiff is entitled to recover.

Had I not arrived at the conclusion that the plaintiff could recover at law, I would have had to consider whether he had any remedy in equity, and I think it would have been found that he had. See *Duncan, Fox, & Co.* v. *North and South Wales Bank*, 6 App. Cas. 1. I refer also to *Exall* v. *Partridge*, 8 T. R. 308; *Pownal* v. *Ferrand*, 6 B. & C. 438; *Bradshaw* v. *Beard*, 12 C. B. N. S. 344; *Johnson* v. *Royal Mail Steam Packet Co.*, L. R. 3 C. P. 38; *Edmunds* v. *Wallingford*, 14 Q. B. D. 811; *Cross* v. *Currie*, 5 A. R. 31; *Re Athill*, 16 Ch. D. 211.

In my opinion, judgment ought to be entered for the plaintiff for $600, with interest thereon from the 10th of May, 1879, and full costs of suit.

O'CONNOR, J., was not present at the argument, and took no part in the judgment.

[QUEEN'S BENCH DIVISION.]

REGINA v. GIBSON ET AL.

Criminal law—Conspiracy—Trade combination—R. S. C. ch. 173, sec. 13, sub-sec. 2—Evidence—Crown case reserved—Form of case—Sufficiency of indictment—Motion to quash—R. S. C. ch. 174, sec. 259.

Held, 1. That a Crown case reserved should be reserved for the consideration of the Justices of one of the Divisions of the High Court, not of a Divisional Court, and when the Court is asked whether on the evidence the defendants were lawfully convicted, the whole of the evidence should not be made part of the case, but merely the material facts established by the evidence.

2. That the sufficiency of an indictment upon a motion to quash it is not a question of law which arises on the trial, and therefore cannot be reserved under R. S. C. ch. 174, sec. 259, and the Court has no power to entertain it; FALCONBRIDGE, J., *dubitante*.

Semble, also, that the indictment in this case was sufficient.

3. That the defendants, members of a trade union, in conspiring to injure a non-unionist workman, B., by depriving him of his employment, were guilty of an indictable misdemeanour, and that what they conspired to do was not for the purposes of their trade combination within the meaning of R. S. C. ch. 173, sec. 13, sub-sec. 2; and that upon the evidence the conviction of the defendants for unlawfully conspiring together to injure B. in his trade and to prevent him from carrying it on, was right.

CASE reserved by the General Sessions of the Peace for the county of Wentworth.

At the said Sessions, held at the city of Hamilton in June, 1888, William Mitchell, William Littlejohn, and David Gibson were tried upon the following indictment:

"Ontario, county of Wentworth, to wit:

"The jurors for Our Lady the Queen upon their oath present that William Mitchell, William Littlejohn, and David Gibson, on the 9th day of April, 1888, did, amongst themselves and with divers other persons to the jurors unknown, unlawfully conspire, combine, confederate, and agree together to injure one Edward Buscombe in his trade of a bricklayer and mason.

"And the jurors aforesaid upon their oaths aforesaid do further present that the said William Mitchell, William Littlejohn, and David Gibson afterwards, to wit, on the day and year aforesaid, did, amongst themselves and with divers other persons to the jurors unknown, unlawfully conspire, confederate, combine, and agree together to prevent one Edward Buscombe aforesaid from carrying on his trade as a bricklayer and mason."

Before the opening of the case counsel for the accused moved to quash the indictment on the ground that it was uncertain and did not sufficiently set out any charge for which the defendants could be convicted. The learned Chairman refused the motion, and the case proceeded, and at the close of the case for the Crown counsel renewed his motion to quash the indictment and submitted that on the evidence the defendants could not legally be convicted, as the evidence shewed the conspiracy was one in furtherance of a trade dispute, and that the prosecution was barred by the Revised Statutes of Canada ch. 173, sec. 13. The Chairman again refused the motion to quash the indictment, and held that the defendants might under the evidence, notwithstanding the R. S. C. ch. 173, sec. 13, be convicted of conspiracy on this indictment. Counsel for the defendants objected to the Chairman's ruling, and the trial proceeded, the jury returning a verdict of guilty against all the defendants. Upon the verdict being recorded counsel for defendants renewed his objections, and requested that the Chairman should reserve the questions raised by his objections for the opinion of the Justices of one of the Divisional Courts of the High Court

of Justice. The Chairman decided to reserve said questions for the opinion of the Queen's Bench Divisional Court of the High Court of Justice, and postponed judgment upon the said defendants until the said questions reserved should be considered and decided.

The questions of law so reserved for the consideration and decision of the said Divisional Court were: whether the said indictment should have been quashed on the ground that it was vague and uncertain, and did not sufficiently set out any charge on which the defendants ought to have been convicted of conspiracy; whether on the evidence which was annexed to and formed part of the case the defendants could have been lawfully convicted of conspiracy, notwithstanding R. S. C. ch. 173, sec. 13.

If the said Court should be of opinion that the Chairman should have quashed the indictment, or because of sec. 13 of R. S. C. ch. 173, the defendants could not legally have been convicted of conspiracy on the evidence, the said verdict should be set aside; otherwise the Court should order judgment to be given therein at the next General Sessions of the Peace for the county of Wentworth.

The evidence shewed that the defendants were members of the Bricklayers and Masons' Union No. 1 of Hamilton; that Buscombe was a bricklayer employed as a day labourer by the corporation of the city of Hamilton, and acting under the city engineer as foreman in the construction of sewers; that one Piggott was a contractor with the corporation of the city of Hamilton for the construction of a new city hall; that it was a private contract, and the city had no control over it except to see that it was performed; that Buscombe was not in Piggott's employment, but in the employment of the city; that Buscombe had at one time belonged to a union in Buffalo for about three weeks, when he ceased to be a member; that in the previous autumn the city was building a bell tower, and that the Hamilton union had withdrawn its members from work on the bell tower until such time as Buscombe should be suspended from his employment by the city. Buscombe was not then employed

on the bell tower, but in other work for the city, and he was suspended by the city under this pressure by this union, in order that the city might get on with the building of the bell tower. At a meeting of this union held on the 19th April, 1888, at which some forty or fifty members were present, the defendant Mitchell moved and the defendant Littlejohn seconded a resolution, which was passed, to the effect that no member of the union should be allowed under a penalty of fifty dollars to work either on the new city hall or any city work until such time as Buscombe should be discharged from the corporation's employment; and the defendant Gibson spoke in support of the resolution, and said that he thought it was as much to the interest of the stone masons to hold out from that job, as it was to the bricklayers, and he thought it was the duty of every member to put Mr. Piggott to every inconvenience they could until such time as Buscombe was discharged; that it would be cowardly to lose the point they had gained last fall over Buscombe. Other members supported the motion and spoke in the same strain; "to fight the people they fought last fall, and not to be so cowardly as to run now; that it was to their interest to stand together and fight for the victory they had got and not let Buscombe get the advantage over them." The evidence clearly shewed that the whole purpose of the action of the defendants was to deprive Buscombe of his employment. The constitution of this union declared that "the object of this union shall be the protection of its members; to assist each other by legal means in obtaining a fair and just remuneration for our labours; to aid in the case of sickness and for the burial of deceased members; improvement in our skill as mechanics, and the elevation of our social position;" and one of the rules was that "no member of this union will be allowed to work more than two days with any journeyman bricklayer or stone mason that is not a member of this union where there is a two-third majority or more of union men working, unless such person or persons consent to become a member of this union.

In case of refusal to do so, all union men shall cease working with such person or persons. Any member or members violating this section shall be liable to suspension or expulsion."

On November 27, 1888, the case was argued before the Queen's Bench Division.

Osler, Q. C., for the defendants: (1) We object to the sufficiency of the indictment. The case was reserved on motion to quash the indictment. In any case in which error would lie, a case may be reserved. The indictment discloses no offence known to the law; it does not set forth overt acts; and no conviction can be had. I refer to *Horseman* v. *Reginam*, 16 U. C. R. 543; *Regina* v. *Bunting*, 7 O. R. at pp. 547, 548, and cases there cited; *Regina* v. *Aspinall*, 2 Q. B. D. 48, especially at pp. 58, 59; *Bradlaugh* v. *Reginam*, 3 Q. B, D. at p. 628 *et seq.*; *Regina* v. *Roy*, 11 L. C. Jur. 89; *Rex* v. *Eccles*, 1 Leach 274; *Wright* on Conspiracies p. 37.

(2) The offence charged is not now an offence at common law, for it comes expressly within R. S. C. ch. 173, sec. 13, sub-sec. 2; and no statute covers the offence; see *Stephen's* History of Criminal Law, vol. III. p. 203 to 227, where the various statutes are collected. The matter complained of was a simple proceeding of the lodge; a resolution not to work, not a resolution to do some act. There is no evidence here of any act of combination; one man moves a resolution, another seconds it, a third speaks to it. When did they agree? If the averment was of overt acts, the evidence would not support it. The evidence being confined to the discussion of business in a lodge, there is no evidence of indictable action. The acts of the three were independent acts. There is nothing to shew that there was anything more than the spontaneous minds of three persons acting on the occasion. I refer to *Wright* on Conspiracies, pp. 39, 48, 54; *Regina* v. *Bunn*, (Gas-Stokers' Case,) 12 Cox C. C. 316.

Lynch-Staunton, on the same side, referred to *Mogul S. S. Co.* v. *McGregor*, 15 Q. B. D. 476; *Regina* v. *Parnell*, 14 Cox C. C. 508.

John Crerar, for the Crown. Except in matters of trade the common law offence remains undisturbed by the statute. I rely on *Rex* v. *Eccles*, *supra*. I also refer to the *Albany Law Journal*, vol. XXXV. p. 348; vol. XXXVI. p. 9; vol. XXXVIII. p. 6.

Osler, in reply, referred to *Hynes* v. *Fisher*, 4 O. R. 60.

February 4, 1889. ARMOUR, C. J.—We feel it to be our duty to call attention to the very irregular way in which this case is reserved, in order that it may not be followed in future. It is reserved for the consideration of the Queen's Bench Divisional Court of the High Court of Justice, which has no jurisdiction over it, instead of for the consideration of the Justices of the Queen's Bench Division of the High Court of Justice; and we are asked whether on the evidence the defendants were lawfully convicted, the whole of the evidence being made part of the case, instead of merely the material facts established by the evidence being made part of the case.

The provisions relating to Crown cases reserved in R. S. C. ch. 174, secs. 259-264, are founded upon 14 & 15 Vic. ch. 13, which was substantially a transcript of the Imperial Act 11 & 12 Vic. ch. 78. The provision of the Imperial Act is for the reservation "of any question of law which shall have arisen on the trial," and the provision of the R. S. C. ch. 174, sec. 259, is for the reservation "of any question of law which arises on the trial."

In *Regina* v. *Martin*, 2 C. & K. 950, the prisoners were convicted on one count of an indictment, and their counsel moved in arrest of judgment on the ground that the count on which the prisoners had been convicted was bad upon its face. The Court (the Dorsetshire Sessions) overruled the objection, and reserved the case for the opinion of the Judges, and Wilde, C. J., there said: "The statute 11 & 12 Vic. ch. 78, sec. 2, expressly authorizes this Court to arrest

the judgment on cases reserved, and we, therefore, think that you are entitled to be heard." And Rolfe, B., said: "Mr. Ffooks seemed to suggest a doubt whether this Court could entertain this case, as the objections were on the face of the record. I think that the word 'trial' in the second section of the statute 11 & 12 Vic. ch. 78, ought to have a very liberal construction, and I think it applies to any proceeding in the Court below; and, as in that section, this Court is expressly authorized to arrest the judgment, I have no doubt that we have jurisdiction to hear this case." And since this decision the Court for Crown cases reserved have frequently determined the sufficiency of an indictment in arrest of judgment upon a case reserved. See also *Regina* v. *Webb*, 1 Den. C. C. 338. I find no case, however, in which a case has been reserved as to the sufficiency of an indictment upon a motion to quash it, and the reason is, I think, obvious, and is because the sufficiency of an indictment upon a motion to quash it, is not a question of law which arises on the trial.

R. S. C. ch. 174, sec. 143, provides that "Every objection to any indictment for any defect apparent on the face thereof, shall be taken by demurrer or motion to quash the indictment, before the defendant has pleaded, and not afterwards."

In *Regina* v. *Faderman*, 1 Den. C. C. 565, the counsel for the prisoners demurred to the indictment, and the Judge gave judgment for the Crown, but reserved the question as to the validity of the indictment for the Court for Crown cases reserved, and that Court held that it had no jurisdiction to entertain the question under 11 & 12 Vic. ch. 78; that the word "convicted" in the statute meant "convicted by a verdict;" that "trial" meant "trial before a jury."

Parke, B., said: "Properly, there is no trial till issue is joined." Cresswell, J.: "Is a prisoner tried who pleads guilty?" Alderson, B.: "You say the trial begins with the arraignment: how, then, do you explain the question which is put to the prisoner after arraignment: How will

you be *tried?* At what point in the proceedings did the trial by battle begin? Trial is a very technical word." Parke, B.: "Convicted in the statute means convicted on the trial." The question which Cresswell, J., asked in this case was answered in *Regina* v. *Clark*, L. R. 1 C. C. R. 54, in which a case was reserved by the Sessions as to whether the prisoner's act, as described in the depositions, supported the indictment, the prisoner having pleaded guilty, and the Court said: "In this case we have no jurisdiction. It was not a question arising on the trial; for the man pleaded guilty, and he must be taken to know the law. The power to state a case for the consideration of this Court only applies to questions of law which arise on the trial." See also *Regina* v. *Mellor*, 7 Cox C. C. 454; *Regina* v. *O'Rourke*, 32 C. P. 388.

I am of opinion, therefore, that the learned Chairman had no power to reserve, nor have we any power to entertain, the question of the sufficiency of this indictment upon the motion to quash it.

R. S. C. ch. 174, sec. 143, above in part quoted, further provides that "no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act." There is no statutory provision such as this in England, and this is to be borne in mind when reference is had to cases reserved upon the sufficiency of indictments in the English reports.

The analogous statutory provision in England to the first part of sec. 143, above quoted, is materially different from it, and is to be found in 14 & 15 Vic. ch. 100, sec. 25.

The defect alleged to exist in this indictment was one which could have been taken advantage of by demurrer, and no motion in arrest of judgment by reason of such defect, was, therefore, allowable; and the learned Chairman had consequently no power to reserve the question of the sufficiency of the indictment, a question which could not arise on the trial; nor have we any power to entertain it.

Were the sufficiency of the indictment, however, pro-

perly before us, I think we should be bound to hold it sufficient in arrest of judgment on the authority of the cases of *Rex* v. *Eccles*, 1 Leach 274; *Heyman* v. *The Queen*, L. R. 8 Q. B. 102; *Regina* v. *Goldsmith*, L. R. 2 C. C. R. 74; *Regina* v. *Stroulger*, 17 Q. B. D. 327; *Rex* v. *Gill*, 2 B. & Ald. 204.

R. S. C. ch. 173, sec. 13, provides that in this section, the expression "trade combination," means any combination between masters or workmen or other persons, for regulating or altering the relations between any persons being masters or workmen, or the conduct of any master or workman, in or in respect of his business or employment, or contract of employment or service; and the expression "act" includes a default, breach, or omission.

2. No prosecution shall be maintainable against any person for conspiracy to do any act, or to cause any act to be done for the purposes of a trade combination, unless such act is an offence punishable by statute.

Now what is meant by "the purposes of a trade combination" in the second branch of the section? Clearly the purposes defined in the first branch of the section, namely, the regulating or altering the relations between any persons being masters or workmen, or the conduct of any master or workman, in or in respect of his business or employment, or contract of employment or service.

The members of this union were a combination of workmen, and as such they had the right under the first branch of this section to regulate or alter the relations between themselves as workmen or the conduct of any one of themselves as such workmen, in or in respect of his business or employment, or contract of employment or service.

But what these defendants and the other members of this union present at the meeting referred to conspired to do was not within any of the purposes of their combination permitted by law, nor was it even within the purposes of their constitution and rules.

The rule upon which the defendants relied, and which is above quoted, prohibited any member from working more

than two days with any journeyman, bricklayer, or stonemason that was not a member of the union, but none of the members of this union were working with Buscombe, nor was he employed by the same master.

The constitution of all secret societies such as this union is professedly benevolent, but the use made of these societies by those who control them is frequently malevolent, and so it was in this case.

The members of this union, actuated by malice against Buscombe, had the previous fall deprived Buscombe of his employment by withdrawing their men from work upon the bell tower. These defendants and the other members of this union present at the meeting referred to, actuated by malice against Buscombe, conspired and agreed together to again deprive Buscombe of his employment and to injure him.

The authorities leave me no room to doubt that the defendants in conspiring as they did to injure Buscombe by depriving him of his employment were guilty of an indictable misdemeanour, and I am clear that what they thus conspired to do was not for the purposes of their trade combination within the meaning of the statute.

The evidence amply justified the conviction, and the conviction was right and must be affirmed.

I refer to *Regina* v. *Parnell*, 14 Cox C. C. 508, and to *State* v. *Stewart*, 59 Vermont 273, in which latter case all the cases on the subject of such a conspiracy as this are referred to; and to *Mogul S. S. Co.* v. *McGregor*, 21 Q. B. D. 544.

STREET, J.—I agree in the opinion that the question arising upon a motion to quash an indictment is not a "question of law which arises on the trial," within the meaning of sec. 259 of ch. 174, R. S. C., and that we have no jurisdiction to consider that portion of the case reserved for our opinion which deals with the sufficiency of the indictment in point of law.

The other question submitted is, whether upon the

evidence given at the trial the defendants could have been lawfully convicted of conspiracy, notwithstanding ch. 173, sec. 13, R. S. C.

I think the two sub-sections of sec. 13, may be read together as if they ran as follows: "No prosecution shall be maintainable against any person for conspiracy to do any act or cause any act to be done for the purposes of any combination between masters or workmen for regulating or altering the relations between any persons being masters or workmen, or the conduct of any master or workman, in or in respect of his business or employment, or contract of employment or service, unless such act is an offence punishable by statute."

The defendants were members of a trade union, which was a combination of workmen; the objects declared by their constitution being "the protection of its members; to assist each other by legal means in obtaining a fair and just remuneration for our labours, and in the case of sickness, and for the burial of deceased members, improvement in our skill as mechanics, and the elevation of our social position."

By one of these rules the members were forbidden to work under certain circumstances with any person not a member of the combination. Edward Buscombe was not a member of the combination; he was employed by the corporation of the city of Hamilton as a foreman in the work of constructing sewers in the city; one Piggott, a contractor, had taken a contract from the city for the construction of the city hall. There was evidence that at a meeting of the combination the defendants were actively concerned in obtaining the passing of a resolution to the effect that no member of it should be allowed to work on the city hall or any city work until such time as Buscombe should be discharged from the city's employ; also that the defendant Gibson urged upon the persons present that it was the duty and the interest of all the members to put Piggott to every inconvenience they could until such time as Buscombe was discharged. In the previous year the same

man Buscombe had been employed by the corporation in the construction of a bell tower, and there was evidence that by means of pressure put upon the city by the same combination they had procured his discharge from his employment.

Upon this evidence I am of opinion that the jury might properly have found that the acts done by the defendants were not done for the purpose of the combination, but for the malicious purpose of injuring Buscombe in his trade, and of preventing him from carrying it on, and that sec. 13 of ch. 173, R. S. C., raises no bar to their being lawfully convicted of conspiracy.

FALCONBRIDGE, J.—I do not feel the same strong assurance as do the Chief Justice and my brother that this Court has not power to entertain the question of the sufficiency of the indictment in point of law.

But as we all agree that the evidence fully justifies the conviction and that the indictment is good after verdict, it is superfluous to discuss that point.

[QUEEN'S BENCH DIVISION.]

BARTLETT v. THOMPSON.

Landlord and tenant—Overholding Tenants' Act—Dispute as to date when tenancy commenced—"Colour of right."

When there was a dispute between landlord and tenant as to the date when the tenancy commenced, and an application was made under the Overholding Tenants' Act at a time when according to the tenant's contention his lease had not expired;

Held, that there was that "colour of right" in the tenant which the Act contemplates.

Price v. *Guinane*, 16 O. R. 264, approved and followed.

THE plaintiff proceeded under the Overholding Tenants Act, R. S. O. ch. 144, to obtain from the defendant the possession of a certain lot of land and a store erected thereon in the town of Woodstock, which had been verbally leased to the defendant in 1883, by one Clarke, who conveyed to the plaintiff on the 15th June, 1888.

It was not disputed that on the 15th April, 1888, Clarke had given the defendant notice to quit possession on or before the 15th October, 1888; but the defendant alleged that he was a yearly tenant, and that each year began on the 1st October, and therefore the notice was not good; and this was the question in dispute.

On the 19th November, 1888, the Judge of the County Court of Oxford, after hearing the parties and the evidence, determined that the lease began on the 15th October, and the notice was therefore sufficient; and he made an order under the statute for the issue of a writ to put the plaintiff in possession.

On the 23rd November, 1888, FALCONBRIDGE, J., made an order in Court directing that the proceedings before the County Judge be sent up to the Queen's Bench Division, and staying further proceedings until after the defendant's motion to set aside the proceedings should be disposed of.

On the 15th February, 1889, *Wallace Nesbitt*, for the defendant, moved before the Divisional Court, (ARMOUR, C. J., and FALCONBRIDGE, J.,) to set aside the proceedings; and

C. J. Holman, for the plaintiff, shewed cause.

THE COURT approved and followed the case of *Price* v. *Guinane*, 16 O. R. 264, and held that there being a dispute between the parties as to the tenancy, there was that "colour of right" in the tenant which the Act contemplates, and the County Judge should have dismissed the case.

The proceedings were set aside without costs.

[CHANCERY DIVISION.]

JONES V. DALE.

Specific performance—Written contract—Omitted term—He who comes into equity must do equity—Payment in cash substituted by Court for delivery of chattels—Substitutionary satisfaction.

In an action for specific performance of an agreement for the sale of lands, it appeared that the parties intentionally omitted from the writing a part of the agreement, as to the tenour of which both parties agreed; and the defendant asked to have this inserted in the judgment for specific performance, but the plaintiff objected.

Held, that on the principle that he who comes into equity must do equity, it was proper that the omitted portion of the agreement should be inserted as claimed.

The plaintiff agreed in writing to sell to the defendant certain lands for $3,500, of which the defendant should pay $500 on the date of the agreement, to be represented, however, by two horses and two organs which he was to deliver to the plaintiff. The defendant, however, sold the organs and parted with one of the horses. On the plaintiff subsequently bringing this action for specific performance, the Court ordered the defendant to pay $500 in lieu of the horses and organs.

THIS was an action brought by Henry Jones against Thomas W. Dale for specific performance of a certain agreement under seal dated September 29th, 1887, whereby

the plaintiff agreed to sell to the defendant certain lands for $3,500 on the following terms: that the defendant should pay $500 on the date of the agreement, as to which payment of $500 it was agreed that two organs and two horses were to be delivered by the defendant to the plaintiff and accepted by him in lieu of and as representing the said payment of $500; and that the balance of the purchase money should be secured by a mortgage as therein mentioned.

The action came on for trial at Whitby, on April 3rd, 1888, before Ferguson, J., who gave judgment for the plaintiff, and in the course of it held as to the $500 payment as follows:—

"Now, in regard to the first thing put down in the agreement, it is worded in this way:—'Five hundred dollars on the date of these presents, being made up of two organs at $150 each, and two horses at $100 each.' It appears there was an understanding between the parties that the price of the horses was to be $120 each, making a difference of $40, which is one of the matters I say was settled outside of the agreement; and on the evidence, the plaintiff offered to give the defendant according to their separate agreement $20 in cash and $20 in goods out of his store to satisfy this difference. Then it stands as if there were five hundred dollars to be paid at the making of this agreement, and to be paid by the delivery of these four articles. The defendant neither paid the five hundred dollars nor delivered the horses or organs, and has since parted with some of them. He contracted to pay the five hundred dollars in that way, and put it out of his own power to do it in that way, and it appears to me that upon that part of the agreement he should be ordered to pay the five hundred dollars in money; I see nothing in that which is out of the power of the Court, or that the Court should not do."

The rest of the facts of the case appear sufficiently for the purposes of the present report from the judgment of Boyd, C.

The defendant moved by way of appeal before the Divisional Court, and the motion came on for argument on June 11th, 1888, before Boyd, C., and Robertson, J.

Watson, for the defendant. We do not appeal on the facts, but what we say is that the agreement is not in writing, and it should not be specifically enforced. There are parts of it which the plaintiff admits he should perform, but which are not in the writing. In the matter of the $500 payment for which two horses and two organs were to be taken, this was really an agreement for exchange of property. Under the circumstances the judgment should not stand on this point: *Cuddee* v. *Rutter*, W. & T. L. C. 6th ed. Vol. I. p. 907; *Fothergill* v. *Rowland*, L. R. 17 Eq. 132; *Fry* on Specific Performance p. 29, sec. 60; *Elphinstone's* Interpretation of Deeds, p. 91. As to the part of the agreement which is not in writing, the defendant says that this should be performed if the rest is to be: *Jervis* v. *Berridge*, L. R. 8 Ch. 351; *Fry* on Specific Performance, 2nd ed., secs. 548, 549, *seq.*

McGillivray, for the plaintiff. As to the $500 there was simply an option given to the defendant to pay by turning over the horses and organs. Dale parted with both the organs and one of the horses, and the Judge refused to let him have the option if he got them back. The Judge thought the defendant had acted in bad faith. We contemplated an immediate delivery of the horses.

December, 15th, 1888. BOYD, C.—The written contract for the sale and purchase of the lands in this case satisfies the provisions of the Statute of Frauds, but the parties omitted intentionally from the writing a part of the agreement, as to the tenour of which both parties agree. The plaintiff admits what this term was in the following passage from his evidence p. 81. "Part of my agreement with the defendant was that I was to retire from the sewing machine business if he used the store for sewing machines and organs. If he sold the store I could go on and sell sewing machines." The defendant asks that this should be embodied in the judgment for specific performance; and the plaintiff objects to that course, although admitting that he is bound by this part of the agreement. The judgment is silent on this head. The contention is

well-nigh covered by authority. In *Martin* v. *Pycroft*, 2 DeG. M. & G. at p. 795, the Court of Appeal says, "where persons sign a written agreement upon a subject, obnoxious or not obnoxious to the Statute [of Frauds], and there has been no circumvention, no fraud, nor (in the sense in which the term 'mistake' must be considered as used for this purpose) mistake, the written agreement binds at law and in equity, according to its terms, although verbally a provision was agreed to, which has not been inserted into the document; subject to this that either of the parties sued in equity upon it, may perhaps be entitled, in general, to ask the Court to be neutral, unless the plaintiff will consent to the performance of the omitted term." In *Jervis* v. *Berridge*, L. R. 8 Ch. App. at p. 359, Lord Selborne, L. C. treats the manner of dealing with the omitted term as depending on the same principles, whether it has been done "designedly or otherwise," so far as the Court may consider the propriety of staying its hand unless the whole contract is performed. When the term is not expressed in the writing neither party can seek rectification directly by the insertion of what was deliberately omitted, and as a matter of evidence one party is at the mercy of the other's conscience, and against his oath may experience insuperable difficulty in establishing the omitted term, but where both concur in an action such as this for specific performance, that there is a material ingredient of the of the transaction left unexpressed because one party chooses to trust the other without writing, it seems to me eminently proper for the Court to deal with the whole contract, and not to pass over any part for technical reasons. The ground of interference rests really upon an application of the maxim "he who comes into equity must do equity," and this part of the bargain as to the business concerned the very property which was the subject of sale and purchase.

[The learned Chancellor then considered another point in the case, not necessary to report, and continued.]

On the remaining objection, I agree with the judgment in

appeal. The price was fixed by the contract: as to $500 of it there was an arrangement by which it was to be paid in chattels, two horses and two organs. The parties understood and agreed upon what horses were meant and the kind of organs, but the defendant broke the bargain, sold all that kind of organs in his possession and disposed of one of the horses. The Judge held at the trial that the plaintiff had not lost his right to be paid in money and was remitted thereto by the failure of the defendant to complete promptly and by his disabling himself from doing as he agreed. It is not reasonable now to ask the plaintiff to take one horse or to allow the defendant to get back the other for the purpose of transferring it to the plaintiff. The plaintiff was willing to take the horses as he knew them in September, 1887, but that is a different thing from getting them as they may be now.

In *Simmonds* v. *Swaine*, 1 Taunt. 549, an award ordered a sum of money to be paid or to be secured, not specifying the kind or amount of the security. It was held though the latter alternative was void for uncertainty that the other should be performed. An alternative mode of payment is contemplated by this contract; the defendant has disabled himself from making over the chattels to the plaintiff as and when agreed upon by this contract; he has in effect elected to comply with the contract in the other way which is equally satisfactory to the plaintiff, *i. e.* by the payment of the sum fixed ($500). Nothing turns upon the fact that part of the price was originally to be paid in chattels not specifically identified; that term is a subsidiary one and susceptible of a substitutionary satisfaction, and the Court having jurisdiction as to the land will deal with the whole subject matter of the agreement: *Penman* v. *Somerville*, 22 Gr. 178; *Marsh* v. *Milligan*, 3 Jur. N. S. 979, a decision of Wood, V. C., to which I alluded during the argument.

The defendant having only partially succeeded it will be well to give no costs of this appeal.

ROBERTSON, J., concurred.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

RE FARLINGER AND VILLAGE OF MORRISBURG

Municipal corporations—By-law—Bonus to manufactory—51 Vic. ch. 28, secs. 1, 16—Registration—R. S. O. ch. 184, sec. 351—Debentures—R. S. O. ch. 184, sec. 342, sub-sec. 1.

By sec. 1 of the Municipal Amendment Act, 1888, (51 Vic. ch. 28) that statute came into force on 1st August, 1888, except sec. 16 thereof, which was not to take effect until 1st November, 1888, and by sub-sec. 5 of sec. 16 the latter section was not to affect any by-law theretofore adopted or passed, the vote taken, or debentures issued or to be issued in pursuance thereof.

A by-law granting a bonus to a manufacturing industry was passed by the municipal council of a village on the 29th October, 1888, after having been submitted to and approved by the electors. It provided on its face that it should take effect on 1st December, 1888. For this and similar by-laws an annual levy was required of an amount exceeding ten per cent. of the total annual municipal taxation of the village, contrary to the provisions of sub-sec. 4 of sec. 16 of 48 Vic. ch. 28 (O.)

Held, that although the by-law was in contravention of sub-sec. 4 of sec. 16, yet, having regard to the provisions of sec. 1, and by the operation of sec. 16, sub-sec. 5, of that Act, the by-law was withdrawn from the effect of sub-sec. 4.

2. That sec. 351 of R. S. O. ch. 184, which requires a by-law creating a debt by the issuing of debentures for a longer term than one year to be registered within a fortnight from the final passing thereof, is merely directory.

3. That the object of sub-sec. 1 of sec. 342 of R. S. O. ch. 184 is to prevent the burthen of the debt incurred by borrowing money to pay the bonus from being irregularly distributed or unduly postponed to later years; and that the by-law in question, which provided for the raising of $25,000 by the issue of twenty debentures for $2,006.10 to fall due one in each year for twenty years, "it being estimated that the sale of such debentures will realize the said sum of $25,000," and for levying $2,006.10 in each year by a special rate, substantially complied with the sub-section.

MOTION to quash by-law No. 133 passed by the council of the village of Morrisburg. The by-law in question, after being submitted to the electors and approved by them, was passed by the council on 29th October, 1888.

It was for the purpose of granting a bonus of $25,000 to a paper manufacturing company to be established in the village, and for borrowing the required amount upon debentures, upon the terms set out in the judgment.

The motion was argued before Street, J., in Court on the 12th February, 1889.

J. B. Clarke, for the motion.

S. H. Blake, Q. C., and *Fullerton*, contra.

February 15, 1889. STREET, J.—The first objection is that the by-law is in contravention of sub-sec. 4 of sec. 16 of ch. 28, 51 Vic., Ontario Statutes of 1888, which provides that, "No municipality shall grant a bonus in aid of any manufacturing industry, where the granting of such bonus would, for its payment, together with the payment of similar bonuses already granted by said municipality, require an annual levy for principal and interest, exceeding ten per cent. of the total annual municipal taxation thereof."

It is not disputed on the part of the municipality that if this by-law is held to be valid, an annual levy will be required for this and similar by-laws of an amount exceeding ten per cent. of the annual municipal taxation of the municipality, but it is contended that the section relied upon does not apply, because the by-law in question was passed on 29th October, 1888, and that it is expressly declared by the first section of ch. 28, above referred to, that sec. 16 of the Act shall not come into force until 1st November, 1888.

To this it is answered that the by-law attacked provides on its face that it shall take effect on 1st December, 1888, in accordance with sub-sec. 1 of sec. 340 of the Municipal Act, ch. 184, R. S. O., and that the operation of the prohibition contained in sub-sec. 4 of sec. 16 of ch. 28 is to prevent its taking effect.

I am of opinion, however, that the difficulty is removed by the 5th sub-sec. of sec. 16 of ch. 28, which provides that sec. 16 shall not affect any by-law heretofore adopted or passed, the vote taken thereon, or the bonds or debentures issued or to be issued in pursuance thereof. The whole of sec. 16 of ch. 28 is to remain until 1st November, 1888, as if it had not been passed; it is to come into force on that day and to speak as if it were passed on that day. When that day arrived the by-law in question had been adopted and passed, and by the operation of the 5th

sub-sec. this by-law is withdrawn from the effect of the 4th sub-sec.

The second objection taken to the by-law is that it was not registered within two weeks from the day of its final passing, as required by sec. 351 of ch. 184, R. S. O. It was pointed out by counsel for the applicant that the words used in this section are that every by-law creating a debt "*shall* be registered" within the period mentioned; and he argued that this imperative enactment must mean that the by-law became invalid if not registered, or did not come into force if not registered within the required time.

The by-law had been passed by a council having jurisdiction to pass it, and all the conditions entitling them to pass it had been performed; their power to pass it had not been improperly exercised, and the by-law itself was in substantial compliance with the provisions of the Act. This being the case, I do not think it would be proper to declare it invalid under a section of the Act which does not declare that a non-compliance with its provisions shall have that effect, and I prefer to treat the section as merely directory.

The third and last objection is that the by-law should have provided what amount of principal and what amount of interest is to be levied in each year for the repayment of the debentures.

The council in the present case have exercised the option allowed by sec. 342 of the Municipal Act, by making the debt repayable by annual instalments.

The by-law provides that the council, "In order to raise the said sum of $25,000, may issue twenty debentures of the said corporation for the sum of $2,006.10 each, to fall due on the 30th day of November, 1889, and on the same day in each of the nineteen following years, it being estimated that the sale of such debentures will realize the said sum of $25,000."

It then provides that to pay the said debentures there shall be raised in each year for the twenty years during

which the debentures are to run, the sum of $2,006.10 by a special rate sufficient therefor in addition to all other rates on the ratable property of the village.

It is certainly true that sub-sec. 1 of sec. 342 seems to contemplate that when the debt is made payable by annual instalments, each debenture shall be issued for the principal sum re-payable in the year in which it falls due, and bearing interest payable annually or semi-annually, whereas in the debentures intended under this by-law the interest and principal payable in each year are added together, and are not separable except by a somewhat elaborate calculation. But I can see no reason why such a method of carrying the matter out is objectionable; it would clearly be so if it were necessary that a sinking fund should be raised in each year, but under the section in question no sinking fund becomes necessary. The object of the section is to prevent the burthen of the debt from being unequally distributed or unduly postponed to later years; this object is attained by the manner in which these debentures are to be drawn, as effectually as if the precise directions of the statute had been followed, and there is nothing which declares that a non-compliance with the precise terms of the section shall, under the by-law, be invalid, as there is in sec. 340. I think the council have substantially complied with the provisions of sub-sec. 1 of sec. 342, and that this objection also fails.

I think the motion must be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

RE PRYCE AND CITY OF TORONTO.

Municipal corporations—Damages to land by construction of pavement—Method of estimating—Increase in value—Set-off.

In an arbitration under the arbitration clauses of the Municipal Act, a land-owner claimed that certain lands had been injuriously affected by the construction of a block pavement.

Held, that in estimating the land-owner's compensation the arbitrator should set off against the land-owner's claim for damages sustained, the increase in the value of the land arising from the construction of the pavement in which this land shared in common with all the other lands benefited, and not merely such direct and peculiar benefit as accrued to this particular land.

Re Ontario and Quebec R. W. Co. and Taylor, 6 O. R. at p. 348, and *James* v. *Ontario and Quebec R. W. Co.*, 12 O. R. at p. 630, followed.

THIS was an arbitration under the arbitration clauses of the Municipal Act.

The land-owner claimed that certain lands of hers situated upon Ossington Avenue, in the city of Toronto, had been injuriously affected by the construction of a block pavement along that avenue. The arbitrator to whom the matter was referred had awarded $225 as compensation.

Counsel for the city applied that the matter might be referred back to the arbitrator, upon the ground that in arriving at his award he had refused to consider the increase in the value of the property in question arising from the construction of the pavement in question, in which this land shared in common with all the other lands benefitted, being of the opinion that he should only take into account such direct and peculiar benefit as accrued to this particular land.

It was agreed by counsel for both parties that the arbitrator had adopted this view in making his award, and that the motion should be treated as if he had so certified to the Court.

The motion was argued before Street, J., in Court, on the 12th February, 1889.

C. R. W. Biggar, for the city of Toronto.
J. E. Robertson, for the land-owner.

February 19, 1889. STREET, J.—The rule settled by the Court of Appeal in *James* v. *Ontario and Quebec R. W. Co.*, 15 A. R. 1, affirming the same case in 12 O. R. 624, decided upon a statute which I cannot well distinguish from the Municipal Act in its legal effect, seems to be that the proper mode of estimating the damage done is to ascertain the value of the land before and after the construction of the work in question, and to allow to the land-owner as damages any depreciation in value owing to any matter as to which he has a right to complain. The question which arises in the matter now under discussion was considered by the Court of Appeal in that case but was not considered necessary to a determination of the questions involved in it. It was, however, considered by Ferguson, J., in the Court below, and he states his opinion at p. 620 to be that the railway company were entitled to the benefit of the value given to the lands by the construction of the railway as a set-off against the land-owner's claim for damages sustained. This was also the view taken by the late Chief Justice Cameron in *Re Ontario & Quebec R. W. Co. and Taylor*, 6 O. R. at p. 348. It appears to me to be the construction which best gives effect to the letter as well as the spirit of the Act. The principle upon which damages are awarded in these cases is that of compensation. Why should the land-owner be entitled to charge the city with the damage he sustains and not be compelled to give credit for the benefit he receives from the work which has caused him the damage of which he complains? It is said that other land-owners who do not happen to be damaged receive the same benefit without having to allow for it. If there is a hardship in this, it is one for the Legislature to rectify by excluding from the computation the general benefit which the land-owner receives; this I conceive they have not done, and it is not for the Courts to do it.

I think the award must be referred back to the arbitrator for reconsideration upon this point.

See also *Re Credit Valley R. W. Co. and Spragge*, 24 Gr. 231; *Re Colquhoun and Berlin*, 44 U. C. R. 631, 639; *Weir* v. *St. Paul, &c., R. W. Co.*, 18 Minn. 155, 169; *Zoeller* v. *Kellogg*, 4 Mo. App. 163.

[QUEEN'S BENCH DIVISION.]

CHAPLIN V. PUBLIC SCHOOL BOARD OF TOWN OF WOODSTOCK ET AL.

Public schools—Seats of trustees—Contracts with school board—R. S. O. ch. 225, sec. 247, construction of—Declaring seats vacant—Powers of remaining trustees—Powers of Court—Injunction—Quo warranto—Parties.

In an action brought by a ratepayer against a school board, three of the persons elected as trustees, and one G., the statement of claim alleged that the three defendant trustees had by reason of their being interested in certain contracts with the board *ipso facto* vacated their seats, by virtue of sec. 247 of the Public Schools Act, R. S. O. ch. 225; that they nevertheless continued to sit and vote, and had voted in favour of certain resolutions which were passed, whereby the Principal of the schools was dismissed and the defendant G. appointed in his place; and that but for the votes of the three defendant trustees the result would have been different. The prayer was that the seats of the three should be declared vacant, and the votes and resolution declared void, and for an injunction restraining the defendants the trustees from further acting as members of the board.

Held, upon demurrer, following *Hardwick* v. *Brown*, L. R. 8 C. P. 406, that the seat of a trustee does not under sec. 247 actually become vacant until the other members of the board have declared it to have become vacant; and in this case, no action having been taken by the remaining members of the board, that the seats of the three defendant trustees were full; and being full, that the Court would not interfere by injunction to restrain the occupants of them from acting as trustees.

2. That *quo warranto* proceedings were the only means by which the seats could be declared vacant by the Court; that the duty of declaring them vacant, if the facts charged were established, devolved upon the remaining individual members of the board, who were not parties to the action and were not made parties by the fact that the school corporation was a party defendant.

Regina v. *Mayor of Hereford*, 2 Salk. 701; *Rex* v. *Smith*, 2 M. & S. 583, referred to.

3. That the defendant G. was an unnecessary and improper party to the action.

DEMURRERS by the defendants the Public School Board of the town of Woodstock, J. W. Garvin, James Hay, the elder, John Morrison, and Alex. Watson to the plaintiff's statement of claim.

The writ of summons was issued on 31st December, 1888. The statement of claim alleged that the plaintiff was a ratepayer, and was entitled to vote at the election of school trustees for the town of Woodstock. His complaint, shortly stated, was this: That the defendants Hay, Morrison, and Watson, being members of the school board, had, by reason of their being interested in certain contracts with the board, *ipso facto* vacated their seats under sec. 247 of ch. 225, R. S. O.; that they nevertheless continued to sit and vote as members of the board, and had voted in favor of certain resolutions which were passed, the effect of which was that Mr. Van Slyke, the principal of the schools, was dismissed, and the defendant Garvin was appointed in his place; and that they had voted against a certain resolution, which was rejected, for the retention of Mr. Van Slyke. The claim alleged that but for the votes and influence of the three trustees who were defendants, the results of the votes upon these resolutions would have been different. The plaintiff prayed that the seats of the three trustees might be declared vacant, and that the votes given by them should be declared void; that the resolution which was carried should be declared void, and the resolution which was rejected should be declared to have been carried, and to be binding on the defendants; and for an injunction restraining the defendants the trustees from further acting as members of the school board.

The defendants the school board, the trustees, and Garvin demurred separately to the statement of claim, upon the ground that the plaintiff shewed no right in himself to maintain the action, and that the proceedings of the *de-facto* board were binding upon them.

Sec. 247 of ch. 225, R. S. O., the "Public Schools Act," provides that any trustee who has any pecuniary interest

in any contract with the corporation, or who receives or expects to receive any compensation for any work, employment, or duty on behalf of such corporation, "*shall ipso facto vacate his seat,*" and every such contract, &c., shall be void, "and the remaining trustees shall declare the seat vacant, and forthwith order a new election."

Section 244: "If any person elected as a school trustee attends any meeting of the school board, as such, after being disqualified under this Act, he shall be liable to a penalty of $20 for every meeting so attended."

The demurrers were argued before Street, J., in Court, on the 15th February, 1889.

Wallace Nesbitt, for the defendants.
C. J. Holman, for the plaintiff.

February 19, 1889. STREET, J.—For the purposes of this demurrer it must be assumed that the three defendants Hay, Morrison, and Watson, whilst holding the office of trustees, have been interested in some contracts with the school board, (the amount of Mr. Watson's contract being stated, however, at only $2.25); and that they are, therefore, within the provisions of sec. 247 above quoted.

The real meaning of that section has been a matter of judicial doubts, which do not appear to have been set at rest by any decision of our own Courts. Does the statute mean that the seat of the offending trustee shall be actually vacant from the time of the committing of the forbidden acts, so that everything done afterwards by him is an absolute nullity? Or does it mean that the seat is not actually vacated until the remaining trustees shall declare it vacant?

A somewhat similar statute in England was considered in *Hardwick* v. *Brown*, L. R. 8 C. P. 406. That statute, 5 & 6 Wm. IV. ch. 76, sec. 52, enacts that, "if any person holding the office of mayor, alderman, or councillor for the borough shall be declared bankrupt, &c., such person shall thereupon immediately become disqualified,

and shall cease to hold the office of such mayor, alderman, or councillor as aforesaid; and the council thereupon shall forthwith declare the said office to be void, and shall signify the same by notice under the hands of three or more of them, &c., and the said office shall thereupon become void." A member of the council of Newcastle became bankrupt, but before the council had acted in any way under the statute, he handed in his resignation, which the council by resolution accepted, and a new election took place: it was held that the meaning of the statute was that by his bankruptcy he was disqualified from doing any act as councillor, and therefore that his resignation was a nullity, and because the council had not followed the Act by declaring his office to be void, that the new election was a nullity.

Bovill, C. J., says: "The proper construction, as it seems to me, is, that, immediately upon the bankruptcy, &c., the person so becoming bankrupt, &c., shall be disqualified and shall cease to do any act as mayor, alderman or councillor; and that, upon the proper notice being given, the office shall become void for all purposes. If that be the true construction of the section, the office would not become void until the notice was given." See also *Aslatt* v. *Corporation of Southampton*, 16 Ch. D. 143.

In *Hardwick* v. *Brown* the fact which created the disqualification was known to the council at the time they accepted the resignation of the bankrupt, and his resignation was accepted in the face of a resolution offered in amendment that his seat should be declared vacant on account of his bankruptcy: the council therefore accepted the resignation of a member of their body whom they knew to be disqualified from acting in any way, although still legally the holder of a seat at their board. It is hardly to be conceived that if the board had accepted his resignation without any knowlege of his bankruptcy, and a new election had been ordered and taken place, that the new election would have been held void upon his bankruptcy being subsequently discovered.

I think the statute considered in *Hardwick* v. *Brown* is sufficiently similar in its terms and meaning to sec. 247 of our School Act to enable me to treat that case as throwing some light upon the interpretation to be given to our Act. It is to be observed that the circumstances which create disqualification under the English Act are facts as to which there could be no difficulty of proof. The fact that a member had become bankrupt, or had executed a deed of arrangement with his creditors, could readily be ascertained, and a preliminary investigation by the council before declaring him disqualified would be almost unnecessary. The fact would probably become at once a matter of notoriety, and little difficulty could be created by a statute which declared that from the time the circumstance happened the member's right to take part in the proceedings of the board should cease.

Under our sec. 247 the acts which give rise to disqualification are, however, of a different character, and from their very nature are apt to be kept secret as long as possible. The section should, therefore, be construed so as to attain as far as possible the objects aimed at by it without affecting innocent persons, if possible. Those objects I take to be the rendering void of the contracts into which the offending member has entered with the corporation, the preventing of his exercising any influence at the board with regard to such contracts, and his punishment for a contravention of the Act by the forfeiture of his seat upon his guilt being established, and by the imposition of a penalty for continuing to sit as a member of the board after he has ceased to be *de jure* a member of it. All of these objects can be attained by holding, as was held in *Hardwick* v. *Brown*, that the seat does not become actually vacant until the other members of the board have declared it to have become vacant.

It is not alleged in the pleadings here, nor was it stated by counsel before me, that any proceedings whatever had been taken by the remaining members of the board to declare the seats of these three defendants vacant, and I must hold, therefore, that they are full.

The seats being full, the Court will not interfere by injunction to restrain the occupants of them from acting as trustees. Injunction, since the Judicature Act, seems to be the appropriate, or at all events the alternative, remedy in cases of disputed claims of this nature, in which mandamus would have been formerly required, and accordingly we find our own Courts in *Smith* v. *Petersville*, 28 Gr. 599, and *Mearns* v. *Petrolia*, 28 Gr. 98, and the English Court in *Aslatt* v. *Corporation of Southampton*, 16 Ch. D. 143, interfering by injunction at the suit of the holders of seats at a council board, to restrain other persons claiming the seats from preventing their exercising their rights as such actual holders, because before the Judicature Act mandamus was the remedy provided for enforcing the rights of the occupants of offices against persons preventing their enjoyment of them. But on the other hand, where the actual holder of the office is charged with holding it improperly, *quo warranto* proceedings on behalf of the Queen remain the only means by which it can be declared vacant; see *Regina ex rel. Stewart* v. *Standish*, 6 O. R. 403; and so long as it is full, a general injunction against acting in it cannot be granted. It is true that the demurrer of the defendants admits, for the purposes of the demurrer, that the acts charged against the three defendants, trustees, are truly charged; but that is not sufficient, in the absence of a declaration by the remaining members of the board, to render the seats actually vacant. The duty of declaring them vacant, if the charges are established, devolves upon the remaining individual members of the board, who are not parties to this action, and are not sufficiently made parties by the fact that the school corporation is a party defendant: *Regina* v. *Mayor of Hereford*, 2 Salk. 701; *Rex* v. *Smith*, 2 M. & S. 583.

As against the defendant Garvin no relief seems to be claimed, and he appears to be clearly an unnecessary and improper party to the action. He is not charged with complicity in any of the offences charged against the three trustees, nor with knowledge that they had no right to

act. It is only alleged that he was appointed principal of the schools at a salary of $900 a year. It does not even appear that Mr. Van Slyke, his predecessor, claims to oust him from the office.

I think, therefore, that the plaintiff has shewn no grounds upon which, proceeding in his own name as an individual ratepayer and elector, he can obtain against any of these defendants the relief which he seeks, and as the defects in his proceedings go to the root of his rights, the demurrers must all be allowed with costs.

[QUEEN'S BENCH DIVISION.]

RE COLLARD AND DUCKWORTH.

Will—Devise for life—Power of appointment by will—Exercise of power—Covenant not to revoke will—Title to land—R. S. O. ch. 100, sec. 19.

M. D. by her will devised certain land to trustees upon trust to hold one part to the use of her son C. S. C. for his life, and after his decease to convey the same to his children or to such of the testatrix's other three sons or their children as C. S. C. might by his last will appoint; and the other part to the use of her son W. D. in precisely the same way.

C. S. C. and W. D. each appointed his parcel to the other by will duly executed, and each conveyed to the other his life interest, and covenanted in the conveyance not to revoke the appointment may by the will. They then contracted to sell both parcels to a purchaser.

Held, that C. S. C. and W. D. each took under the will a life estate with a power to appoint the inheritance in fee by will amongst the specified objects, and that such a power could not be executed except by will; the intention being that the donee of the power should not deprive himself until the time of his death of his right to select such of the objects of the power as he might deem proper; and notwithstanding the covenants here given not to revoke the appointments, a subsequent appointment by will to one of the other objects of the power would be a good execution of it, and the covenants would not affect the title of the subsequent appointee, for he would take the estate under the original testatrix and not under the devisee for life.

Held, also, that the position of C. S. C. and W. D. was not aided by sec. 19 of R. S. O. ch. 100, which gives to the donee of a power the right to release or to contract not to exercise it; by so doing they could not confer upon themselves the right to give the purchaser a good title.

Upon a petition under the Vendor and Purchaser Act it was, therefore, declared that C. S. C. and W. D. could not make a good title.

PETITION under the Vendor and Purchaser Act by Charles Solomon Collard and William Dean praying for a declaration that they had a good title to their respective portions of lot No. 31, con. 1 from the bay in the city of Toronto, and could convey the same to William Duckworth, the purchaser, in fee simple free from incumbrances.

The petitioners each claimed in severalty a portion of the land in question under the will of Mary Dean, their mother, who owned in fee simple at the time of her death. By her will she devised the land in question to trustees upon trust to hold the portion claimed by the petitioner Charles Solomon Collard, "to the use and benefit of my son Solomon Collard for and during the term of his natural life and upon and after his decease to convey the same

unto his children, or to such of my other three sons or their children as my said son Solomon may by his last will and testament appoint." The devise under which the petitioner William Dean claimed was in precisely the same terms, his name appearing in the place of that of Solomon Collard.

The petitioners each appointed his parcel of the land to the other by will duly executed, and each conveyed to the other his life interest, and covenanted in the conveyance not to revoke the appointment made by the will.

The petition was argued before Street, J., in Court on the 8th March, 1889.

D. Urquhart and *E. J. B. Duncan*, for the petitioners.
McCrimmon, for the purchaser.

March 11, 1889. STREET, J.—What each of the petitioners took under the will was a life estate with a power to appoint the inheritance in fee, by will, amongst the specified objects.

It is well settled law that a power to appoint by will cannot be executed in any other manner. The intention of the creator of such a power is taken to be that the donee of it shall not deprive himself until the time of his death of his right to select such of the objects of the power as he may deem proper: *Sugden* on Powers, 8th ed., p. 210; *Reid* v. *Shergold*, 10 Ves. 370; *Doe* v. *Thorley*, 10 East 438; *Walsh* v. *Wallinger*, 2 Russ. & Myl. 78; *Archibald* v. *Wright*, 9 Sim. 161.

Notwithstanding the covenant of the vendors here with each other, or with the purchaser, that they will not revoke the appointment, a subsequent appointment by will to one of the other objects of the power would undoubtedly be a perfectly good execution of it, and would cut out the title of the purchaser. Such an appointment would be a breach of the covenant, and would render the covenantor liable in damages, but would not at all affect the title of the appointee under the later appointment, for he

would take the estate under the original testatrix Mary Dean, and not under the devisee for life: *McCormick* v. *McRae*, 11 U. C. R. 187; *Robinson* v. *Ommanney*, 21 Ch. D. 780; *S. C.*, 23 Ch. D. 285.

The question does not at all depend upon whether or not a testator may be bound by covenant to deal with his own property by a will in a particular form. The vendors have no estate in the inheritance of this property; they have only a power to direct to whom of certain persons the trustees are to convey it. That power is, by the terms in which it is created, to be executed only by will; it is of the very nature of a will that it shall be revocable during the testator's life, and any attempt of the donee to execute the power by an irrevocable instrument cannot bind the person taking under a later will.

For these reasons I think it clear that the petitioners can not make a good title to the land in question.

I should add that the position of the vendors is not aided by sec. 19 of ch. 100, R. S. O., to which I was referred, and which only gives to the donee of a power the right to release or to contract not to exercise it. Whatever might be the effect of the vendors either releasing or contracting not to exercise the power which they possess, it would certainly not confer upon themselves the right to give the purchaser a good title.

[QUEEN'S BENCH DIVISION.]

YOUNG v. MIDLAND RAILWAY COMPANY.

Railways—Compensation for land taken—Conveyance in fee by tenant for life—C. S. C. ch. 66, sec. 11—24 Vic. ch. 17, sec. 1—Estates in compensation money—Statute of Limitations—Will—Devise of land taken for railway—Inoperative to pass compensation—Parties.

Under the Railway Act, C. S. C. ch. 66, sec. 11, sub-sec. 1, as interpreted and explained by 24 Vic. ch. 17, sec. 1, a tenant for life had power to convey the fee to a railway company, but had no power to receive the purchase money; and, therefore, a railway company which took a conveyance in fee from a tenant for life and paid her the purchase money, remained responsible for the payment.

The meaning of sub-sec. 22 of sec. 11 is that the money value of the land is converted into a piece of real estate, which the railway company holds for the owners of the land in place of which it stands, and that the estates in the land existing at the time the land is taken become estates in the compensation instead; and upon the tenant for life, in this case, conveying the fee, she became tenant for life in the compensation, and those entitled to the inheritance in the land became entitled to the reversion in fee in the compensation as against the railway company; and the Statute of Limitations did not begin to run against them till the death of the tenant for life.

The tenant for life conveyed to the railway company in 1871. The person entitled to the reversion after the life estate died in 1871 intestate, and I. H. Y., his sole heiress-at-law, died in 1884, leaving a will, in which she devised to the plaintiff a specific parcel of land, including the part conveyed to the railway company.

Held, that this will did not pass to the plaintiff the right to receive the compensation money, and that as to it I. H. Y. died intestate and it descended to her heirs-at-law, of whom the plaintiff was one; and the plaintiff was allowed to amend by adding the other heirs-at-law as parties.

ON 14th November, 1867, John Robert Torrance, being the owner in fee simple of 100 acres of land, being the south part of lot 27 in concession C. of the township of Scarborough, made his will, by which he devised it to his wife Margaret Torrance, for the term of her natural life, but made no disposition of the remainder of his interest in the land, which, accordingly, upon his death on 19th November, 1867, descended to his father, John Torrance, his sole heir-at-law.

On the 27th October, 1871, Margaret Torrance, the tenant for life, in consideration of $1,200 paid to her by the Toronto and Nipissing Railway Company, executed a

conveyance to that company of ten acres of the property, which conveyed or purported to convey the fee simple to the grantees. The land so conveyed was required by the grantees for the purposes of the railway, and the full consideration was paid by the railway company to Margaret Torrance, the grantor. The defendants, the Midland Railway Company of Canada, had acquired all the rights and were subject to the liabilities of the Toronto and Nipissing Railway Company.

John Torrance, the heir-at-law of John Robert Torrance, to whom the reversion descended, died intestate about the year 1871, leaving Isabella Hamilton Young, his heiress-at-law: she died on the 11th May, 1884, and by her will devised to the plaintiff, his heirs and assigns for ever, "100 acres of land, being the south part of lot No. 27 in the concession named C. in the township of Scarborough, together wth all my right, title, and interest therein, present and future."

Margaret Torrance died in the year 1884. The plaintiff now claimed to be paid the $1,200, or the value of the land taken by the railway company.

The action was tried before Street, J., at the Toronto Spring Assizes, 1888, without a jury, and judgment was then reserved.

J. K. Kerr, Q. C., and *Wm. Macdonald*, for the plaintiff.
Osler, Q. C., for the defendants.

March 2, 1889. STREET, J.—Upon the authority of *Cameron* v. *Wigle*, 24 Gr. 8, I think that Margaret Torrance had power under the first sub-section of the 11th sec. of ch. 66, C. S. C., as interpreted and explained by the first sec. of ch. 17 of the stat. 24 Vic. (1861) to convey the fee to the railway company, although she was herself only tenant for life; but I am of opinion that she had no power to receive the purchase money. The defendants contended before me that the effect of the 2nd section of the last men-

tioned Act had been overlooked in *Cameron* v. *Wigle*, and that Margaret Torrance was "owner" of the land within the meaning of that section, referring in support of this contention to the interpretation placed upon the word "owner" by sub-sec. 15 of sec. 7 of ch. 66, C. S. C.: but the word must retain its ordinary meaning except in the cases covered by sub-sec. 15, of which the right to receive purchase money is not one. The railway company, therefore, in my opinion, remained responsible for the payment of the purchase money notwithstanding they had paid it to Mrs. Torrance. She had only power to contract for the sale of the fee, and to receive interest on the purchase money during her life.

The defendants further contended that the right to claim the purchase money had become barred by the Real Property Limitations Act, owing to the lapse of more than ten years from the time when they paid the purchase money to Margaret Torrance in 1871, at which time they say the life estate in the land which she then held must be taken to have been terminated by the conveyance of the life estate and inheritance to the railway company. I cannot see the force of this argument, and I do not think it should prevail. Under the 22nd sub-sec. of the 11th sec. of ch. 66, C. S. C., it is provided that "The compensation for the land shall stand in the stead of such land." The meaning of this I understand to be that the money value of the land is converted into a piece of real estate, which the company or the Court holds for the owners of the land in the stead of which it stands, and that the estates in the land existing at the time the land is taken become estates in the compensation instead. Margaret Torrance then became tenant for life, and the heir-at-law of John Robert Torrance became entitled to the reversion in fee in the compensation, as against the railway company. The estate for life of Margaret Torrance did not terminate until 1884, and the estates of the reversioners are not barred, because the statute only began to run against them from that time. I do not think, however, that the will of Isabella Hamilton

Young passed to the plaintiff the right to receive this compensation. The devise in her will is of a specific parcel of land only, which includes in terms the land which had been conveyed by Margaret Torrance to the railway company.

It is evident that the land which had become vested in the railway company under the conveyance from Margaret Torrance, and had never been the property of the devisor Isabella Hamilton Young, cannot pass by her will, and although it is provided by the statute that the compensation for the land taken shall stand in the stead of the land, it would be carrying the language of the will beyond its natural meaning to hold that it is to be taken to cover and include a sum of money into which a portion of the land had been converted long before the devisor had any interest in either the land or the money. I think that Isabella Hamilton Young died intestate as to this compensation, and that it descended to her heirs-at-law, of whom the plaintiff is one.

The plaintiff applied at the close of the argument for leave to add the other heirs of Isabella Hamilton Young as parties, if necessary, and I think he should have leave to do so. The defendants must, of course, have the right to answer any amendments made to the pleadings under which the proposed new parties are added. At present the matter cannot be finally disposed of, and the trial of the action is not completed. When the amendments are made, I can hear any other evidence which may be found necessary, and dispose of the action. If the other heirs decline to be made parties plaintiffs, they should be added as parties defendants, so that no other action may be necessary.

END OF VOLUME XVI.

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. *Malicious prosecution—Unlawful and malicious injury—Reasonable and probable cause.*

See MALICIOUS PROSECUTION, 1.

2. *Breach of Promise—Statute of Limitations—Successive promises—Independent contracts—Mitigation of damages—General reputation.*

See HUSBAND AND WIFE, 4.

3. *Breach of promise—Evidence.*

See HUSBAND AND WIFE, 1.

4. *Deceit—Corporations—Demurrer.*

See COMPANY, 1.

ARBITRATION AND AWARD.

1. *Motion to set aside award—Conduct and jurisdiction of arbitrator—Draft award—Admissions of arbitrator—Discovery of fresh evidence—Absence of material witness.*]—*Held*, that an award, good on its face, and made upon a reference without provision for appeal, could not be set aside because of an alleged mistake in law or excess of jurisdiction disclosed in a draft award, not being a part of or delivered with or accompanying the award, or because of admissions made by the arbitrator in conversations with the defendant's solicitors.

Dinn v. *Blake*, L. R. 10 C. P. 388; *Hodgkinson* v. *Fernie*, 3 C. B. N. S. 189, followed.

Re Dare Valley R. W. Co., L. R. 6 Eq. 429; *East and West India Dock Co.* v. *Kirk*. 12 App. Cas. 738, distinguished.

Held, also, that no case was made out for remitting the action to the arbitrator on the ground of the discovery of fresh evidence, it not being shewn that the evidence could have been obtained by reasonable diligence; nor on the ground of the

absence of a material witness, of whose evidence the defendants were aware during the progress of the reference, and neglected to ask for a commission or a postponement. *Lemay* v. *McRae et al.*, 307.

2. *Disqualification of arbitrator —Offer by party of solicitorship pending reference—Order of reference, construction of - - Judicature Act, 1881, sec. 48.—C. L. P. Act, secs. 189, 209—9 and 10 Wm. III. ch. 15—Interim finding of facts—Time for moving against—Waiver of objections to.*]—By an order made at *nisi prius* on the 4th November, 1886, upon the application of the defendants and without the consent of the plaintiffs, the actions and all matters in question therein were referred to the award of the persons named, who were given all the powers therein of a Judge of the High Court of Justice sitting for the trial of an action. By clause 2 of the order the referees were directed to make and publish their award in writing on or before the 3rd January, 1887, or such other day as they should appoint. By clause 6 it was provided that there should be the right of appeal in the same way as if the order was made under sec. 189 of the C. L. P. Act; and by clause 8, that the reference should be considered as made in pursuance of sec. 48 of the Judicature Act, 1881; and also, in so far as the same was applicable, as under the provisions of sec. 189 of the C. L. P. Act.

Held, that the reference was a compulsory one, so far as the plaintiffs were concerned, and that it was not a reference under 9 & 10 Wm. III. ch. 15, but under sec. 48 of the Judicature Act and sec. 189 of the C. L. P. Act.

During the reference it was agreed between the parties that the arbitrators should proceed to the ground and ascertain by their own examination the quantities of material moved (as to which the dispute was), and certify their findings, and all other questions in the actions and reference were to remain open; and pursuant to this agreement the arbitrators proceeded to the ground, and ascertained certain facts, and on 23rd August, 1887, reported, "we do hereby find and certify that the plaintiffs moved the respective quantities hereinafter mentioned," &c.

Held, that this finding and certificate was not the award which clause 2 of the order of reference directed the referees to publish; nor was it an award within the meaning of sec. 209 of the C. L. P. Act; but was merely a finding of facts pending the reference, to enable the arbitrators to make their award; and apart from the question of waiver, the parties were not bound to make any motion as to the finding until the making of the award; and therefore the objection that a motion against the finding made on the 29th May, 1888, was too late, failed.

Held, also, upon the evidence, that there was no waiver of the objections to the finding; and that, although the finding was not an award, the motion made against it by the plaintiffs was a convenient and proper one.

The finding and certificate was set aside, because, pending the reference and before the finding, one of the arbitrators had received an offer of the solicitorship of the defendants' company, and had after the finding accepted it, and was thus disqualified from acting. *Conmee et al.* v. *Canadian Pacific R. W. Co.*, 639.

See MUNICIPAL CORPORATIONS, 4.

ASSESSMENT AND TAXES.

Crown lands—Indian lands—Tax sale—Reeve purchasing at tax sale.

See CROWN LANDS, 1.

BANKRUPTCY AND INSOLVENCY.

1. *Preference — Chattel mortgage to insolvent's wife—Application of wife's property to payment of creditors—R. S. O. (1887) ch. 124.*]—W., being in insolvent circumstances, and pressed by one of his creditors, G., procured his wife to convey her house and lot to G., who, by consent of Mrs. W., applied part of the purchase money in payment of W.'s debt to him, and paid the balance to W., who made a chattel mortgage on his stock-in-trade to his wife for the amount of the purchase money which she should have received.

Held, [reversing the judgment of ROSE, J., at the trial,] that the chattel mortgage was void as against W.'s creditors under R. S. O. (1887), ch. 124, and that it did not come within any of the exceptions in sec. 3.

Per STREET, J. The necessary preference of a particular creditor placed the transaction outside of the class which it was the intention of the Legislature to protect. *Stoddard* v. *Wilson*, 17.

2. *Fraudulent preference—Disposal of property by preference creditor—Right of other creditors to set aside preference.*]—A favoured creditor, with the connivance of an insolvent debtor, procured a third person to purchase the debtor's entire stock in trade, for which the purchaser gave his note to the debtor, who immediately indorsed it to the favoured creditor, who discounted it with a bank. The debtor did not execute any assignment for the benefit of creditors. In an action by the other creditors to compel the preference creditors to share ratably with them.

Held, [reversing the judgment of GALT, C. J., at the trial], that as the preference creditor had disposed of the note to a *bonâ fide* holder for value no relief could be given.—*Robertson* v. *Holland*, 532.

3. *Assignment for benefit of creditors—Assignee not a sheriff—Requisite number of creditors not assenting—R. S. O. ch. 124, sec. 3. sub-sec. 2, construction of—Chattel mortgage—Jus tertii—Costs.*]—The meaning of R. S. O. ch. 124, sec. 3, sub-sec. 2, is that an assignment executed without the consent of the requisite number of creditors shall have the same effect as if had been executed with such consent until and unless it be superseded by an assignment executed with such consent; and the words which occur through the Act, "an assignment for the general benefit of creditors under this Act," are to be governed by this construction.

Held, therefore, that a sheriff who had seized goods of insolvent debtors under execution was not justified in refusing to give them up to the debtors' assignee, who was not a sheriff, and the assignment to whom had not been assented to by the number of creditors required by R. S. O. ch. 124, sec. 3, but

Held, also, that as the goods were covered by a chattel mortgage, the sheriff could set up the rights of the mortgagee in answer to an action by the assignee to restrain the sale of the goods under the execution.

The assignee having failed in the

action, because the mortgagee's rights disentitled him to succeed, and the sheriff having contested the assignee's rights on the other ground, which was declared to be untenable, no costs were given to either party. *Anderson* v. *Glass*, 592.

4. *Assignment for creditors—Filing of claim—Collateral securities—Mortgage debt — Open account — Tacking —Accommodation paper — Right to rank.*]—W. made an assignment to trustees for the benefit of his creditors prior to 1884. In July, 1884, H. filed a claim against the estate, claiming (1) upon two mortgages on land; (2) upon an open account and certain notes made by W.; (3) upon certain notes made by T. in favour and for the accommodation of W., and endorsed and delivered by W. to H. as collateral security for W.'s indebtedness to H. After filing the claim the mortgage debts were paid to H., who had thereupon assigned the mortgages, and the T. notes were also paid by T. to H., and T. had thereupon filed a claim in respect to them against W.'s estate, and received a dividend thereon. The mortgages had been given to secure payment of entirely separate and isolated debts from W. to H. H. afterwards made an assignment to trustees for his creditors, and these latter brought this action, claiming that notwithstanding all the above circumstances, they were still entitled to rank on and receive a dividend from the W. estate on the whole of the above indebtedness, and on H.'s claim as originally filed.

Held, that as to the mortgage debts they were not entitled to receive a dividend, these being separate and distinct debts, but that as to the other indebtedness, they were still entitled to rank for the full amount notwithstanding the payment in full of the T. notes, on the authority of *Eastman* v. *Bank of Montreal*, 10 O. R. 79, provided that they did not in all receive more than 100 cents on the dollar; and this did not prevent T. also ranking in respect to the sum he had paid as accommodation maker.

When a mortgagee is also a creditor in respect to a simple contract debt, he cannot tack the simple contract debt to the mortgage debt, and the creditor does not by reason of his debtor having made an assignment for the benefit of his creditors, acquire any higher position in this respect than he occupied at the time of or immediately prior to the assignment. *Young* v. *Spiers*, 672.

BANKS AND BANKING.

1. *Composition and discharge—Execution of deed by local manager —Validity — Agreement to accept part of claim—Authority—R. S. O. ch. 44, sec. 53, sub-sec. 7.*]—At a meeting of the defendant's creditors, at which the plaintiffs were not represented, an agreement was made to accept 40 cents on the $, on the amount of the claims. A deed of composition with a covenant to accept the 40 cents was prepared, and was executed by C. N., the manager of the plaintiff's branch at L. The execution was "for Bank of Commerce, C. Nicholson," opposite to which was an ordinary seal. At the time the manager executed the deed, there were two creditors mentioned in the schedule who had not executed. Before either of these creditors had executed, and before the composition notes had been tendered to the manager, he wrote defendants' solicitors withdrawing from

the arrangement. It did not appear that the head office had repudiated the manager's authority. The composition notes were subsequently tendered to the manager, but he refused to accept them. By the plaintiffs' act of incorporation the management of the bank's affairs was to be by the directors who had authority to open branches and to appoint the officers. The chief place of business was to be at T., where the corporate seal was kept.

Held, that the deed was not binding on plaintiffs' corporation, not being under the corporate seal, nor under a signature or sign manual whereby it executed documents.

Held, however, on the evidence, that the manager had authority to agree to accept less than the whole of the claim, and did so agree, and that the debtor performed his part by tendering the notes: and that under R. S. O. (1887) ch. 44, sec. 53, sub-sec. 7, the assignment was irrevocable. *The Bank of Commerce v. Jenkins*, 215.

2. *Winding-up Act—Banking Act—Payment of the ten per cent. on subscription—Transfer of shares—Marginal transfer — Shareholders within month of suspension—Bank dealing in its own shares—R. S. C. ch. 129, secs. 20, 29, 45, 70, 77.*]—Where ten per cent. was not paid at the time of original subscription of bank shares, nor within thirty days thereafter, as required by the Banking Act, R. S. C. ch. 120, sec. 20, but was paid before the first transfer took place, and was accepted by the bank.

Held, that subsequent transferees of the shares were properly placed upon the list of contributories in winding-up proceedings.

The provision as to payment is for the protection of the public, and till payment is made the person subscribing may not be able to deal with the stock, but he is at least equitable owner, and may become legally entitled on making the prescribed payment.

Where the evidence showed that the bank had adopted the practice of dealing with their shares by way of marginal transfer, the first transfer being made in blank, subject, as by marginal note, to the order of a broker, and the ultimate purchaser signing an acceptance in the book immediately under the transfer so signed in blank by the seller, the intermediate dealing of the broker being omitted from extended record in the bank books, and the transferees were duly entered as shareholders in the stock ledger of the bank.

Held, that this amounted substantially to an acceptance of shares transferred in blank, which was lawful where transfer by deed was not prescribed, and the entry in the stock ledger amounted to registration within the meaning of the Act.

Where it appeared that in one such case the transferee did not sign the acceptance, but that he subsequently dealt with the shares by selling and transferring them.

Held, that the transferees from him were properly placed upon the list of contributories, notwithstanding anything in the Banking Act, R. S. C., ch. 120, sec. 29.

Where one of those placed upon the list of contributories acquired his shares within one month from the suspension of the bank.

Held, that he was liable as a contributory. R. S. C., ch. 120, sec. 77, is cumulative so as to make also liable those who have been holders during the month preceding the suspension, leaving them to discuss

among themselves their respective liabilities.

Where the shares which had been transferred to one placed on the list of contributories had been previously held by the cashier of the bank in trust, as alleged, for the bank, which it was objected was thus trafficking in its own shares.

Held, that even if the cashier did hold the shares in trust for the directors of the bank, this would not be necessarily illegal, as he might have such shares, under sec. 45 of the Banking Act, as security for overdue debts; and, besides, this was a matter which, though it might give the appellant a right to rescind during the currency of the banking institution, became of no moment after the rights of creditors represented by the liquidators arose. The matter was not an absolute nullity, but, at most, one which the shareholders could waive as voidable, and it became, by the suspension, of unimpeachable validity as between the appellant and the liquidators. *In re the Central Bank of Canada, Baines and Nasmith's Cases*, 293.

BARRISTER AND SOLICITOR.

1. *Professional misconduct — Exercise of disciplinary jurisdiction by Law Society—R. S. O. ch. 145, secs. 36, 44—Constitution of discipline committee—Evidence under oath—Action at law by complainant—Question whether wrongful acts done in professional character — Restitution —Waiver.*]—The plaintiff, a barrister and solicitor, was charged before the Benchers of the Law Society with professional misconduct in his dealings with certain shares of bank stock entrusted to him by a young woman. The charges were referred to the standing committee of the Benchers on discipline, who inquired and reported to the Convocation of Benchers. Convocation adopted the report, and resolved that the plaintiff "is unworthy to practise as a solicitor, and that he is disbarred as a barrister." This action was brought to have the resolution declared void, and to restrain the defendants from taking further proceedings under it, the plaintiff objecting to the proceedings of the committee and of Convocation as illegal, defective, and improper.

Held, per BOYD, C., at the trial, that the discipline committee was properly constituted, a quorum being present, without notice of its meetings being given to the treasurer of the Law Society, who was an *ex-officio* member of all standing committees, but who was absent from Canada at the time; and that no valid objection arose from the fact that the other members of the committee, though notified of the meetings, were not advised of the particular business they were called to transact; and at all events any cause of complaint as to procedure was removed by the fair and just conduct of the final proceedings before Convocation at large, where the plaintiff had ample opportunity to explain and defend himself.

2. It is not essential to the jurisdiction of domestic tribunals that they should have the powers of ordinary Courts of justice in the trial of its litigated matters. R.S.O. ch. 145, sec. 36, is not imperative; it confers the power to examine witnesses under oath, which may or may not be employed according to the sound discretion of the particular tribunal. Where there is or is likely to be any conflict in the evidence, the wit-

ness should be sworn. But in this case the salient facts were not controverted by the plaintiff; his counsel having stated in his presence that he did not know that he could differ from the conclusions which the committee had come to; and the evidence derived from admissions of a party unsworn is sufficient to found even a decree of the Court. The objection that the Discipline Committee had taken evidence without oath, therefore failed.

3. The intervention of the Law Society upon the solicitation of the person aggrieved was quite warrantable, notwithstanding that such person had brought an action for pecuniary redress.

4. The jurisdiction of the Law Society should not be less than that of the Court; and the latter is exercised not merely in cases arising out of purely professional employment, but whenever the transaction is so connected with the professional character of the solicitor as to afford a presumption that that character formed a ground and reason of the employment. It is for the Benchers to determine and adjudge what is and what is not becoming conduct in a member of the Society, under R. S. O. ch. 145, sec 44; and any act of any member that will seriously compromise the body of the profession in public estimation is within the province of this law. Any misconduct which would prevent a person from being admitted to the Society justifies his removal; and the conduct which unfits a man to be a solicitor should *a fortiori* preclude his being a barrister. The plaintiff according to his own statements before the Committee, was acting as a solicitor in the transactions complained of; and the objection that he was not engaged in that capacity, or in the capacity of barrister, failed.

5. The fact that the plaintiff, prior to the resolution of the Benchers, had made restitution to the complainant, did not oust the jurisdiction to discipline. *Hand* v. *Law Society of Canada*, 625.

BILLS OF SALE AND CHATTEL MORTGAGE.

Undisclosed trust — Informality cured by taking possession—Insolvency of mortgagor—Prior seizure by mortgagees under execution—Preference—48 Vic. ch. 26, sec. 2 (O.).]—A chattel mortgage made by D. to McL. was given to secure a sum made up of debts due to McL. and two other persons; McL. made the usual affidavit of *bona fides*, asserting that the whole sum was due him; no trust of any kind appeared upon the mortgage, though the intention was that McL. should hold it as trustee for the other two. The mortgage was filed within the proper time after its execution. McL. assigned the mortgage to the plaintiffs, who afterwards obtained judgment against D., and under the execution the sheriff seized the property covered by the mortgage. After this seizure the plaintiffs instructed the sheriff to withdraw, and then took and held possession of the property under the mortgage. The defendants placed writs of execution against the goods of D. in the hands of the sheriff after the plaintiffs had taken possession under their mortgage. D. was solvent when he gave the chattel mortgage, but insolvent when the plaintiffs took possession.

Held, that the fact that no trust was declared on the face of the mortgage was nothing more than an

informality, and was cured by the taking possession before the rights of creditors had attached on the chattels; and neither the insolvency of the mortgagor at the time of taking possession, nor the fact of the seizure under execution before taking possession, affected the position of the plaintiffs.

Held, also, that the taking possession could not be viewed as a preference within 48 Vic. ch. 26, sec. 2 (O.). *Bank of Hamilton* v. *Tamblyn et al.*, 247.

BILLS AND NOTES.

Action against indorser—Denial of indorsement—Evidence of circumstances connected with indorsement.]—*See* EVIDENCE, 3.

1. *Authority to draw—Promise to accept—Privity.*]—On the maturity of a bill of exchange the drawers thereof, thinking the acceptor would be unable to meet it telegraphed him if unable to pay it to draw on them for the amount. The acceptor took the telegram to the manager of the plaintiff's bank, who on the faith of it discounted a sight bill drawn by the acceptor on the drawers with the proceeds of which he retired his acceptance which was held by another bank. The drawers refused to accept the bill so re-drawn.

Held, that the telegram having been sent for the purpose of inducing persons to advance money on it, and to take the bill so drawn in pursuance of it, a privity was created between the plaintiffs and the defendants, senders of the telegram, entitling the former to maintain an action against the latter for the money so advanced.

Held, also, that no time being mentioned in the telegram an authority to draw at sight would be implied.—*Bank of Montreal* v. *Thomas*, 503.

BREACH OF PROMISE.

Statute of Limitations—Successive promises—Independent contracts—Mitigation of damages—General reputation.]—*See* HUSBAND AND WIFE, 4.

BY-LAW.

Municipal corporations—Favouritism—Delegation of functions.]—*See* MUNICIPAL CORPORATIONS, 2.

Municipal—Transient traders.]—*See* MUNICIPAL CORPORATIONS, 1.

CANADA TEMPERANCE ACT.

1. *Disqualifying interest of magistrate—Rejection of evidence to shew interest—Award of costs—Inspector's fee—Interpreter's fee—Evidence of prior conviction—Jurisdiction of magistrate—Certiorari.*]—Upon a motion to quash a conviction by a police magistrate for a second offence against the Canada Temperance Act: 1. It was contended that the magistrate had a disqualifying interest in the prosecution, because he had employed and paid agents to secure convictions under the Act, and because he was a strong temperance advocate, with an alleged bias in favor of the prosecution in cases under the Act. It was not shewn that the magistrate was interested or engaged in promoting or directing the prosecution of this offence, or defraying the expenses of it, or paying agents for evidence to be given upon it.

Held, that it was not to be inferred from anything alleged to have been done by the magistrate in other prosecutions, that the same was done by him in this; and that the statements were of too loose and vague a character to support a finding that the magistrate was disqualified from sitting.

2. At the hearing, the defendant attempted to shew by witnesses that the magistrate had a disqualifying interest in the case, but the magistrate refused to admit such evidence

Held, that the evidence was inadmissible, and even if admissible, the the rejection of it would not afford ground for quashing the conviction.

Regina v. *Sproule*, 14 O. R. 375, not followed.

3. It was also contended that the magistrate exceeded his jurisdiction by ordering the defendant to pay $3 as inspector's fee, $2 for an interpreter, and $1 justice's costs.

Held, that the fees to be paid to witnesses in prosecutions such as this are not established by any law, and such are to be allowed, under sec. 58 of the Summary Convictions Act, as to the justice seems reasonable; and an interpreter may properly be treated as a witness.

In any case, however, the award of costs was within the jurisdiction of the magistrate, and *certiorari* would not therefore lie (being taken away by the statute under which the conviction was made) on the ground of want of jurisdiction; and the erroneous allowance of certain items of costs would not warrant the quashing of the conviction.

4. The information specifically charged that the defendant had been previously convicted under the Act, and the affidavit filed by the defendant did not deny the fact, but only the evidence of it.

Held, that the question whether the defendant had been previously convicted or not, was a matter within the jurisdiction of the magistrate, and his finding as to it was conclusive.

Held, also, that the provisions of sec. 115 of the Canada Temperance Act are directory only. *Regina* v. *Brown*, 41.

2. *Hard labour—Payment of inspectors' attendance and mileage.*]—Under the Canada Temperance Act there is no power to order imprisonment at hard labour.

Quære, whether there was power to order defendant to pay a sum for two days attendance of the inspector and his mileage. *Regina* v. *Tucker*, 127.

3. *Conviction — Jurisdiction of police magistrate — Place where offence committed—Question of fact —Statute not proved to be in force— Certiorari—Want of jurisdiction to be shown affirmatively—Joint conviction—Imprisonment of one defendant for default of the other—R. S. C. ch. 178, secs. 87, 88.*]—The defendants were convicted by the police magistrate of the town of Peterborough, of selling intoxicating liquor in that town, contrary to the provisions of the Canada Temperance Act. It was contended that only the contract for sale was made in Peterborough, but that the actual sale took place in Port Hope; there was no conflict of evidence; the magistrate held upon the undisputed facts that the sale was in Peterborough. Upon a motion to quash the conviction.

Held, that the question where the sale took place was one of fact, and the magistrate having found, as shewn by the conviction, that the

defendants had sold intoxicating liquor in Peterborough, the Court could not review his decision.

Held, also, that the defendants were not entitled to a *certiorari* to remove the conviction on the ground that the Act was not proved to be in force in Peterborough, because on their application for the *certiorari* they did not shew affirmatively that the Act was not in force there. But

Held, that the conviction was bad and must be quashed, because in the award of punishment it was directed that each of the defendants should pay half the fine and costs, and that in default of distress the defendants should be imprisoned, and under such award one of the defendants, having paid his half of the fine and costs, might be imprisoned for the other's default; and this defect was not cured by secs 87 and 88 of the Summary Convictions Act, R. S. C. ch. 178. *Regina* v. *Ambrose and Winslow*, 251.

4. *R. S. C. ch. 106, sec, 100, construction of—"Not less than $50"—Penalty—Powers of magistrate.*]—The words "not less than $50" and "not less than $100," in the Canada Temperance Act, R. S. C. ch. 106, sec. 100, should be construed as "$50 and no less," and "$100 and no less"; and a summary conviction by a Police Magistrate for a first offence against the Act was quashed because the penalty imposed $75, was beyond the jurisdiction of the magistrate; FALCONBRIDGE, J., dissenting.

Regina v. *Cameron*, 15 O. R. 115, not followed.

Stimpson qui tam, v. *Pond*, 2 Curtis 502, referred to, and approved. *Regina* v. *Smith*, 454.

Canada Temperance Act.] —*See* POLICE MAGISTRATE, 1.

CASES.

Church v. *Fenton*, 28 C. P. 384, 4 A. R. 159, 5 S. C. R. 239, referred to and followed.—*See* CROWN LANDS, 1.

Cochrane v. *Hamilton Provident and Loan Society*, 15 O. R. 138, followed.—*See* EJECTMENT, 1.

Cooper v. *Emery*, 1 Phil. 390, distinguished.—*See* VENDOR AND PURCHASER, 1.

Costello v. *Hunter*, 12 O. R. 333, distinguished. — *See* HUSBAND AND WIFE, 4.

Dinn v. *Blake*, L. R. 10 C. P. 388, followed. — *See* ARBITRATION AND AWARD, 1.

Earls v. *McAlpine*, 27 Gr. 164, 6 A. R. 145, followed.—*See* HUSBAND AND WIFE, 3.

East and West India Co. v. *Kirk*, 12 App. Cas. 738, distinguished.—*See* ARBITRATION AND AWARD, 1.

East v. *Bank of Montreal*, 10 O. R. 79, followed.—*See* BANKRUPTCY AND INSOLVENCY, 4.

Gilbert v. *Doyle*, 24 C. P. 60, not followed.—*See* LANDLORD AND TENANT, 1.

Gilchrist and Island, 11 O. R. 537, distinguished and dissented from.—*See* MORTGAGE, 3.

Gough v. *McBride*, 10 C. P. 166, specially referred to.—*See* EVIDENCE, 2.

Hardwick v. *Brown*, L. R. 8 C. P. 406, followed.—*See* PUBLIC SCHOOLS, 2.

Hickey v. *Stiver*, 11 O. R. 106, distinguished. – *See* WILL, 3.

Hodgkinson v. *Fernie*, 3 C. B. N. S. 189, followed. — *See* ARBITRATION AND AWARD, 1.

James v. *Ontario and Quebec R. W. Co.*, 12 O. R. at p. 630, followed. *See* MUNICIPAL CORPORATIONS, 10.

London and Canadian Loan Assurance Co. v. *Morphy*, 14 A. R. 577, specially referred to.—*See* PARTNERSHIP, 1.

Mundell v. *Tinkis*, 6 O. R. 625, followed. – *See* FRAUDULENT CONVEYANCE, 1.

McHardy v. *Ellice*, 1 A. R. 628, followed.—*See* MUNICIPAL CORPORATIONS, 8.

McIntosh v. *Rogers*, 12 P. R. 389, followed.—*See* VENDOR AND PURCHASER, 1.

Pennyman v. *McGregor*, 18 C.P. 132, followed.—*See* HUSBAND AND WIFE, 3.

Potts v. *Leask*, 36 U. C. R. 476, not followed.—*See* PARTNERSHIP, 1.

Price v. *Guinane*, 16 O. R. 264, approved and followed.—*See* LANDLORD AND TENANT, 3.

Re Albermarle, etc., 45 U. C. R. 133, distinguished.—*See* MUNICIPAL CORPORATIONS, 6

Re Dare Valley R. W. Co., L. R. 6 Eq. 429, distinguished.—*See* ARBITRATION AND AWARD, 1.

Re Eldon and Ferguson, 6 U. C. L. J. 207, followed.—*See* MUNICIPAL CORPORATIONS, 4.

Re Kiely, 13 O. R. at p. 457, specially referred to.—*See* MUNICIPAL CORPORATIONS, 2.

Re Muskoka and Gravenhurst, 6 O. R. at p. 357, approved of.—*See* MUNICIPAL CORPORATIONS, 4.

Re Nash and McCraken, 33 U. C. R. 181, specially referred to.—*See* MUNICIPAL CORPORATIONS, 2.

Re Ontario and Quebec R. W. Co. and Taylor, 6 O. R. at p. 348, followed.— *See* MUNICIPAL CORPORATIONS, 10.

Re Rosher, Rosher v. *Rosher*, 26 Ch. D. 801, not followed –*See* HUSBAND AND WIFE, 3.

Re Shaver, 6 O. R. 312, distinguished.—*See* WILL, 3.

Re Squier, 46 U C. R. 474, specially referred to.—*See* MUNICIPAL CORPORATIONS, 3.

Re Winstanley, 6 O. R. 315, followed.—*See* HUSBAND AND WIFE, 3.

Regina v. *Cameron*, 15 O. R. 115, not followed.—*See* CANADA TEMPERANCE ACT, 4.

Regina v. *Levecque*, 30 U. C. R. 509, distinguished.—*See* JUSTICE OF THE PEACE, 3.

Regina v. *Mayor of Hereford*, 2 Salk. 701, referred to.—*See* PUBLIC SCHOOLS, 2.

Regina v. *Sparham*, 8 O. R. 570, approved of.—*See* JUSTICE OF THE PEACE, 1.

Regina v. *Sproule*, 14 O. R. 375, not followed. — *See* CANADA TEMPERANCE ACT, 1.

Regina v. *Williams*, 10 Mod. 63, followed.—*See* CRIMINAL LAW, 2.

Regina v. *Young*, 13 O. R. 198, not followed.—*See* POLICE MAGISTRATE, 1.

Rex v. *Dixon*, 10 Mod. 335, followed.—*See* CRIMINAL LAW, 2.

Rex v. *Smith*, 2 M. & S. 583, referred to.—*See* PUBLIC SCHOOLS, 2.

Rogers v. *Ingham*, 3 Ch. D. 351, followed.—*See* WILL, 4.

Scripture v. *Gordon*, 7 P. R. 164, not followed.—*See* PARTNERSAIP, 1.

Small v. *Riddel*, 31 C. P. 373, not followed.—*See* PARTNERSHIP, 1.

Smart v. *Sorenson*, 9 O. R. 640, considered.—*See* DOWER, 1.

Smith v. *Faught*, 45 U. C. R. 484, followed.—*See* HUSBAND AND WIFE, 3.

Smith v. *Methodist Church*, 16 O. R. 199, followed.—*See* TORONTO GENERAL HOSPITAL, 1.

Stebbing v. *Metropolitan Board of Works*, L. R. 6 Q. B. 37, approved of.—*See* MUNICIPAL CORPORATIONS, 4.

Stimpson qui tam v. *Pond*, 2 Curtis 502, referred to and approved.—*See* CANADA TEMPERANCE ACT, 4.

Summers v. *Summers*, 5 O. R. 110, distinguished.—*See* WILL, 3.

Tylee v. *Deal*, 19 Gr. 601, followed, *See* WILL, 4.

Woodbury v. *Marshall*, 19 U. C. R. 597, not followed.—*See* LANDLORD AND TENANT.

CHARITY.

Mortmain—Charitable uses—Methodist Church. *See* MORTMAIN, 1.

CHURCH.

Sale by trustees of Church property—Publication of notice—Weekly paper—Daily paper—R. S. O. (1887) ch. 237, sec. 13.]—Trustees in selling some Church property under R. S. O. (1887) ch. 237, sec. 13, advertised on the same day of the week for four successive weeks in a daily paper.

Held, not a sufficient compliance with the provisions of the statute directing publication in a "weekly paper," to make a proper sale of the lands, and that the purchaser had good ground for refusing to accept the title offered. *Re trustees of East Presbyterian Church* v. *McKay*, 30.

COMPANY.

1. *Action for deceit - Demurrer—Fraudulent representations in annual reports and by officers of corporations—Vendor and purchaser of shares—Rights of action.*]—An action for deceit will lie against a corporation.

Demurrer to a statement of claim for damages against a company, wherein it was alleged that the plaintiff was induced by fraudulent statements in the annual reports, and in letters written to him by the president to purchase stock practically from the company, which stock was valueless, overruled with costs.

Semble, that if the plaintiff had been induced to buy the stock from a private holder by the false representations aforesaid, the corporation would not have been liable, but only

the individual officers; but that if the vendor of the shares was privy to the representations, the plaintiff could also recover against him.—*Moore* v *Ontario Investment Association*. 269.

2. *London and Canadian L. and A. Co.—Forfeiture clause—Company—Right to hold land after period prescribed by Act of Incorporation—Abortive sale—Power to re-sell—Recital of facts in deed to subsequent purchaser.*]—The plaintiffs, a loan company, who, by the terms of their charter, were bound "to sell any real estate acquired in satisfaction of any debt within five years after it shall have fallen to them, otherwise it shall revert to the previous owner, or his heirs or assigns," acquired the the equity of redemption in certain land from a mortgagor by deed, in which was contained a provision against the merger of the legal and equitable estates. By agreement made within the five years the plaintiffs sold to a purchaser, on whose default they resumed possession of the property.

In an action for specific performance against a subsequent purchaser who objected to the title on the ground, among others, that the plaintiffs had not sold the land within five years from its acquisition: It was

Held, that the form of conveyancing by which the plaintiffs acquired the land did not give them greater rights of retention than if they had foreclosed, but

Held, that any *bonâ fide* agreement to sell was sufficient to prevent a forfeiture where the sale was not carried out through the default of the purchaser.

Held, also, that it was unnecessary to procure a release from the former purchaser whose contract and the determination thereof should, as a matter of conveyancing, be recited in the deed from the plaintiffs to defendant. *London and Canadian L. and A. Co.* v. *Graham*, 329.

3 *Winding-up proceedings—Fully paid-up shareholder—"Contributory"—R. S. O. (1887), ch. 183, sec. 5.*]—A shareholder who has fully paid up his shares in a company is a "contributory" within the meaning of section 5 of R. S. O. (1887), ch. 183, so as to entitle him to initiate winding-up proceedings. *Re Macdonald and Noxon Bros. Manufacturing Co.*, 368.

4. *Power to hold lands—Statutes of Mortmain—Constitutional law—Powers of Dominion Parliament—Statute of Limitations—Defendant setting up—Estoppel by assenting to conveyance.*]—A conveyance of lands to a corporation not empowered by statute to hold lands is voidable only and not void under the statutes of Mortmain, and the lands can be forfeited by the Crown only.

Where, too, a corporation is empowered by statute to hold lands for a definite period, without any provision as to reverter, and holds beyond the period, only the Crown can take advantage of it, and it is not a defence to an action of ejectment that the lands were acquired by the plaintiff from the corporation after the period fixed by the statute.

Semble, the Dominion Parliament has power to enact that a license from the Crown shall not be necessary to enable corporations to hold lands within the Dominion; and a Dominion Act enabling a Quebec corporation to hold lands in Ontario would operate as a license.

By an arrangement made within ten years before this action of ejectment was begun, the land in question was conveyed by the owners of the legal estate to D., through whom the plaintiff claimed. One of the terms of the conveyance and a part of the consideration was that D. should, and he did thereby, release a debt which he held against the defendant and others. The defendant did not execute the conveyance, but he was an assenting party to the whole transaction, and was aware that the conveyance was being executed, and that D. was releasing his liability.

Held, that he was estopped from setting up a prior adverse possession in himself as effectually as if he had been a conveying party.

Per ARMOUR, C.J.—At all events, upon the evidence, the possession of the defendant at the date of the conveyance, if any, was as tenant at will to the owners of the legal estate; and there was also evidence of an entry by D. sufficient to prevent the setting up by the defendant of any possession prior thereto. *McDiarmid* v. *Hughes*, 570.

Liability for act of agent—Malicious arrest.]—*See* MALICIOUS ARREST, 1.

COMPENSATION.

Damages to land by construction of pavement—Method of estimating.] —*See* MUNICIPAL CORPORATIONS, 10.

CONDITION PRECEDENT.

Building contract—Certificate of Engineer—Completion—Right of action.]—*See* CONTRACT, 1.

CONTRACT.

1. *Work and labour — Building contract—Final certificate of engineer of completion of work—Necessity for — Condition precedent.*] — The plaintiff entered into a contract with defendants for the construction of certain main sewers. The contract provided that the work and material should in all things be performed and provided according to the plans and specifications, by a named date, and to the entire satisfaction of the engineer in charge of the work. The specifications provided that the contractor should, on the 1st day of each month, hand in to the engineer his account for work during the preceding month, and be paid on the certificate of the engineer at the rate of 85 per cent. of work done during the previous month; an additional 10 per cent. when the work was finished, and the balance of five per cent. at the expiration of three months from the date of the completion of the contract, &c. No final certificate was obtained from the engineer of the completion of the work; nor was the work completed to his satisfaction. In an action to recover the balance alleged to be due under the contract.

Held, that the certificate of the engineer as to the completion of the work was a condition precedent to the right to recover, and therefore the plaintiff must fail. *Robinson* v. *Corporation of Town of Owen Sound*, 121.

2. *Misrepresentation — Rescission and recovery back of money paid—Statute of Frauds.*]—The plaintiffs, a company formed for the purpose of colonizing lands in the North West Territories, represented to defendant, by means of an advertise-

ment issued in a daily paper, that the Dominion Government had agreed to the selection by the company of a "compact choice tract of land" in the said territories, "comprising 2,000,000 acres, for the purpose of settlement, free from the use of intoxicating liquors." The defendant, on the faith of these representations, desiring to send his son to a place where he would be precluded from the use of intoxicating liquors, entered into two agreements with the company, agreeing in each "to purchase and pay for 320 acres of land, in the order of choice from the odd numbered sections of our lands as procured or to be procured from the Dominion," and paid certain instalments thereon. It was proved that the company never had, and could not obtain, the choice compact tract stated, nor any special privileges as to the exclusion of liquors.

Held, that these were material misrepresentations; and defendant, having been induced to enter into the agreements thereby, was therefore entitled to have them rescinded and to recover back the money paid by him.

Per GALT, C. J., also, the agreements were void under the Statute of Frauds, as when they were made the plaintiffs had no lands, and there was nothing in the agreements to shew what lands the defendant was entitled to, or the plaintiffs were bound to convey. *The Temperance Colonization Society* v. *Fairfield*, 544.

Master and servant — Express right to dismiss—Bona fide exercise of power—Manner of exercise.]—*See* MASTER AND SERVANT, 1.

CONTROVERTED ELECTION.

Municipal corporation — Procedure.]—*See* QUO WARRANTO, 1.

CONVICTION.

1. *Liquor License Act, R. S. O. (1877) ch. 181—Absence of police magistrate from city—Jurisdiction of justices of the peace.*]—The defendant was convicted by the police magistrate of the city of Toronto, for an offence committed at Toronto against the Liquor License Act, R. S. O. (1877), ch. 181, sec. 39.

Sec. 68 of that Act, makes such magistrate the proper tribunal for the trial of such offence; but the information was taken before a single justice of the peace, who was acting for the police magistrate in his absence and at his request, and upon such information the defendant was brought before two justices of the peace, and remanded till the day on which he was convicted.

Held, that the information was properly taken before one justice under the provisions of sec. 6 of the Summary Convictions Act, which is made applicable both by R. S. O. (1877) ch. 181, sec. 68, and R. S. O. (1887) ch. 74, sec. 1; and two justices being the tribunal substituted for the police magistrate in the case of absence, by 41 Vic. ch. 4, sec. 7, the defendant was legally convicted. *Regina* v. *Gordon*, 64

Justice of the peace—House of ill-fame—Inmate—R. S. C. ch. 157, sec. 8, sub-sec. 9.]—*See* JUSTICE OF THE PEACE, 3.

Justice of the Peace—Distress for penalty—Excessive punishment—R. S. C. ch 158, sec. 6.]—*See* JUSTICE OF THE PEACE, 1.

Territorial jurisdiction of Justices —Shewing same on face of conviction.]—*See* JUSTICE OF THE PEACE, 2.

Defective—Transient trader—See MUNICIPAL CORPORATIONS, 1.

Disqualifying interest in magistrate—Exclusion of evidence—Quashing a certiorari—Costs—Prior Conviction.]—*See* CANADA TEMPERANCE ACT, 1.

CONSIDERATION.

Parol evidence to prove true consideration of chattel mortgage—Admissibility.]—*See* EVIDENCE, 1.

COSTS

Summary convictions—Jurisdiction of magistrates.]—*See* CANADA TEMPERANCE ACT, 1.

CRIMINAL LAW.

1. *Forgery—Corroboration — Interest of witnesses—R. S. C. ch. 174, sec. 218.*]—The defendant was convicted of uttering, with knowledge that it was a forgery, the indorsement of the name "Taylor Brothers" upon a promissory note, which had been discounted by a bank, but given up and destroyed before maturity, upon security being furnished to the bank. The manager of the bank and the business partner of the defendant gave evidence of the forgery, and three members of the firm of Taylor Brothers, were also called as witnesses, and denied having indorsed the note, or having any knowledge of it.

Held, that the members of the firm of Taylor Brothers were not persons interested or supposed to be interested in respect of the indorsement, within the meaning of R. S. C. ch. 174, sec. 218, and their evidence therefore was sufficient to corroborate that of the other witnesses *Regina* v. *Selby*, 255.

Keeping house of ill-fame—Husband and wife—Joint conviction.]—There may be a joint conviction against husband and wife for keeping a house of ill-fame; the keeping has nothing to do with the ownership of the house, but with the management of it.

Regina v. *Williams*, 10 Mod. 63, and *Rex* v. *Dixon*, *ib.* 335, followed. *Regina* v. *Warren*, 590.

3. *Conspiracy — Trade combination—R. S. C. ch. 173, sec. 13, subsec. 2—Evidence—Crown case reserved—Form of case—Sufficiency of indictment—Motion to quash—R. S. C. ch. 174, sec. 259.*]—*Held*, 1. That a Crown case reserved should be reserved for the consideration of the Justices of one of the Divisions of the High Court, not of a Divisional Court, and when the Court is asked whether on the evidence the defendants were lawfully convicted, the whole of the evidence should not be made part of the case, but merely the material facts established by the evidence.

2. That the sufficiency of an indictment upon a motion to quash it is not a question of law which arises on the trial, and therefore cannot be reserved under R. S. C. ch. 174, sec. 259, and the Court has no power to entertain it; FALCONBRIDGE, J., *dubitante*.

Semble, also, that the indictment in this case was sufficient.

3. That the defendants, members

of a trade union, in conspiring to injure a non-unionist workman, B., by depriving him of his employment, were guilty of an indictable misdemeanour, and that what they conspired to do was not for the purposes of their trade combination within the meaning of R. S. C. ch. 173, sec. 13, sub-sec. 2; and that upon the evidence the conviction of the defendants for unlawfully conspiring together to injure B. in his trade and to prevent him from carrying it on, was right. *Regina* v. *Gibson, et al.*, 704.

House of ill-fame—Inmate—Satisfactory account of herself—R. S. C. ch. 157, sec. 8, sub-sec. 3.]—*See* JUSTICE OF THE PEACE, 3.

CROWN LANDS.

1. *Indian lands—Assessment and taxes — Tax sale*]— *R. S. O. ch. 193, sec. 159—R. S. C. ch. 43, sec. 77, sub-sec. 3—51 Vic. ch. 22, sec. 2—Reeve purchasing at tax sale.*]—*Held*, that land in which the Indian title has been surrendered to the Crown and which has been afterwards sold or located, is liable to be sold for taxes imposed by a municipality, although while the title and interest are wholly in the Crown, the land is exempt from taxation;

Church v. *Fenton*, 28 C. P. 384; 4 A. R. 159; 5 S. C. R. 239, referred to and followed.

Held, also, that a reeve of the township in which the lands so sold for taxes are situate is not disqualified, *ex officio*, from purchasing. *Totten* v. *Truax et al.*, 490.

CROWN PATENT.

1. *Construction of—Reservation of drowned lands—Use of bracket boards on mill-dam—Prescription—Evidence — "More or less."*] — A Crown patent, issued in 1852, conveyed to the plaintiff M. B. a tract of land "containing by admeasurement sixty acres, be the same more or less," and otherwise known as lot 9 in the 4th concession of the township of Ops, "exclusive of the lands covered by the waters of the S. river, which are hereby reserved, together with free access to the shore thereof for all vessels, boats, and persons." The lot actually contained 200 acres, but the dry part was only 60 acres. At and before the issue of the patent, there was a certain mill-dam on the S. river, which raised the waters of the river and flooded a portion of lot 9; the plaintiffs did not object to the flooding of lot 9 by the dam, but brought this action to restrain the defendants from still further flooding the lot to the extent of about four acres, by the use of bracket boards upon the dam, which raised the water about a foot.

The two Judges composing the Divisional Court, agreed in reversing the judgment of Proudfoot, J., 13 O. R. 692, and in holding that the defendants had no prescriptive right to overflow the plaintiffs' lands by means of the bracket boards, but disagreed as to the construction of the patent; as to which it was

Held, per ARMOUR, C. J., that the words in the grant, "containing by admeasurement sixty acres, be the same more or less," did not control or affect the description of the land granted, that description being plain and unambiguous; that the words "exclusive of the lands covered by the waters of the S. river, which are hereby reserved," meant the waters of the river S. in its natural channel, the waters between its shores in its natural condition; and therefore

that B. took under the patent, not only the dry part of lot 9, but also the drowned land, excluding the channel of the river; and the plaintiffs had established their title to the land upon which the water was penned back by the use of bracket boards upon the dam.

Per STREET, J.—The language of the description in the patent admits of two different constructions, and that should prevail which would make the quantity of land conveyed agree with the quantity mentioned in the patent; and therefore the patent should be construed as if it excluded all the drowned land both within and without the actual channel of the river; the extent of the drowned land being measured by reference to the height of the water as maintained by the dam without the bracket boards.

Remarks upon the admission of extrinsic evidence to aid in the construction of a Crown patent. *Brady* v. *Sadler*, 49.

2. *Free grant lands—Pine timber—Right to—Estoppel.*]—In 1871, S. under the Free Grant and Homestead Act, located certain land in the Crown Lands Department, but never entered into possession, or performed the settlement duties. The lot was located through B., the Crown lands agent for the district. In 1873, S. sold the timber on the lot to B. In 1875 B. wrote the department asking if a cancellation and relocation would affect his title to the pine, and that it be relocated subject to his claim. The department replied that if the purchase was a *bonâ fide* one, and in accordance with the order in council, a relocation would not affect his claim. The order in council was, that the department would recognize the right of all purchasers or locatees of free grant lands who had purchased or located any lot on or before 30th September, 1871, and who on that day were in actual occupation of, or resident on the lots located, to sell and dispose of all pine trees on the said lots. On 10th September, 1875, S.'s location was cancelled for non-performance of the settlement duties; and on the 3rd July, 1876, the lot was relocated to the plaintiff. The plaintiff was informed by B. of his purchase of the timber, and stated that he had a good title to it, which the plaintiff believed, and acted on that belief. On the 9th November, 1886, the patent issued to the plaintiff, and contained no reservation of the pine trees. In 1883, B. sold the timber to the defendant, who in October, 1886, cut same notwithstanding he was notified by the plaintiff to desist. The timber was removed by defendant after the issue of the patent. In an action by plaintiff to recover the value of the timber.

Held, that as the patent contained no reservation of the pine trees standing or being on the land, and as the land was located prior to 43 Vic. ch. 4 (O.), the trees "remaining on the land" at the time of the patent passed to the plaintiff; that prior to the issue of the patent, the locatee under R. S. O. ch. 24, sec. 10 had no right to cut timber except for building, fencing and fuel, and in the actual clearing of the land for cultivation; nor was there any right under 37 Vic. ch. 23 (O.), for the locatee was not, on or before 30th September, 1871, "in actual occupation or resident on the lots located;" and, semble, that the words "remaining on the land" applied only to the trees not then cut; but it was not necessary to decide this point, for the plaintiff being in possession with

the assent of the crown, he had title to the timber as against the defendant a wrong-doer.

Held, also that the plaintiff having acted on B.'s misrepresentations was not estopped from bringing the action. *Langmaid* v. *Mickle*, 111.

CUSTOM HOUSE.

Municipal corporations—Right to purchase land for Custom house—Municipal government.]—*See* MUNICIPAL CORPORATIONS, 5.

DAMAGES.

Action for malicious arrest—Measure of damages.]—*See* MALICIOUS ARREST, 1.

DEED OF LAND.

Husband and wife—Consideration—49 Vic. 20, sec. 10, (O.)—*See* HUSBAND AND WIFE, 5.

Conveyance subject to condition of maintenance—Money payment in lieu of maintenance.]—*See* MAINTENANCE, 1.

DESCRIPTION OF LAND.

Insufficient description in contract of sale,]—*See* SALE OF LAND, 1.

DEVOLUTION OF ESTATES ACT.

1. *Necessity of guardian's consent to sale of lands "devolving" on executors or administrators—R. S. O., 1887, ch. 108, sec. 8.*]—Where a will devised lands to the executors on trust to sell the same.

Held, that the case was not within sec. 8 of the Devolution of Estates Acts, and the approval of the official guardian or an order of the Court was not necessary to a sale.

The word "devolve" in this section, is not used in its strict and accepted meaning of falling upon by way of succession, but in the sense merely of "passing," and what is meant is, that where infants are concerned, no real estate which, but for the preceding sections, would not come to the executors or administrators by a devise, gift, or conveyance, can be validly sold without the written consent of the official guardian. *In the matter of Booth's Estate*, 429.

DISTRICT COURT.

Courts—Interpleader—Jurisdiction of District Court of Thunder Bay—Jurisdiction of High Court of Justice—R. S. O. ch. 91, sec. 56.]—The District Court of the Provisional Judicial District of Thunder Bay has jurisdiction in interpleader under R. S. O. ch. 91, sec. 56; for it has "the jurisdiction possessed by County Courts," which is by R. S. O. (1877) ch. 44, sec. 19, sub-sec. 6, "in interpleader matters as provided by the Interpleader Act"; and such jurisdiction is determinable in a sheriff's interpleader by the fact whether the process under which the goods were seized has issued out of the District Court, and not by the amount for which the recovery was had or the process issued.

The High Court of Justice has no jurisdiction, by virtue of R. S. O. ch. 91, sec. 56, sub-sec. 2, or otherwise, to entertain a motion against a verdict or judgment obtained in

the District Court in an interpleader issue. *Isbister* v. *Sullivan*, 418.

DOWER.

1. *Equity of redemption—Surplus after sale under mortgage—Husband and wife—Bar of dower—Payment into Court—R. S. O. 1887, ch. 133, sec. 7.*]—Where one mortgaged certain lands in fee, his wife joining to bar dower, and subsequently in his life time conveyed away his equity of redemption, and the mortgagees afterwards sold under the power of sale and had a surplus in their hands, which they desired to pay into Court under R. S. O. 1887, ch. 133, sec. 7.

Held, reversing the decision of the Master in Chambers, that they should be allowed to do so, in view of the conflict of opinion and decision as to sections 5 and 8 of R. S. O. 1887, ch. 133, entitled an Act respecting Dower

There is a sharp distinction made in those sections between the wife's dower in the legal estate which she has barred in a mortgage for her husband's benefit, and as to which her rights accrue, or rather enlarge to their original extent the moment a sale is had for the purpose of satisfying the mortgage, and the dower which is given by sec. 1 in respect of a mere equitable estate; for by that section such equitable dower arises and attaches at the time of the husband's death and not before, and *non constat* that the widow had no claim to the surplus moneys in this case.

Smart v. *Sorenson*, 9 O. R. 640, considered. *Re James Croskery*, 207.

Mortgage — Prior registration — Merger — Surety.] — *See* REGISTRY LAWS, 1.

EASEMENT.

Way—Appurtenant—Part ownership — Restriction of user.] — *See* WAY, 1.

EJECTMENT.

1. *Res judicata—Judgment by default of appearance — Divisional Court, jurisdiction of—Direct appeal from Master in Chambers.*]—Since the Ontario Judicature Act, a judgment recovered in an action of ejectment by default of appearance will sustain a defence of *res judicata* to an action subsequently brought by the defendant to try the same question.

Cochrane v. *Hamilton Provident and Loan Society*, 15 O. R. 138, followed.

A Divisional Court has no jurisdiction to hear an appeal direct from the Master in Chambers, or a substantive motion to set aside a judgment by default of appearance. *Ball* v. *Cathcart*, 525.

ELECTIONS.

Municipal—Corrupt practices—Bribery by, agents—Presumption as to candidates intention—Gifts by candidate—Payments to canvassers.]—*See* MUNICIPAL CORPORATIONS, 7.

ESTATE BY CURTESY.

Real estate acquired before 1872—Conveyance by wife alone.] — *See* HUSBAND AND WIFE, 2.

ESTOPPEL.

1. *Estoppel by record—Fraudulent mortgage—Foreclosure judgment*

against assignee of insolvent—Subsequent action by assignee to set aside mortgage as fraudulent—Demurrer—Res Judicata—48 Vic. ch. 26, sec. 7, sub-sec. 2 (O.)]—Plaintiff as assignee for the benefit of creditors under 48 Vic. ch. 26, (O) brought this action on behalf of certain creditors uder sec. 7, sub-sec. 2 of that Act to set aside as fraudulent a mortgage made by his assignor, while insolvent, to the defendants.

The defendants set up as a defence, *inter alia*, a judgment for foreclosure on the said mortgage to which the plaintiff as assignee was a party defendant.

On demurrer to this it was *Held*, that the judgment of foreclosure was no bar to this action.

The plaintiff acted in a dual capacity as assignee of the mortgagor's equity of redemption, and also as a trustee for creditors. It was in the former capacity he was made defendant in the foreclosure action, in which he could not have set up the fraud of his assignor, nor was he bound to have counter-claimed for his present cause of action; while in this action he was suing as trustee for creditors, and in another right. *Glass* v. *Grant et al.*, 233.

Witness to instrument not estopped from denying knowledge of contents.]—*See* STATUTE OF LIMITATIONS, 1.

Party assenting to conveyance, though not executing.]—*See* COMPANY, 4.

EVIDENCE.

1. *Chattel mortgage—Consideration—Parol evidence to vary.*]—A chattel mortgage of certain timber was expressed to be given in consideration of the payment of $300 to the mortgagor; all the covenants and provisions being applicable to a money payment or default therein. At the trial it was endeavoured by parol evidence to shew that upon the delivery of certain pieces of timber sold by the father of the mortgagor to the mortgagee, the whole of the provisions of the mortgage were to become ineffective and the mortgagee be prevented from claiming payment of the sum stipulated for in the manner and at the time set forth.

Held, that the parol evidence was inadmissible. *Tyson* v. *Abercrombie*, 98.

2. *Registered memorial of will twenty years old - Possession consistent with.*]—A registered memorial twenty years old of a will executed by a devisee when possession of the land has been consistent with the registered title, is good evidence of the devise therein contained.

Gough v. *McBride*, 10 C. P. 166, specially referred to. *McDonald* v. *McDougall*, 401.

3. *Action against indorser of promissory note—Denial of indorsement—Admissibility of evidence as to circumstances connected with the indorsement—New trial—Con. Rule 791.*]—I., the maker, and F., the indorser, of a promissory note were sued upon it, and F. denied his indorsement.

At the trial an indenture of conveyance of land from I. to F. was put in without objection, and I. testified that it was given to secure F. against his indorsement of certain notes of which the one sued on was a renewal. There was nothing in the indenture to shew that it was given for anything but the expressed consideration of $1,500, and it was not pretended that such considera tion was paid.

Held, that it was competent for F. to shew what the indenture was given for; that it was not given to secure him against such indorsement; and therefore evidence of the existence of an indebtedness from I. to F. upon an open account was receivable to support the proof that it was given to secure such indebtedness.

I. was asked if F. did not say to him when he asked him to indorse another note the endorsement on which was admitted by F. to be his, that he, F., "never backed anybody's note."

Held, that this question was irrelevant, and I.'s answer to it conclusive; and evidence contradicting such answer was inadmissible.

Held, also that, having regard to the whole case and the charge of the trial Judge adverting to the evidence so improperly received and to its importance, substantial injury and miscarriage were thereby occasioned, and there was sufficient ground for granting a new trial. *Bank of Hamilton* v. *Isaacs*, 450.

Extrinsic evidence to aid in construction of Crown patent—Admissibility.]—*See* CROWN PATENT, 1.

Corroborative — Breach of Promise.]—*See* HUSBAND AND WIFE, 1.

Taking evidence in foreign country — Perjury — County Judge.]—*See* MUNICIPAL CORPORATIONS, 3.

EXECUTORS AND ADMINISTRATORS.

1. *Action by administrator—Grant of letters after action brought—Relation back to death—R. S. O. 1887 ch. 194, sec. 122.*]—Since the Ontario Judicature Act, the rule in equity prevails as opposed to that at law, that letters of administration when obtained relate back to the death, and it is sufficient if a plaintiff suing as administrator qualifies before the trial.

R. S. O. 1887, ch. 194, sec. 122, which imposes a liability in certain eventualities on inn-keepers who give liquor to persons who thereby become intoxicated, is a remedial measure, and should receive a liberal construction. *Trice* v. *Robinson*, 433.

FRAUDULENT CONVEYANCE.

1. *To defeat delay, and hinder creditors—43 Vic. ch. 26, sec. 2, (O).*]—The defendant E. C. having entered into a business partnership, at the instigation of his wife, conveyed certain land to her to prevent its becoming liable to creditors of the new firm. He, then, as agent for his wife, placed the property in the hands of the plaintiff, a land agent, to sell or exchange, and through him an agreement for exchange was arranged. The plaintiff sued the wife for his commission, and recovered a verdict against her, but while the action was pending, she reconveyed the land to her husband. There was no consideration for any of these conveyances.

In an action to set aside the reconveyance as fraudulent and void against the creditors of the wife. It was

Held, (reversing the judgment of GALT, C. J., C. P. at the trial) that the conveyance by the husband to the wife having been made to defraud creditors, (following *Mundell* v. *Tinkis*, 6 O. R. 625). the Court would not assist a person who has

placed his property in the name of another in order to defraud his creditors; that the wife had an interest in the property which could be made available to her creditors for the payment of her debts, and that the conveyance from her was made with intent to defeat, delay, and prejudice her creditors, and that as the evidence shewed she was unable to pay her debts in full, it fell within the provisions of 48 Vic ch. 26, sec. 2, (O), and was void. *Johnson* v. *Cline*, 129.

2. *Prior mortgage set aside by creditor—Priority of subsequent bonâ fide mortgage — Subrogation—Costs —Salvage.*]—As a general rule the doctrine of subrogation does not apply in favour of a party who has not paid money or given something in satisfaction or extinguishment of a security, claim, or demand, or partly so, or who has not paid something by way of getting in a security, or the like.

The plaintiff, an execution creditor against lands, brought an action to set aside as fraudulent, two mortgages of real estate made by his execution debtor and succeeded as to the first. the action being dismissed as to the second mortgage. The lands were sold but did not realize enough to pay the plaintiff and the second mortgagee. The plaintiff then claimed to be entitled by his diligence to priority for his execution over the second mortgage to the extent of the mortgage to set aside as fraudulent.

Held, that he was not entitled to any such priority as to his execution, but that his costs as between solicitor and client over and above his costs as between party and party, and such of the latter costs as might not be realized from the defendants (other than the second mortgagee) were a first charge on the fund as in the nature of salvage. *Coursolles* v. *Fookes*, 691.

FRAUD AND MISREPRESENTATION.

Temperance Colonization Society—Sale of lands—Rescission on ground of misrepresentation.] — *See* CONTRACT, 2.

FRAUDULENT PREFERENCE.

Sale of debtor's property—Note for purchase money endorsed to favoured creditor—Innocent purchaser.]—*See* BANKRUPTCY AND INSOLVENCY, 2.

FREE GRANT LANDS.

Crown patent — Pine timber — Right to—See CROWN PATENT, 2.

GUARANTEE.

Bond — Revocation — Principal and surety.]—*See* PRINCIPAL AND SURETY, 1.

HUSBAND AND WIFE.

1. *Breach of promise—Evidence—Corroboration—R. S. O.* (*1887*), *ch. 61, sec. 6.*]—In an action for breach of promise of marriage, the plaintiff swore to the promise, and the defendant denied it, and alleged that the plaintiff had been his mistress, which she denied. Witnesses were called on her behalf who shewed that the parties were of the same social rank; that there was nothing unreasonable or improbable in their becoming en-

gaged to be married; that he formed her acquaintance in 1880, and then commenced and continued for about six years to pay her attention, during which time his visits to her were constant; that he took her out driving frequently; that she received the attentions of no other man during that period, nor did he pay attention to any other woman; that he was received by her family as a lover; that he went to see and sat up with her father during his last illness; and that he made her frequent presents of jewellery, wearing apparel, and money. Letters also were put in by the plaintiff, written by the defendant to her about the time it was alleged he had broken off their engagement, addressing her in loving terms. The jury found that there was a contract, and a breach by the defendant, and that the defendant had failed to prove his defence; and they gave the plaintiff damages.

Held, that the evidence given was material evidence in support of the promise to marry, and that it furnished the corroboration of the plaintiff's testimony required by R. S. O. (1887), ch. 61, sec. 6.

It was contended that the evidence was as consistent with the keeping by the defendant of the plaintiff as his mistress, as it was with an engagement to marry.

Held, that the presumption was in favor of the moral and against the immoral relationship; and the fact that the defendant set up the immoral relationship as a defence did not render the evidence less material in support of the promise. *Yarwood* v. *Hart*, 23.

2. *Real estate acquired before 1872 —Conveyance by wife—Non joinder of husband.*]—A woman married between 1859 and 1872, and who had issue living and capable of inheriting, acquired before the year 1872, a vested remainder in fee in land subject to a life estate, and in 1886 the life tenant still being alive, conveyed her remainder by deed without her husband joining therein.

Held, that the conveyance was valid to pass her whole interest freed from any right, interest, or control of her husband, and the life tenant having died, a good title in fee simple under the conveyance could be made. *Re Gracey and the Toronto Real Estate Co.*, 226.

3. *Devise to married woman — Restraint on alienation—R. S. O.* (1887) *ch. 132, sec. 8.*]—Certain lands were devised to a married woman with the proviso that she should not alienate or incumber them until her sister should arrive at the age of forty years; and also that the devise should be for her separate use, independent of her husband's control.

She applied under R. S. O. (1887) ch. 132, sec. 8, for an order to bind her interest, for her own benefit, in these lands.

Held, that the restraint against alienation was valid, and would have been so even if the applicant had been a *feme sole*.

Earls v. *McAlpine*, 27 Gr. 164; 6 A. R. 145; *Pennyman* v. *McGregor*, 18 C. P. 132; *Smith* v. *Faught*, 45 U. C. R. 448; *Re Winstanley*, 6 O. R. 315, followed in preference to *Re Rosher*, *Rosher* v. *Rosher*, 26 Ch. D. 801.

Held, also, that the restraint on alienation was not a restraint on anticipation, within the meaning of the statute. *Re Weller*, 318.

4. *Breach of promise of marriage —Statute of Limitations—Successive promises — Independent contracts—*

Justification of breach—Use of obscene language by the plaintiff—Mitigation of damages—General reputation.]—In an action for breach of promise of marriage the jury found that there was at first a mutual promise to marry in six months, and a subsequent mutual promise to marry on the death of the defendant's father. The jury were also asked (Q. 3): "After the father's death in April, 1879, did the defendant, in response to a question by the plaintiff, say that all was left to his brother to share, and that until his brother shared with him he could not marry her?" To which they answered "yes" The division of the father's estate did not take place till December, 1887.

Held (FALCONBRIDGE, J., dissenting), that the answer to the third question was a finding of a mutual promise to marry upon a division of the defendant's father's estate, and, as a breach of that promise did not take place until December, 1887, the cause of action arising thereupon was not barred by the Statute of Limitations at the time the action was brought, in 1888. The several mutual promises were all independent contracts, the promise of the one party being the consideration for the promise by the other, so that each successive mutual promise became a new and independent contract, from the breach of which only the statute would begin to run.

Costello v. *Hunter*, 12 O. R. 333, distinguished.

Per FALCONBRIDGE, J., that the answer of the jury to the third question did not shew a new or substituted agreement, but an excuse for delay or a continuance of the original promise, and the case was therefore governed by *Costello* v. *Hunter*.

Held, also, FALCONBRIDGE, J., dissenting, that want of bodily chastity is the only misconduct which affords a justification in law for a breach of a promise to marry. It is no justification to shew that the woman had been heard to use obscene language; nor is such evidence admissible in mitigation of damages, although general evidence of reputation may perhaps be admissible. *Grant* v. *Cornock*, 406.

5. *Deed direct to wife—Consideration—Vendor and purchaser—49 Vic. ch. 20, sec. 10, (O.)—Action for recovery of land—Equitable title—Evidence.*]—The defendant being the owner of the equity of redemption in certain lands, executed a deed on October 18th, 1884, purporting to convey them directly to his wife for a consideration of $100, the receipt of which was acknowledged in the margin and in the body of the deed. The plaintiff who claimed by conveyance from the wife brought this action to recover possession from the defendant, who contended that the deed to his wife had been made without consideration, and was therefore void. The plaintiff purchased *bonâ fide* without notice of there having been no consideration.

Held, that under 49 Vic. ch. 20, sec. 10, (O.) the acknowledgment of the consideration in the deed authorized the plaintiff to deal on the footing of its having been paid upon execution of it, and the defendant could not now dispute the consideration.

49 Vic. ch. 20, sec 10, (O.) is not to be restricted to claims upon alleged vendors' liens and the like.

Semble, that even if the deed in question were to be considered voluntary and without consideration, the authorities, though not at all in

unison, were sufficient to support a judgment in the plaintiff's favour, inasmuch as he had at all events a good title in equity, which was now sufficient. *Jones* v. *Mugrath*, (2), 617.

Fraudulent conveyance from husband to wife.]—*See* FRAUDULENT CONVEYANCE, 1.

INDIAN LANDS.

Crown Lands—Assessment and taxes.]—*See* CROWN LANDS, 1.

INSURANCE.

1. *Fire insurance—Title—Fraud and false statement—1st and 15th statutory conditions — Partnership interest—Damages—Threshing machine covered while in any of the outbuildings insured—Outbuildings insured in another Co.—Liability.*]—In an action on a fire insurance policy, application was made at the trial to set up the first statutory condition as a defence, in that a threshing machine insured as plaintiff's own property, was partnership property; and also to set up the 15th condition, in that there was fraud and false statement, for the like reason, in the proofs of loss. *Held*, that the application must be refused, the 1st condition having no reference to title; and as to the 15th, the statement was not proved to be wilfully false and fraudulent, and the fact that the threshing machine was partnership property, was not material, no question as to title having been asked in the application for insurance. As the terms of the policy limited the right of the plaintiff to recover to the extent of his own interest only, the damage was reduced to the extent of that interest.

The plaintiff had two barns, Nos. 1 and 2. The threshing machine was insured as "in No. 1 barn." The machine was in No. 2 barn, though the horse power was outside. The plaintiff applied to the company, and an endorsement was made on the policy stating that the machine should be covered "while in any one of the outbuildings insured." Barn No. 2 was insured, though not by the defendant's company.

Held, that the machine was covered by the policy, and that the plaintiff was entitled to recover in respect of it. An objection was also made that a reaper, destroyed by the fire, was not covered by the policy. *Held*, on the evidence, that the objection was not tenable. *Stillman* v. *The Agricultural Insurance Co.*, 145.

2. *Insurance, life—Provident institutions—Default in payment of dues—Forfeiture clauses in policies—Waiver—Estoppel.*]—The plaintiff's husband was the holder of two certificates of the defendants, a Provident Institution, whereby on his paying $1.50 and $2.50 respectively, semi-annually on May 15th, and November 15th, together with assessments, and conforming to the conditions thereof, the defendants promised to pay the plaintiff a certain amount on his death. Among the conditions were, that 30 days default in payment would suspend him from membership and void the certificates, and that he should then be reinstated on furnishing satisfactory proof of good health within 90 days from such suspension and paying arrears, and in the meanwhile the certificates should be void and of no effect.

Plaintiff's husband was in his ordinary good health on August

27th, 1886, but died on September 2nd, 1886, having paid all dues and assessments regularly up to May 15th, 1886. It appeared that on August 14th, plaintiff's husband received a letter from the defendants' secretary requesting payment of the dues due on May 15th, 1886, and of a certain assessment, and the same day remitted the money, and on August 21st, 1886, the defendants sent written receipts therefor, marked across their face: "Conditional that you are now in good health;" and also wrote demanding payment of a certain other assessment as due from the plaintiff's husband as a member, which communications, however, never actually reached him On August 23rd, 1886, the plaintiff wrote to the defendants offering to pay the assessment; and on the same day the defendants replied that they had received the money, and forwarded the receipts to the plaintiff's husband, and added that they trusted that this would be satisfactory. The plaintiff's husband was retained in the defendants' books as a member all the while, and the certificates were never cancelled. It also appeared that it had not been the general practice of the defendants to hold members to the strict terms of payment. The plaintiff now brought this action against the defendants to recover upon the certificates.

Held, that she was entitled to judgment, for the evidence shewed that there was no intention up to her husband's death and for some time thereafter, to take advantage of his default in payment, and the receipt of the money in August by the defendants and their crediting him on the books therewith, clearly revived the certificate; and the defendants could not be allowed to fall back on the default in order to destroy the plaintiff's right. *Horton* v. *The Provincial Provident Institution*, 382.

JUDGMENT.

Consent—What is Consent Judgment.]—*See* MAINTENANCE, 1.

JURY.

Verdict—Malicious prosecution—General Verdict.]—*See* VERDICT, 1.

JUSTICE OF THE PEACE.

1. *Conviction—R. S. C. ch. 158, sec. 6—Distress for the penalty—R. S. C. ch. 178, secs. 87, 88.*]—A conviction under 'An Act respecting Gaming Houses," R. S. C. ch. 158, sec. 6, provided, in addition to fine and imprisonment, for distress in default of payment of the fine.

Held, that the punishment being in excess of that warranted by the statute, the conviction must be quashed.

Held, also, that, as the maximum penalty prescribed for the offence was imposed, the defect in the conviction in the provision for distress was not cured under R. S. C. ch. 178, secs. 87 & 88.

Regina v. *Sparham*, 8 O. R. 570, approved of. *Regina* v. *Logan*, 335.

2. *Summary conviction under R. S. O. ch. 214, sec. 15—Dog killing sheep—Award of compensation—Proving character of dog—Territorial jurisdiction of justices—R. S. C. ch. 178, sec. 87.*]—The owner of a sheep killed or injured by a dog can, under R. S. O. ch. 214, sec. 15,

recover the damage occasioned thereby without proving that the dog had a propensity to kill or injure sheep; and the Act applies to a case where the dog has been set upon the sheep.

It did not appear up on the face of the conviction in question that the offence was committed within the territorial jurisdiction of the convicting justices of the peace, but upon the depositions it was clear that it was so committed.

Held, that the saving provision of sec. 87 of R. S. C. ch. 178, should be applied; and the order *nisi* to quash the conviction was discharged. *Regina* v. *Perrin*, 446.

3. *Conviction—House of ill-fame—Inmate—Satisfactory account of herself—R. S. C. ch. 157, sec. 8, sub-sec. (j).*—Upon a charge against an inmate of an house of ill-fame under sub-sec. (j.) of sec 8, R. S. C. ch. 157, it is not necessary to shew that the accused was called upon to account for her presence in the house before arrest; the concluding words of the sub-section, "not giving a satisfactory account of themselves," are to be read as applying only to frequenters, and not to keepers or inmates.

Regina v. *Levecque*, 30 U. C. R. 509, distinguished. *Regina* v. *Remon*, 560.

JUSTICE OF THE PEACE.

See POLICE MAGISTRATE, 1.

Canada Temperance Act—Penalty "not less than $50"—Construction.] —*See* CANADA TEMPERANCE ACT, 4.

LANDLORD AND TENANT.

1. *Overholding Tenants' Act—Powers of County Judge—"Colour of right"—Writ of possession—Stay of Proceedings.*] — The expression of "colour of right" in the Overholding Tenants' Act, R. S. O. ch. 144, means such semblance or appearance of right as shews that the right is really in dispute.

The Act confers no authority upon the County Judge to try the question of the tenant's right or title; and as soon as it is made to appear that the right is really in dispute, there is then that colour of right which the Act contemplates, and the Judge is bound to dismiss the case.

Gilbert v. *Doyle*, 24 C. P. 60, and *Woodbury* v. *Marshall*, 19 U. C. R. 597, not followed.

Upon the proceedings before the County Judge being commanded to be sent up, the High Court has power to stay proceedings upon the writ of possession under the Act. *Price* v. *Guinane*, 264.

2. *Payment of taxes by tenant—Rent—Real Property Limitation Act.*] —Where there is no contract between landlord and tenant as to payment of taxes on the demised premises, the landlord must pay them; and therefore a contract for payment of the taxes by the tenant must be regarded as part of the compensation which the landlord receives for the use of the land.

And where the tenant agreed to pay the taxes and six dollars monthly in addition as rent, and did pay the taxes during the whole period of his possession, but did not pay anything else for about eighteen years;

Held, STREET, J., dissenting, that the payment of taxes was equivalent to payment of part of the rent, and prevented the running of the statutory period of limitation prescribed by the Real Property Limitation Act.

Per STREET, J.—The tax collector could not be treated as the agent of

the landlord, and the payment of taxes was not sufficient to take the case out of the statute. *Finch* v. *Gilray*, 393.

3. *Overholding Tenants' Act—Dispute as to date when tenancy commenced—"Colour of right."*]—When there was a dispute between landlord and tenant as to the date when the tenancy commenced, and an application was made under the Overholding Tenants' Act at a time when according to the tenant's contention his lease had not expired;

Held, that there was that "colour of right," in the tenant which the Act contemplates.

Price v. *Guinane*, 16 O. R. 264, approved and followed; *Bartlett* v. *Thompson*, 16 O. R. 716; R. S. O. ch. 144.]—*See* LANDLORD AND TENANT, 3.

LAW SOCIETY.

See BARRISTER AND SOLICITOR.

LONDON AND CANADIAN LOAN AND AGENCY CO.

Right to hold land after period prescribed by Act of Incorporation—Abortive sale—Power to resell.—*See* COMPANY, 2.

MAINTENANCE.

1. *Maintenance, sum payable in lieu of—Payable at end of year—Consent judgment.*]—The plaintiff conveyed his farm to his son, subject to the payment of an annuity of $60 a year; and the plaintiff's "maintenance in board, washing and keep out of the farm," or to "receive in cash an amount sufficient to pay for the same yearly." There was also a bond of same date whereby defendant covenanted to furnish such maintenance, or pay such sum. The defendant sold the farm, and went to reside elsewhere. The plaintiff went and lived with him on the new farm for some years, receiving his maintenance, &c., but becoming dissatisfied left.

Held, that the plaintiff was not bound to reside with the defendant wherever he might choose to go; and under the circumstances was entitled to be paid a reasonable sum for his maintenance, payable at the end of each year.

At the trial, the defendant's counsel raised the objection that the amount, if any, was only payable at the end of the year. The trial Judge overruled the objection, and decreed that plaintiff was entitled to receive $2 a week, payable weekly. The defendant's counsel then asked to have the amount payable monthly, to which the Judge acceded, and gave judgment accordingly.

Held, that the judgment could not be deemed to be by consent, so as to preclude the defendant from afterwards moving against it. *Sweeney* v. *Sweeney*, 92.

MALICIOUS ARREST.

False imprisonment—Reasonable and probable cause—Misdirection—Damages—Liability of corporation for act of agent.]—Action of trespass for false imprisonment. The plaintiff was arrested, as alleged, by direction of the defendants' agent the treasurer of the defendant association. On being brought before the police magistrate, the defendants did not appear to prosecute, when the police magistrate remanded plaintiff,

and subsequently dismissed the charge, and discharged the plaintiff. At the trial the Judge charged the jury that it was not necessary to enquire whether or not the plaintiff was guilty of the crime charged against him, for by his acquittal he must be taken to have been not guilty, and the fact that M. believed him guilty, was no excuse. If G. had laid an information, it would have been different, but not having done so, the only question was whether he gave plaintiff into custody.

Held, misdirection; for the defendant M. was justified in ordering the plaintiff's arrest if a felony was committed, and he had reasonable and probable cause to suspect that plaintiff committed the felony.

Held, also, that the defendants could only be liable for the damage proceeding from the arrest, and not for the subsequent proceedings

A corporation may be liable for false imprisonment under an order of its agent acting within the scope of his authority. *Lyden* v. *McGee and the Industrial Exhibition Association*, 105.

MALICIOUS PROSECUTION.

1. *Unlawful and malicious injury —Findings of jury—Reasonable and probable cause—R. S. C. ch. 168, sec. 59.*]—Plaintiff who was in occupation of a house on a farm of the defendant's cut off the ends of some logs used in the construction of a small building, which logs were so old and rotten that they had fallen out of their places in the building and the ends rested on the ground. Defendant had plaintiff arrested and imprisoned on a charge of "unlawful and malicious injury to his property," but the magistrate dismissed the case.

In an action for malicious prosecution, the jury found in answer to questions submitted by the Judge that defendant had not reasonable ground for believing that plaintiff had unlawfully and maliciously injured the property, and did not take care to inform himself as to the facts and was actuated by other motives than the vindication of the law in laying the information, and assessed the damages at $100.

On motion to set aside the verdict the application was dismissed.

Per BOYD, C.—It was open to the jury to find that the wood was of no value, and that the injury was of too trifling a character to justify the defendant in setting the criminal law in motion, and that was evidently the meaning of their answers to the questions. If there was no actual positive damage proved, the plaintiff was not chargeable under R. S. C. ch. 168, sec. 59.

Held, also, that it was proper to leave the whole case to the jury, and the questions were sufficient for that purpose, and the jury having found a want of reasonable care on the part of the defendant to inform himself of the true state of the case was a sufficient justification for holding that there was want of reasonable and probable cause.

Per FERGUSON, J.—The jury virtually found that the property said to be injured, was of no appreciable value, and that being the case, such facts and circumstances did not exist as were necessary to constitute reasonable and probable cause for the prosecution. *Webber* v. *McLeod*, 609.

Verdict—Jury—General verdict.] —*See* VERDICT, 1.

MARRIED WOMEN.

Property—Real Estate acquired before 1872—Conveyamce by wife—Non-joinder of Husband.]—*See* HUSBAND AND WIFE, 2.

MASTER AND SERVANT.

Wrongful dismissal—Written contract—Consideration — Remedy on covenant—Construction of contract — Right to dismiss — Reasonable grounds—Bonâ fide exercise of power —Manner of exercise.]—The plaintiff agreed to obtain patents for certain improvements in a machine of his invention, the patent for which had been assigned to the defendant, and to assign the patents for the improvements when obtained to the defendant, who in consideration thereof, agreed to employ the plaintiff for two years for the purpose of demonstrating and placing the patents on the market, the defendant covenanting to pay the plaintiff a certain sum per month and expenses during the two years, and to give him a share of the profits, and the plaintiff covenanting to devote his whole time and attention to "the business of the defendant."

By the 10th clause of the agreement it was provided that the defendant should be the absolute judge as to the manner in which the plaintiff performed his duties, and should have the right at any time to dismiss him for incapacity or breach of duty.

The defendant summarily dismissed the plaintiff within three months for alleged breach of duty in relation to work not within the terms of his employment as above specified.

Held, that the work to be performed not being the only consideration for the wages to be paid, except for the tenth clause the defendant would have had no right to dismiss the plaintiff at all, but would have been left to his remedy upon the plaintiff's covenant.

"The business of the defendant" meant the business for which the plaintiff was employed, and the defendant had no legal right to dismiss the plaintiff for alleged breach of duty in connection with work not within the terms of his employment; and even if such work was within the terms of his employment, the defendant had, upon the evidence, no reasonable grounds for dismissing the plaintiff.

Held, also, that where one party put himself in the power of the other, the latter should exercise the power with entire good faith; and, upon the evidence, that the defendant had not exercised the power given him by the 10th clause in good faith; but even if he had, that he had not exercised it in a legal manner; for he was bound to give the plaintiff an opportunity to be heard and to explain his alleged misconduct, which he did not do. *Marshall* v. *McRae*, 495.

MAXIM.

Cujus est solum ejus est usque ad cœlum.]—*See* WILL, 2.

MISTAKE.

Rectification of contract — When ordered — Evidence — Exchange of mortgages—Liability of assignors.] —In order to secure the rectification of an instrument, the clearest evidence is required to be adduced. If the Court, after considering all the circumstances surrounding the mak-

ing of the instrument, whether it accords with what would reasonably and probably have been the agreement between the parties, gauging the credibility of witnesses, paying due regard to their interest in the subject matter, and weighing their testimony, is satisfied beyond reasonable doubt that the instrument does not embody the true agreement between the parties, it should rectify it.

The transaction between the plaintiff and defendant was an exchange of mortgages. The plaintiff in assigning his mortgage to the defendant guarded himself against personal liability; but the defendant in assigning her mortgage did not do so, and the plaintiff sued her upon the covenant in her assignment that the mortgage assigned was a good and valid security, alleging that it was not so.

Held, upon the evidence, that the true agreement was that neither the plaintiff nor the defendant should be personally liable in respect of the mortgage which each assigned to the other; and rectification according to such agreement was adjudged. *Clarke* v. *Joselin*, 68.

MORTGAGE.

1. *Vendor and purchaser—Power of sale—Variation from Short Forms Act—Notice of sale to incumbrancers.*]—The vendors were selling land under the following power of sale contained in a mortgage made under the Short Forms Act: "Provided that the company (the mortgagees) on default of payment for two months may, without any notice, enter on and lease or sell the said lands." After more than two months' default, the mortgagees entered, and after having done so, made the contract for sale, and served notice of exercising the power of sale on some of the subsequent incumbrancers personally, and upon the solicitors of others.

Held, that if the Act were applicable, the power of sale was properly exercised; if the Act were not applicable, then, taking the words in their strictest sense, the vendors had done all that the power required; and the fact that they did give notice to some of the subsequent incumbrancers did not oblige them to give notice to all.

Quære, whether the variations in the power from the statutory form prevented the Short Forms Act from applying. *Re British Canadian Loan and Investment Co. and Ray*, 15.

2. *Solicitor and client—Sale under power—Recovery of deposit.*]—Plaintiff was a purchaser under a power of sale in a mortgage for $200 taken by a solicitor for costs, only $30 of which had been incurred at the date of the mortgage. The power was exercised to collect the full amount of the mortgage and interest. Before the purchase was completed the mortgagee's right to sell was raised as a question of title by the plaintiff who had become aware of these facts. Before the objections were removed, the property was sold again under a prior mortgage.

Held, that the mortgage was a valid security for no more than $30; that the plaintiff having become aware of the vexatious user of the power, was justified in refusing to complete the purchase, and was entitled to recover back the deposit paid by him. *Locking et al.* v. *Halsted*, 32.

3. *Short Form Act — "Express exception from"—Power of sale without notice — Validity under Act—Entry prior to sale.*]—The power of sale contained in a mortgage, purporting to be under the Short Form Act, was: "Provided that the mortgagee on default for one day may, without any notice, enter on and lease or sell said lands."

Held, per GALT, C. J., at the trial, that this case was distinguishable from *re Gilchrist and Island*, 11 O. R. 537, as the sale there was by an assignee of the mortgagee, and not as here by the mortgagee himself: and that under the power entry on the land was not necessary prior to sale.

On appeal to the Divisional Court.

Per ROSE, J. The power was operative under the Short Form Act; and therefore the point as to entry was immaterial. *Gilchrist and Island*, dissented from.

Per STREET, J. The form was not operative; and the words therefore must be confined to their actual meaning apart from the statute; and that under its terms the power did not arise, or at all events could not be exercised until entry made on the land. *Clark* v. *Harvey*, 159.

4. *First and second mortgagee—Part discharge of second mortgage—Consolidation — Apportionment — Equities.*]—Two mortgages of a lot of land were made at different periods for different sums by the owner thereof, who afterwards conveyed the equity of redemption in thirty-six feet of the lot to one of the defendants, with a covenant against incumbrances which was partially carried out by the discharge from the second mortgage of the land conveyed. Subsequently the mortgagor conveyed the equity of redemption in the remainder of the lot to another of the defendants.

The plaintiff was the assignee of both mortgages, but acquired the second after the discharge therefrom of the thirty-six feet, and now sought payment of the amount due on both mortgages or foreclosure.

Held, that she was not entitled to consolidate her securities against the owner of the thirty-six feet, who however had the right as against the owner of the residue of the land to cast the whole burden of the incumbrances on it; but had no such right against the plaintiff: that the whole of the land, if not redeemed, should be sold charged with the first mortgage, which should be apportioned between the two parcels according to their respective values.

On the owner of the thirty-six feet paying the amount of the first mortgage, the remainder of the land only should be sold and the proceeds divided amongst the parties interested, including the plaintiff as second mortgagee. *Fraser* v. *Nagle et al.*, 241.

5. *Cutting timber—Liability of second mortgagee to account to first mortgagee.*]—The remedy of a mortgagee against a mortgagor in possession or any one claiming under him who cuts standing timber on the mortgaged premises, where such cutting will render the security insufficient, is not limited to a mere prevention of the mischief by injunction. And where a second mortgagee in possession had cut down timber and sold it, and subsequently in an action on the first mortgage a sale of the property proved insufficient to satisfy the amount thereof. It was,

Held, that the second mortgagee was bound to account for the value of the timber cut and removed by

him prior to the action. *McLeod* v. *Avey*, 365.

. *Banks and banking—Redemption of prior mortgage—Assignment in place of discharge—Form of assignment—Schedule of securities—Rights of sureties—R. S. O. ch. 102, sec. 2.*]—A bank held a mortgage on certain lands of a customer to secure a current discount account, some of the paper of which consisted of notes made merely for the customer's accommodation. The plaintiff had a second mortgage on the lands, and tendered the bank, (who were threatening to sell under their power of sale) together with the amount they claimed as due, a simple assignment to the plaintiff of the mortgage debt and lands containing a covenant that the amount claimed was due. The bank refused to accept the tender as made. The plaintiff then brought this action to compel the execution of the assignment as tendered, or any valid assignment with a covenant that the mortgage moneys were unpaid, and the mortgage a subsisting security for the amount tendered, or for an account.

On a motion to restrain the bank from dealing with the securities until the trial.

Held, that the plaintiff could not insist on the execution of the assignment as tendered, nor was he entitled to any covenant save the usual trustee covenant against incumbrances.

Held, also, that the bank was entitled to have the assignment shew the exact position of the parties, and also to have the collateral notes specified therein.

Although perhaps not essential, it was not unreasonable that the transfer should also shew the nature of the collateral securities held by the bank.

Held, lastly, in settling the minutes of judgment, that the plaintiff might pay the amount claimed into Court, but there was no reason why it should remain there pending the taking of the account, and the judgment should provide that it might at once be paid out to the bank. *Gooderham* v. *The Traders' Bank*, 438.

7. *Power to distrain—Interest or rent—Distress after maturity, without fixing new tenancy—Interest as damages—Rent more than six months overdue—8 Anne, ch. 14.*]—In 1881 plaintiff made a mortgage to the defendants maturing in 1886, in which was contained a proviso under the Short Forms of Mortgages Act, that the mortgagees might distrain for arrears of interest, and a special provision by which plaintiffs leased the lands until the maturity of the mortgage, at a rental of the same amount as the interest. In August, 1888, while plaintiff was in possession, the defendants distrained on his goods for rent or interest due at the maturity of the mortgage in 1886, and also for the amount in 1887 and 1888.

Held, in an action for illegal distress, that no right of distress existed as to the rent due at the maturity of the mortgage, as more than six months had elapsed after the expiry of the tenancy.

Held, also, on the evidence, that there was no definite tenancy after the maturity of the mortgage, and that the interest thereafter being recoverable not by the terms of the contract, but as damages, the rent became uncertain and therefore there was no right of distress. *Klinck* v. *Ontario Industrial Loan, etc., Co.*, 562.

8. *Right of payment off to obtain partial release—Assignee of equity of redemption—Running with the land.*]—A mortgage on five stores, and expressed to be for $10,500, contained a provision that on payment of $2,500 the mortgagees would release the easterly store mortgaged, and any one or more of the other four stores on payment of $2,000 each at any time, on receiving a bonus of three months' interest on the sum so paid.

Held, that the benefit of this clause passed to the assignee of the equity of redemption, who was entitled to enforce it.

It appeared that the whole $10,500 had not been advanced.

Held, that the amount required to be paid to entitle the assignee of the equity of redemption to obtain a release of any of the stores must be abated proportionately. *Clarke* v. *Freehold Loan and Saving Co.*, 598.

Bar of dower—Priority of registration — Surety — Merger.]—*See* REGISTRY LAWS, 1.

MORTMAIN.

1. *Charity — Charitable uses—Methodist church—9 Geo. II. ch. 36, —14 & 15 Vic. ch. 142—47 Vic. ch. 88. (O.)*]—A testator devised all his estate, real and personal, to a trustee upon trust to convert the same into money, to hold upon trust to pay "to the treasurer for the time being of the Superannuated Fund of the Methodist Church, $1,000;" and "to pay all the rest and residue unto the treasurer, for the time being, of the Trustee Board of the Brant Avenue Methodist Church, to be applied by them or their successors, in redeeming the debt existing against the church property."

Held, that the legacy to the Superannuated Fund of the Methodist Church was valid, for by 14 & 15 Vic. ch. 142, the corporation was empowered to take land devised in any manner whatever in its favour; and that all the benefits of the statute were extended to the Methodist Church, by the statutes of Union, 47 Vic. ch. 106, (D.); and 47 Vic. ch. 88, (O.) so far as the Superannuated Preachers' Fund was concerned.

Held, however, that the residuary devise was invalid, for neither by 47 Vic. ch. 88, (O.) nor by any other statute, was the new corporation "The Methodist Church" empowered to hold land *for all purposes*, including that for the endowment of particular churches, and the proper construction of sec. 6 of 47 Vic. ch. 88, (O.) as amended by 51 Vic. ch. 83, sec. 2, was that the corporation of the Methodist Church should have the rights, privileges, and franchises conferred upon the Connexional Society, but only for the purposes and objects of the said Connexional Society.

Held, lastly, that the residuary benefit intended was invalid both as to realty and personalty, because the direction was, as to money, that it should be applied in payment of incumbrances on the church property. *Smith* v. *The Methodist Church et al.* 199.

Toronto General Hospital—Devise of lands—9 Geo. II. ch. 36.]—*See* TORONTO GENERAL HOSPITAL, 1.

Conveyance to corporation—Voidable not void.]—*See* COMPANY 4.

MUNICIPAL CORPORATIONS.

1. *Transient traders—42 Vic. ch. 32, sec. 22—Municipal by-law—Conviction.*]—The by-law under which the defendant was convicted, provided that "no transient trader or other person occupying a place of business in the town of M., for a temporary period less than one year, and whose name has not been duly entered on the assessment roll for the current year, shall * * offer goods, wares, and merchandise for sale * * within the limits of the town of M., without, or until he shall have first duly obtained a license for that purpose." The conviction was for that the defendant, being a transient trader, occupying a place of business in the town of M., did sell certain goods, wares, and merchandize, contrary to the by-law.

Held, that the by-law was sufficiently within the powers given by 42 Vic. ch. 31, sec. 22, to warrant the conviction; and that the words in the by-law, "less than one year," were but a limitation of the words "temporary periods," used in the statute, and did not vitiate the by-law; but

Held, that the want of an allegation in the conviction that the defendant was a transient trader whose name had not been duly entered on the assessment roll for the current year, was fatal. *Regina* v. *Caton*, 11.

2. *By-law—Favouritism—Delegations of functions—Regulation of manufactories dangerous in causing or promoting fire—R. S. O. (1887) ch. 184, sec. 406, sub-sec. 14.*]—The corporation of the town of P. passed a by-law to "Regulate or Prevent the Carrying on of Manufactures or Trades Dangerous in Causing or Promoting Fire," whereby it was provided that no such manufacture or trade should be allowed to be carried on within 300 feet of any other building, and a fine of from $5 to $20 was imposed for each day that a violation of the law continued. with distress on default of payment, and imprisonment in default of sufficient distress.

Afterwards they passed another amending by-law, providing that the restriction should not exist if the owners of such buildings within 300 feet consented in writing, the said consent, however, to be submitted for approval by the chairman of the board of works.

Held, that the by-law as amended was invalid within the principles laid down in *Re Kiely*, 13 O. R., at p. 457, and in *Re Nash and McCraken*, 33 U. C. R. 181, viz. because by requiring the consent of the owners of the adjoining buildings to be obtained it constituted these persons the judges of the right asked for, and divested the council of the power they should personally exercise, and by requiring the approval of the Chairman of the Board of Works it permitted favoritism, and all persons who desired to follow the same trade were not placed on the same footing. It was also bad because it delegated in part the exercise of the judgment and discretion that should be exercised by the enacting body alone under R. S. O. 187, ch. 184, sec. 496, sub-sec. 14.

The council also passed another by-law making it unlawful to erect a steam-engine, etc., within the village limits without the leave of the council.

Held, that this by-law was also bad, and unauthorized by R. S. O. 1887, sec. 496, sub-sec. 14, since it applied to all cases whether there was danger in causing or promoting fire or not. *Regina* v *Webster*, 187.

3. *Investigation by County Judge—R. S. O. ch. 184, sec. 477—Necessity for specific charges—Scope of inquiry—Prohibition—When writ of prohibition will lie—Taking evidence in foreign country—Evidence—Perjury.*]—The corporation of the city of T. passed a resolution whereby, after reciting that one of their officers had been guilty of misconduct in relation to his duties as inspector of materials furnished and work done by contractors in certain specified respects, and amongst others, in permitting a certain contractor to furnish inferior material to the corporation, and in receiving from such contractor bribes, and wrongfully conveying to him information to facilitate him in securing contracts; they referred it to the County Judge "to investigate and inquire into the several matters and things therein referred to, and every matter and thing connected therewith, and with the relations which may have existed, or do exist, between the said W. L. (the officer in question) and any contractor having, or having had contracts with the city of T., in order that the truth or falsity of the alleged charges of malfeasance, breach of trust, gross negligence, and other misconduct made against the said W. L. may be ascertained."

Held, that under R. S. O (1887), ch. 184, sec. 477, the corporation had power to pass the said resolution, specifically referring, as it did, to the officer, and the County Judge had power to make the necessary enquiries, and for that purpose to summon witnesses, &c., and in doing so, to proceed with enquiries against other individuals, besides the contractor, so far and so far only, as it might be necessary to the enquiry against such officer; but the Judge was not authorized to branch off into matters between the contractor and the corporation, in which such officer was in no manner concerned; and on the authority of *Re Squier*, 46 U. C. R. 474, the contractor was entitled to a writ of prohibition to prevent such investigation as to any future proceedings therein, but as to past proceedings, he having appeared and taken part, could not now complain as to them.

The corporation, under authority of the same Act, also referred it to the said Judge by three resolutions to enquire generally into the relations between the corporation, its officials and contractors, tending to undue influence in favour of contractors, and as to whether contractors or other persons wrongfully obtained money from the corporation by fraudulent means, and as to the whole system of tendering, awarding fulfilling and inspecting contracts.

Held, that these resolutions were altogether of too general a character to authorize the Judge to proceed with any enquiry in reference to the said contractor in the subjects referred to, and that he was in like manner entitled to a writ of prohibition to prevent such enquiry.

The statute does not mean, or contemplate, that the corporation shall authorize in such general and undefined terms an investigation and inquiry into corporation affairs which implicate individuals generally without naming the person or persons implicated, and without much greater particularity in specifying the nature of the misconduct to be investigated.

Held, that in holding an investigation under the statute, the Judge was acting in a judicial capacity and not as a mere investigator or commissioner.

Semble, that if the county Judge in the course of such investigation

proceeded to the United States to take evidence, any oath administered by him in the United States would have no legal significance, and any false statement made by a person sworn before him under such circumstances would not have attached to it the consequences of perjury. *Re Godson and the City of Toronto*, 275.

[Reversed on Appeal].

4. *Expropriation of land—Reservation of foot strip across street—Damages—Award—Notes of evidence—Appointment of corporation arbitrator—Seal.*] — In an arbitration under the Municipal Institutions Act between the owners of a foot-strip of land across a public street, reserved by them in laying out their property into lots, and which strip had been expropriated by a municipal corporation, the owners were awarded the sum of one dollar as the value thereof.

On a motion by the land-owners to set aside the award,

Held, that they were only entitled under R. S. O. ch. 184, sec. 483, to such damages as necessarily resulted to them from the expropriation; that the loss of profit which they might have obtained in selling their lots if the street had been opened through by them, could not be so regarded; nor could the benefit that would result from the opening to the land owners in the locality, and that the actual value of the land to the owners irrespective of its possible speculative value, was the test of the extent of their loss; *Stebbing* v. *Metropolitan Board of Works*, L. R. 6 Q. B. 37, approved of.

Held, also, that under the circumstances of this matter, the omission to file the evidence taken by the arbitrators, was not irremediable.

Re Muskoka and Gravenhurst, 6 O. R. at p. 357, approved of.

The appointment of the arbitrator by the corporation was not under seal, but the Court declined to set aside the award on that ground, as the objection, if valid, could be taken in any proceeding to enforce the award.

Re Eldon and Ferguson, 6 U. C. L. J. 207, followed. *Re Harvey and Parkdale*, 372.

5. *Right to purchase land—By-law—Ultra Vires—Post Office—Custom House—"For the use of the Corporation."—R. S. O. 1887, c. 184, s. 479 (1).*]—*Held*, that a municipal corporation has no power to pass a by-law for the purchase of land to be presented to the Dominion Government as a site for a post-office and custom-house.

"For the use of the corporation" in R. S. O. 1887, c. 184, s. 479 (1) does not mean merely "for the benefit of."

A by-law should state its purpose in its face. *Jones* v. *Corporation of Town of Port Arthur*, 474.

6. *Erection of new municipality—R. S. O. 1887, ch. 184, secs. 11, 30—Division of assets—School fund.*]—On the erection of two village municipalities out of a township.

Held, that the moneys derived from "The Ontario Municipalities Fund" which had some years previously been appropriated by by-law to the school purposes of the township, were assets properly divisible between the township and the new village municipalities.

Re Albermarle, &c., 45 U. C. R. 133, distinguished.]—*Corporation of East Toronto* v. *Corporation of Township of York*, 566.

7. *Municipal elections—Corrupt practices—Bribery by agents—Presumption as to candidate's intention*

—*Gifts by candidate—Payments to canvassers.*] — A candidate for a municipal office, though not required by law to make his payments through a special agent, is not absolved from keeping a vigilant watch upon his expenditure; and a candidate who, on the eve of a hotly contested election, places a considerable sum of money in the hands of an agent capable of keeping part of it for himself, and spending the rest improperly or corruptly, who never asks for an account of it, gives no directions as to it, and exercises no control over it, must be held personally responsible if it is improperly expended.

And where money given to agents by the candidate was in fact used in bribery;

Held, that the presumption that the candidate intended the money to be used as it was used became conclusive in the absence of denial on his part.

Gifts by a candidate to one who is at the time exerting his influence in the candidate's behalf are naturally and properly open to suspicion; and in the absence of any explanation, such gifts must be regarded as having been made for the purpose of securing or making more secure the friendship and influence of the donee.

In the election in question every member of certain committees was paid a uniform sum of $2 nominally for his services as a canvasser, but apparently without regard to the time he devoted to the work, and without inquiry as to whether he had in fact canvassed at all.

Held, that these payments were corruptly made and constituted the offence of bribery as defined by sub-sec. 2 of sec. 209 of the Municipal Act.

Under the circumstances above referred to and other circumstances of the case, the defendant was found personally guilty of acts of bribery, and to have forfeited his seat as mayor of the city of Ottawa. *Regina ex rel. Johns* v. *Stewart*, 583.

8. *Duty of erecting and maintaining "bridges over rivers"—"Stream"—"River"—R. S. O. ch. 184, sec. 535.*]—Section 535 of the Municipal Act, R. S. O. ch. 184, provides that "It shall be the duty of councils to erect and maintain bridges over rivers forming and crossing boundary lines between two municipalities (other than in the case of a city or separated town) within the county."

The question in this action was, whether the bridges over Doty's Creek, Kettle Creek, and Caddy's Creek, each of which is a stream crossing a boundary line between two township municipalities, were "bridges over rivers," within the meaning of the enactment.

At Doty's Creek, the span of the bridge was 67 feet; at Kettle Creek 31 feet 9 inches; and at Caddy's Creek, 9 feet. The evidence shewed that at Caddy's Creek a culvert would have been sufficient, while to cross the two other creeks bridges were necessary.

Held, that the bridges over Doty's and Kettle Creek were "bridges over rivers," within the meaning and intention of the statute, and that the duty of erecting and maintaining them rested upon the county council, but that the bridge over Caddy's Creek was not such a bridge.

McHardy v. *Ellice*, 1 A. R. 628, applied, notwithstanding changes in the statute, and followed. *Township of North Dorchester* v. *County of Middlesex*, 658.

9. *By-law—Bonus to manufactory—51 Vic. ch. 28, secs. 1, 16—Regis-*

tration—R. S. O. ch. 184, sec. 351—Debentures—R. S. O. ch. 184, sec. 342, sub-sec. 1.]—By sec. 1 of the Municipal Act, 1888, (51 Vic. ch. 28) that statute came into force on 1st August, 1888, except sec. 16 thereof, which was not to take effect until 1st November, 1888, and by sub-sec. 5 of sec. 16, the latter section was not to effect any by-law theretofore adopted or passed, the vote taken, or debentures issued or to be issued in pursuance thereof.

A by-law granting a bonus to a manufacturing industry was passed by the municipal council of a village on the 29th October, 1888, after having been submitted to and approved by the electors. It provided on its face, that it should take effect on 1st December, 1888. For this and similar by-laws an annual levy was required of an amount exceeding ten per cent. of the total annual municipal taxation of the village, contrary to the provisions of sub-sec. 4 of sec. 16 of 48 Vic. ch. 28, (O.)

Held, that although the by-law was in contravention of sub-sec 4 of sect. 16, yet, having regard to the provisions of sec. 1, and by the operation of sec. 16, sub-sec. 5, of that Act, the by-law was withdrawn from the effect of sub-sec. 4.

2. That sec. 351 of R. S. O. ch. 184, which requires a by-law creating a debt by the issuing of debentures for a longer term than one year to be registered within a fortnight from the final passing thereof, is merely directory.

3. That the object of sub-sec. 1 of sec. 342 of R. S. O. ch. 184, is to prevent the burthen of the debt incurred by borrowing money to pay the bonus from being irregularly distributed or unduly postponed to later years; and that the by-law in question, which provided for the raising of $25,000 by the issue of twenty debentures for $2,006.10, to fall due one in each year for twenty years, "it being estimated that the sale of such debentures will realize the said sum of $25,000," and for levying $2,006,10 in each year by a special rate, substantially complied with the sub-section. *Re Farlinger and Village of Morrisburg*, 722.

10. *Damages to land by construction of pavement—Method of estimating—Increase in value—Set-off.*]—In an arbitration under the arbitration clauses of the Municipal Act, a land-owner claimed that certain lands had been injuriously affected by the construction of a block pavement.

Held, that in estimating the land-owner's compensation the arbitrator should set off against the land-owner's claim for damages sustained, the increase in the value of the land arising from the construction of the pavement in which this land shared in common with all the other lands benefited, and not merely such direct and peculiar benefit as accrued to this particular land.

Re Ontario and Quebec R. W. Co. and Taylor, 6 O. R. at p. 348, and *James* v. *Ontario and Quebec R. W. Co.*, 12 O. R. at p. 630, followed. *Re Pryce and City of Toronto*, 726.

Controverted Election — Procedure.]—*See* QUO WARRANTO, 1.

OVERHOLDING TENANT.

Landlord and Tenant—Colour of right.]—*See* LANDLORD AND TENANT, 1.

PARTNERSHIP.

1. Judgment against partners—Payment by one—Enforcing against the other—R. S. O. (1887), ch. 122, secs. 2, 3, 4—Partnership accounts—Statute of Limitations.]—The plaintiff and defendant were partners, and judgment was recovered against them in 1876 by a bank upon certain promissory notes, of which they were respectively maker and indorser. The plaintiff paid the judgment immediately after its recovery, took an assignment of it, and in 1886 proceeded to enforce it against the defendant. The partnership accounts were taken by a referee, whose finding, approved by the Court, was, that the defendant should have paid one-half of the judgment.

Held, that the plaintiff was entitled to that extent to stand in the place of the original judgment creditor, and enforce the judgment against the defendant.

Per ARMOUR, C.J.—The Mercantile Amendment Act, R. S. O., 1887, ch. 122, secs. 2, 3, 4, applies to the case of partners.

Small v. *Riddel*, 31 C. P. 373; *Potts* v. *Leask*, 36 U. C. R. 476; and *Scripture* v. *Gordon*, 7 P. R. 164. not followed, in view of the opinions expressed in *London and Canadian L. & A. Co.* v. *Morphy*, 14 A. R. 577.]—*Honsinger* v. *Love*, 170.

PART-OWNERSHIP.

Way—Easement — Restriction of user—Appurtenant.]—*See* WAY, 1.

PERJURY.

Taking evidence in foreign country—Evidence.]—*See* MUNICIPAL CORPORATIONS, 3.

POLICE MAGISTRATE.

Canada Temperance Act—County and town—R. S. C. ch. 106, sec. 103 b.—R. S. O. (1887), ch. 72, sec. 11—Information and summons—Irregularity.]—A person having a commission as police magistrate for the county of H., such commission not excluding the town of W., and also having a separate commission as police magistrate for the towns of W., C., G., and S., respectively, all being in the county of H., convicted the defendant at W., of an offence against the Canada Temperance Act committed at W., but upon an information taken and summons issued by him at the town of C.

Held, having regard to the provisions of sec. 103*b*. of the Canada Temperance Act, R. S. C. ch. 106, and of R. S. O. (1887) ch. 72, sec. 11, that the magistrate had jurisdiction by virtue of his commission for the county over the offence committed at W., and had also jurisdiction by virtue thereof to take the information and issue the summons at C.; and the fact that he described himself in the information and summons as police magistrate for the town of W. did not deprive him of the jurisdiction which he had as police magistrate for the county.

Regina v. *Young*, 13 O. R. 198, not followed.

Quære, whether the defendant could object to the regularity of the information and summons, he having appeared in obedience to the summons, and pleaded not guilty. *Regina* v. *Roe*, 1.

POSSESSION.

Tenant—Landlord.]—*See* WILL, 1.

POST OFFICE.

Municipal Corporations—Right to purchase Land for Post Office—Dominion Government.]—*See* MUNICIPAL CORPORATIONS, 5

POWER OF SALE.

Mortgage—Short Form Act.]—*See* MORTGAGE, 1.

Vexatious exercise—Mortgage.]—*See* MORTGAGE, 2.

PRACTICE.

Jurisdiction of Divisional Court—Direct appeal from Master in Chambers.]—*See* EJECTMENT, 1.

PRINCIPAL AND SURETY.

1. *Notice terminating liability—Bond applicable to present not future appointment.*]—The defendants executed a bond as sureties for one K., which recited his appointment as agent of the plaintiffs. The bond was sent, executed, to the head office of the plaintiffs, but no appointment was, in fact, made by them for a year and a half afterwards, when K. was notified of his appointment, but of this the defendants were not informed. About three months after the execution of the bond, the defendants, or one of them, wrote to plaintiff's head office repudiating the suretyship, but received no reply.

Held, that whether the plaintiffs were notified by one or both defendants, the latter were discharged.

Per ROSE, J., also. No appointment having been made in fact when the bond was executed, the defendants could not be held liable for defaults occurring months afterwards, for their contract was in respect of a present, not a future engagement. *North British Mercantile Ins. Co.* v. *Kean*, 117.

2. *Promissory note—Collateral security—Novation—Partnership.*]—The plaintiff in 1875 indorsed a promissory note for the accommodation of the defendant N., and the latter delivered it as collateral security to mortgagees of his freehold.

The mortgagees procured the defendant B. to enter into partnership with N. and threw off $1,000 of their mortgage debt, releasing their original securities and taking a new mortgage from both defendants for $1,000 less than the amount of their claim. This was in 1876. In 1879, when the note fell due, the plaintiff paid the amount to the mortgagees, who applied it in reduction of their mortgage debt. At the time the plaintiff paid he did not know of B.'s connection with the matter.

Held, that the plaintiff was entitled to recover against both defendants for the amount paid, as money paid at their request.]—*Purdom* v. *Nichol et al.*, 699.

PROHIBITION.

When writ will lie—Investigation by County Judge—Municipal corporations]—*See* MUNICIPAL CORPORATIONS, 3.

PROVIDENT INSTITUTIONS.

Insurance—Life—Default in payment of dues—Forfeiture—Waiver—Estoppel.]—*See* INSURANCE, 2.

PUBLIC SCHOOLS.

1. *By-law to disestablish—Time when same may be submitted—R. S. O. ch. 225, sec. 63.*]—In a case submitted by the Minister of Education under sec. 237 of the Public Schools Act.

Held, that the plain meaning of sec. 63 of the Public Schools Act, R. S. O., 1887, ch. 225, is that after the township public school board has existed for five years at least, the submission of a by-law for the repeal of the by-law under which that board was established, may be required at any time upon the presentation of a properly signed petition therefor. The by-law establishing the township board may be attacked with a view to its repeal again and again, so long as the agitation against it subsists. *Re Public School Board of Tuckersmith*, 604.

2. *Seats of trustees — Contracts with school board—R. S. O. ch. 225, sec. 247, construction of—Declaring seats vacant—Powers of remaining trustees—Powers of Court—Injunction—Quo warranto—Parties.*]—In an action brought by a ratepayer against a school board, three of the persons elected as trustees, and one G., the statement of claim alleged that the three defendant trustees had by reason of their being interested in certain contracts with the board *ipso facto* vacated their seats, by virtue of sec. 247 of the Public Schools Act R. S. O. ch. 225; that they nevertheless continued to sit and vote, and had voted in favour of certain resolutions which were passed, whereby the Principal of the schools was dismissed and the defendant G. appointed in his place; and that but for the votes of the three defendant trustees the result would have been different. The prayer was that the seats of the three should be declared vacant, and the votes and resolution declared void, and for an injunction restraining the defendants the trustees from further acting as members of the board.

Held, upon demurrer, following *Hardwick* v. *Brown*, L. R. 8 C. P. 406, that the seat of a trustee does not under sec. 247, actually become vacant until the other members of the board have declared it to have become vacant; and in this case, no action having been taken by the remaining members of the board, that the seats of the three defendant trustees were full, that the Court would not interfere by injunction to restrain the occupants of them from acting as trustees.

2. That *quo warranto* proceedings were the only means by which the seats could be declared vacant by the Court; that the duty of declaring them vacant, if the facts charged were established, devolved upon the remaining individual members of the board, who were not parties to the action, and were not made parties by the fact that the school corporation was a party defendant.

Regina v. *Mayor of Hereford*, 2 Salk. 701; *Rex* v. *Smith*, 2 M. & S. 583, referred to.

3. That the defendant G. was an unnecessary and improper party to the action. *Chaplin* v. *Public School Board of Woodstock*, 728.

QUO WARRANTO.

Municipal corporation — Controverted election—R. S. O. (1887), ch. 184, secs 187, 188—Corrupt practices—Procedure—Summons or In-

formation.]—All proceedings taken to contest the validity of any election mentioned in sec. 187 of the Municipal Act, R. S. O. (1887), ch. 184, whether for bribery, corrupt practices, or any other cause, should be commenced by writ of summons in the nature of a *quo warranto*, as provided by sec. 188, and not by information in the nature of a *quo warranto*, or otherwise. *Regina ex rel. Johns* v. *Stewart*, 5.

RAILWAYS.

1. *Notice to expropriate—Notice of desistment—Bond—Ultra vires—Injunction—51 Vic. ch. 78 (D.)—51 Vic. ch. 29 (D.)*]—The defendants, who were originally incorporated under an Ontario Act, gave notice of their intention to expropriate certain lands, and also executed the usual bond, which was duly allowed by the County Judge, and possession taken by them. Subsequently, the Act 51 Vic. ch. 78 (D.) was passed, bringing the railway under the legislative authority of the Dominion, and incorporating the provisions of the Dominion Railway Act as to expropriation of lands, except where inconsistent with the Ontario Act, but ratifying all acts already done in that regard. Afterwards the arbitrators who had been appointed in the matter of the above lands to give the compensation therefor, gave notice of intention to proceed with the arbitration, immediately after which the defendants gave notice of desistment, and then a new notice of intention to expropriate the same with other lands, and subsequently another notice specifying the original land only.

Held, that the notice of desistment served avoided the original bond, and the defendants must now give security by deposit of money in a bank instead of a bond, that being the mode of giving security under the Dominion Railway Act, and unless they did so, the plaintiff was entitled to an injunction restraining the defendants from using the land.

Where a railway company gave notice of their intention to expropriate certain lands adjoining their lines, but which were not required for building any of their works upon, and the evidence shewed grounds for supposing that the powers were to be exercised for other than those purposes which the railway laws of this country permit and allow.

Held, that they should be enjoined from proceeding with the expropriation. *Nihan* v. *St. Catherines and Niagara Central R. W. Co.*, 459.

2. *Omission to ring bell and sound whistle—Highway.*]—In 1871 the owner of a block of land had a plan made and registered laying out the land, into lots with streets, &c. Most of the land including that part marked on the plan as O. street was fenced in and used for pasturage, and so continued until 1881 when a portion thereof including O street, no lots fronting thereon having been disposed of, was sold by the owner to the defendants who treated the land as their private property, using it as a shunting yard. The plaintiff, a little boy, who lived with his father near by, was standing on a snowbank on the side of the track where it crossed O. street. He saw a train approaching and when it came opposite where he was it gave a jerk which frightened him and he slipped down on to the track and was run over by the train and injured. No whistle was sounded or bell rung.

Held, that the omission to sound the whistle or ring the bell did not impose any liability on the defendants as it in no way contributed to the accident.

Held, also, that O. street as marked on the plan was not a highway within the meaning of the Railway Act. *Shoebrink* v. *Canada Atlantic R. W. Co.*, 515.

3. *Compensation for land taken -- Conveyance in fee by tenant for life —C. S. C. ch. 66, sec. 11—24 Vic. ch. 17, sec. 1—Estates in compensation money—Statute of Limitations—Will—Devise of land taken for railway—Inoperative to pass compensation—Parties.*]—Under the Railway Act, C. S. C. ch. 66, sec. 11, sub-sec. 1, as interpreted and explained by 24 Vic. ch. 17, sec. 1, a tenant for life had power to convey the fee to a railway company, but had no power to receive the purchase money; and, therefore, a railway company which took a conveyance in fee from a tenant for life and paid her the purchase money, remained responsible for the payment.

The meaning of sub-sec. 22 of sec. 11, is that the money value of the land is converted into a piece of real estate, which the railway company holds for the owners of the land in place of which it stands, and that the estates in the land existing at the time the land is taken become estates in the compensation instead; and upon the tenant for life, in this case, conveying the fee, she became tenant for life in the compensation, and those entitled to the inheritance in the land became entitled to the reversion in fee in the compensation as against the railway company; and the Statute of Limitations did not begin to run against them till the death of the tenant for life.

The tenant for life conveyed to the railway company in 1871. The person entitled to the reversion after the life estate died in 1871 intestate, and I. H. Y., his sole heiress-at-law, died in 1884, leaving a will, in which she devised to the plaintiff a specific parcel of land, including the part conveyed to the railway company.

Held, that this will did not pass to the plaintiff the right to receive the compensation money, and that as to it I. H. Y. died intestate and it descended to her heirs-at-law, of whom the plaintiff was one; and the plaintiff was allowed to amend by adding the other heirs-at-law as parties.]—*Young* v. *Midland R. W. Co.*, 738.

RECTIFICATION.

Action for rectification of contract — Sufficiency of Evidence.]—*See* MISTAKE, 1.

REGISTRAR.

1. *Fees—Salary—Apportionment —R. S. O. ch. 111, secs. 98-104.*]—*Held*, that on the proper construction of sec. 98 of R. S. O. (1877), ch. 111, each registrar is bound to account to the county as therein mentioned only after he has first received the sum of $2,500 and not before, and this, whether there be successive holders of the position in any one year or not.

The Act being in derogation of the rights of registrars as they previously existed under the common law, must be construed strictly. *Re Ingersoll, Gray* v. *Ingersoll*, 194.

REGISTRY ACT.

Witness to Instrument not estopped from denying knowledge — Subsequent purchaser.]—*See* STATUTE OF LIMITATIONS, 1.

REGISTRY LAWS.

1. *Mortgage—Bar of dower—Prior registration — Surety — Merger.*]—The owner of certain land devised it to his two sons, charged with an annuity to his widow, and also with certain legacies. After his death, in March, 1879, the sons devisees mortgaged the land to one C. This mortgage was not registered till January, 1880, though the widow knew of it. They then raised money from the plaintiff in November 1879, by a mortgage which was registered in the same month, the plaintiff having no knowledge of C.'s mortgage, and, therefore, gaining priority. In this mortgage to the plaintiff the widow joined, barring her dower and releasing her annuity for the benefit of the plaintiff. The plaintiff sold the land under his mortgage, and there was a considerable surplus, and the question was whether the widow as dowress and annuitant had priority over C.

Held, that she had, for the priority gained by the plaintiff over C. by means of his prior registration, enured to the widow's benefit as surety. The fund, so to speak, out of which plaintiff's mortgage was to be primarily paid, was increased by the act of the law based upon the default of the mortgagee, first in point of time.

Held, further, that the fact that the widow had accepted a conveyance of a moiety of the land from one of the sons did not cause her annuity to merge in whole or in part, the mortgage to C. intervening; and it not being to her interest to hold that a merger had taken place.

The question of interest governs merger in the absence of express intention. *Maclennan* v. *Gray*, 321.
[Reversed in Appeal.]

SALE OF GOODS.

1. *Stoppage in transitu — Consignor and consignee—Right of carriers to prolong period of transitus.*]—The defendants, unpaid vendors of goods, shipped them over the Grand Trunk Railway to the vendee at W. When the goods arrived the railway company's agent at W., sent an advice note to the vendee, who refused to take it. After this the vendee assigned to the plaintiff for the benefit of his creditors, and the plaintiff as soon as the assignment was delivered to him, produced it to the railway company's agent and claimed the goods, offering to pay the freight but producing no advice note. The agent did not refuse to deliver the goods, but stated that, according to the rules of the company, when the person claiming the goods was an assignee for the benefit of creditors, his duty was to telegraph to the company's solicitor for instructions; he did so telegraph, but before he received an answer, and on the same day the defendants notified him not to deliver the goods to the vendee or his assignee, assuming a right to stop them in transitu.

Held, [FALCONBRIDGE, J., dissenting,] that the action of the railway company's agent in delaying till he received instructions from the solicitor was not wrongful; that the transitus was not at an end when the defendants intervened, and the right of stoppage was well exercised. *Anderson* v. *Fish*, 476.

SALE OF LAND.

1. *Specific performance—Misrepresentation—House described as "solid brick"—Insufficient description of lands in agreement.*]—Two houses were built with extensions in rear in a terrace or row, the outside walls of the terrace and the extensions being brick, but the inside walls between the houses themselves and the adjoining houses, and also between the extensions and the main houses to the height of the roofs of the extensions being of wood, and the outside rear walls of the houses above the roofs of the extensions were brick resting upon timbers at the top of the wooden wall below.

In an action for specific performance.

Held, not to be "solid brick" houses.

Semble, they were not "brick houses."

The property in an agreement for exchange was described as "135 feet on G. Avenue, the same being 337 feet west from R. Avenue, Parkdale, on the north side of said Avenue." It was shown that R. Avenue was the west boundary of Parkdale and G. Avenue, a street in it which, as such street, would have its termination at R. Avenue, but it extended across R. avenue as a road or way outside of Parkdale, and no further description was given, such as the depth or by reference to a plan or otherwise.

Held, that the property was not sufficiently described. *Stevenson* v. *McHenry*, 139.

Will—Evidence of devise—Registered memorial.]—*See* EVIDENCE, 2.

Requisition—Certified copies of deeds—Removing clouds on title—Lis pendens—Power of attorney.]—*See* VENDOR AND PURCHASER, 1.

SHORT FORM ACT.

Power of sale—Mortgage.]—*See* MORTGAGE, 1.

SPECIFIC PERFORMANCE.

1. *Written contract—Omitted term—He who comes into equity must do equity—Payment in cash substituted by Court for delivery of chattels—Substitutionary satisfaction.*]—In an action for specific performance of an agreement for the sale of lands, it appeared that the parties intentionally omitted from the writing a part of the agreement, as to the tenor of which both parties agreed; and the defendant asked to have this inserted in the judgment for specific performance, but the plaintiff objected.

Held, that on the principle that he who comes into equity must do equity, it was proper that the omitted portion of the agreement should be inserted as claimed.

The plaintiff agreed in writing to sell to the defendant certain lands for $3,500, of which the defendant should pay $500 on the date of the agreement, to be represented, however, by two horses and two organs which he was to deliver to the plaintiff. The defendant, however, sold the organs and parted with one of the horses. On the plaintiff subsequently bringing this action for specific performance, the Court ordered the defendant to pay $500 in lieu of the horses and organs. *Jones* v. *Dale*, 717.

STATUTE OF LIMITATIONS.

1. *Witnessing mortgage covering lands in question—Ignorance of lands so included—Estoppel—R. S.*

O. ch. 181.]—In 1870, the defendant, under agreement therefor with his father, the owner of a farm, went into possession of a certain portion thereof, and remained in possession 16 years. The exact nature of the agreement did not appear, but it pointed to the ownership in defendant of the portion occupied. In 1876, the father executed a mortgage of the whole of the farm to the W. C. Loan Co., which was witnessed by defendant, who made the affidavit of execution on which the mortgage was registered. The defendant swore that he was not aware of the contents of the mortgage, nor that it included the portion of which he was in possession. In 1882 the father made a mortgage to the plaintiffs also of the whole lot, and on default the plaintiffs brought an action to recover possession of the portion occupied by defendant.

Held, that the evidence shewed that the defendant had been in exclusive possession of the land occupied by him for the statutory period so as to acquire a title thereto by possession; and that the fact of his being a witness to the mortgage to the W. C. Loan Co., and its subsequent registration, under the circumstances, did not by virtue of sec. 78 of the Registry Act R. S. O. ch. 181, create an estoppel. *Western Canada Loan and Savings Co.* v. *Garrison*, 81.

See SALE OF LAND.

STATUTES.

8 Anne ch. 14.]—*See* MORTGAGE, 7.

9 Geo. II. ch. 36.]—*See* TORONTO GENERAL HOSPITAL, 1.

9 Geo. II. c. 36.]—*See* MORTMAIN, 1.

14-15 Vic. ch. 6.]—*See* WILL, 4.

14-15 Vic. ch. 142.]—*See* MORTMAIN, 1.

16 Vic. ch. 220.]—*See* TORONTO GENERAL HOSPITAL, 1.

24 Vic. ch. 17, sec. 1.]—*See* RAILWAYS, 3.

C. L. P. Act, ssc. 209.]—*See* ARBITRATION AND AWARD, 2,

C. S. U. C. ch. 82.]—*See* WILL, 4.

C. S. C. ch. 66, sec. 11.]—*See* RAILWAYS, 3.

37 Vic. ch. 23 (O).]—*See* CROWN PATENT, 2.

R. S. C. ch. 43, sec. 77, sub-sec. 3.]—*See* CROWN LANDS, 1.

R. S. C. ch. 106, sec. 103, *b*.]—*See* POLICE MAGISTRATE, 1.

R. S. C. ch. 106, sec. 111.]—*See* CANADA TEMPERANCE ACT, 4.

R. S. C. ch. 109, sec. 2.)—*See* RAILWAYS, 2.

R. S. C. ch. 120, secs. 19, 20, 30, 38, 70, 77.]—*See* BANKS AND BANKING, 2.

R. S. C. ch. 129, secs. 20, 29, 45, 70, 77.]—*See* BANKS AND BANKING, 2.

R. S. C. ch. 157, sec. 8, sub-s. J.]—*See* JUSTICE OF THE PEACE, 3.

R. S. C. ch. 158, sec. 6.]—*See* JUSTICE OF THE PEACE, 1.

R. S. C. ch. 168, sec. 59.]—*See* MALICIOUS PROSECUTION, 1,

R. S. C. ch. 173, sec. 13, sub-sec. 2.]—*See* CRIMINAL LAW, 3.

R. S. C. ch. 174, sec. 218.]—*See* CRIMINAL LAW, 1.

R. S. C. ch. 174, sec. 259.]—*See* CRIMINAL LAW, 3.

R. S. C. ch. 178.]—*See* CANADA TEMPERANCE ACT.

R. S. C. ch. 178, sec. 87.]—*See* JUSTICE OF THE PEACE, 2.

R. S. C. ch. 178, secs. 87, 88.] — *See* JUSTICE OF THE PEACE, 1.

R. S. O., 1877, ch. 50, secs. 252, 263.]—*See* VERDICT, 1.

R. S. O., 1877, ch. 74, sec. 1.]—*See* CONVICTION, 1.

R. S. O. 1877, ch. 111, sec. 98.]—*See* REGISTRAR, 1.

R. S. O. 1877, ch. 144.]—*See* LANDLORD AND TENANT, 3.

R. S. O. 1877, ch. 181, secs. 39, 68.]—*See* CONVICTION, 1.

R. S. O. 1877, ch. 181, sec. 78.]—*See* STATUTE OF LIMITATIONS, 1.

R. S. O., 1887, ch. 24, sec. 10.]—*See* CROWN PATENT, 2.

R. S. O., 1887, ch. 44, sec. 53, sub-sec. 7.]—*See* BANKS AND BANKING, 1.

R. S. O., 1887, ch. 61, sec. 6.]—*See* HUSBAND AND WIFE, 1.

R. S. O. (1887), ch. 72, sec. 11.]—*See* POLICE MAGISTRATE, 1.

R. S. O. (1887), ch. 91, sec. 56.]—*See* DISTRICT COURT, 1.

R. S. O. 1887, ch. 100, sec. 19.]—*See* WILL, 6.

R. S. O. 1887, ch. 102, sec. 2.]—*See* MORTGAGE, 6.

R. S. O. 1887, ch. 108, sec. 4, sub-sec. 2.]—*See* WILL, 5.

R. S. O., 1887, ch. 108, sec. 8.—*See* DEVOLUTION OF ESTATES ACT, 1.

R. S. O., 1887, ch. 122, secs. 2, 3, 4.]—*See* PARTNERSHIP, 1.

R. S. O., 1887, ch. 124.]—*See* BANKRUPTCY AND INSOLVENCY, 1.

R. S. O. 1887, ch. 124, sec. 3, sub-sec. 2.—*See* BANKRUPTCY AND INSOLVENCY, 1.

R. S. O. 1887, ch. 132, sec. 8.]—*See* HUSBAND AND WIFE, 3.

R. S. O., 1887, ch. 133, secs. 5, 7, 8.]—*See* DOWER, 1.

R. S. O., 1887, ch. 144.]—*See* LANDLORD AND TENANT, 1.

R. S. O., 1887, ch. 145, secs. 36, 44.]—BARRISTER AND SOLICITOR, 1.

R. S. O. (1887), ch. 183, sec. 5.]—*See* COMPANY, 3.

R. S. O. (1887), ch. 184, sec. 11, 30.]—*See* MUNICIPAL CORPORATIONS, 6.

R. S. O. (1887), ch. 184, secs. 187, 188.] *See* QUO WARRANTO, 1.

R. S. O, 1887, ch. 184, sec. 209—*See* MUNICIPAL CORPORATIONS, 7.

R. S. O, 1887, ch. 184. sec. 342, sub-sec. 1.—*See* MUNICIPAL CORPORATIONS, 9.

R. S. O., 1887, ch. 184, sec. 351.]—*See* MUNICIPAL CORPORATIONS, 9.

R. S. O., 1887, ch. 184, sec. 477.]—*See* MUNICIPAL CORPORATIONS, 3.

R. S. O., 1887, ch. 184, sec. 479, (1)]—*See* MUNICIPAL CORPORATIONS, 5.

R. S. O. (1887) ch. 184, sec. 483.]—*See* MUNICIPAL CORPORATIONS, 4.

R. S. O. (1887) ch. 184, sec. 496.]—*See* MUNICIPAL CORPORATIONS, 2.

R. S. O. 1887, ch. 184, sec. 535.]—*See* MUNICIPAL CORPORATIONS, 8.

R. S. O. ch. 193, sec. 159.]—*See* CROWN LANDS, 1.

R. S. O., 1887, ch. 194, sec. 122.]—*See* EXECUTORS AND ADMINISTRATORS, 1.

R. S. O. 1887, ch. 214, sec. 15.]—*See* JUSTICE OF THE PEACE, 2.

R. S. O. 1887, ch. 225, sec. 63.]—*See* PUBLIC SCHOOLS, 1.

R. S. O., 1887, ch. 225, sec. 247.]—*See* PUBLIC SCHOOLS, 2.

R. S. O., 1887, ch. 237, sec. 13.]—*See* CHURCH, 1.

41 Vic. ch. 4, sec. 7, (O.).]—*See* CONVICTION, 1.

42 Vic. ch. 32, sec. 22, O.]—*See* MUNICIPAL CORPORATIONS, 1.

47 Vic. ch. 88, O.]—*See* MORTMAIN, 1.

47 Vic. ch. 106, (D.)]—*See* MORTMAIN, 1.

48 Vic. ch. 26, sec. 2 (O.)]—*See* BILLS OF SALE AND CHATTEL MORTGAGE, 1.

48 Vic. ch. 26, sec. 7, sub-sec. 2 (O.)] —*See* ESTOPPEL, 1.

49 Vic. ch. 20, sec. 10 (O).]—*See* HUSBAND AND WIFE, 5.

51 Vic. ch. 22, sec. 2.]—*See* CROWN LANDS, 1.

51 Vic. ch. 28, secs. 1, 16.]—*See* MUNICIPAL CORPORATIONS, 9.

51 Vic. ch. 83.]—*See* MORTMAIN, 1.

51 Vic. ch. 89, sec. 8.]—*See* TORONTO GENERAL HOSPITAL, 1.

SUMMARY CONVICTIONS.

See POLICE MAGISTRATE, 1.

TAX SALE.

Crown lands — Indian lands — Assessment and taxes—Reeve purchasing at tax sale.]—*See* CROWN LANDS, 1.

TORONTO GENERAL HOSPITAL.

Will—Devise of lands to corporation—Mortmain Act—9 Geo. II. ch. 36—16 Vic. ch. 220—51 Vic. ch. 89, sec. 8.]—The Act of incorporation of the Toronto General Hospital provides that the trustees shall have the powers and rights of bodies corporate, and shall be capable of taking from any person by grant, devise, or otherwise, any lands, or interest in lands, etc., for the support and use of the Hospital.

Held, following *Smith* v. *Methodist Church*, 16 O. R. 199, that the plain meaning of this provision is to capacitate any person to devise land to the Hospital, and to qualify the Hostal to receive and hold beneficially land so devised.

It is the duty of the Court where it finds legislation intended to legalize the dedication of property to laudable public purposes, to construe the Act so as to enlarge rather than limit its operation. *Butland* v. *Gillespie*, 486.

VENDOR AND PURCHASER.

1. *Requisitions—Certified copies of deeds—Removing clouds on title—Lis pendens—Power of attorney—Compensation for deficiency in land sold.*]—Upon a petition under the Vendor and Purchaser Act;

Held, (1) that the purchasers were entitled to certified copies of registered deeds or memorials of deeds in the chain of title which the vendors were unable to produce.

McIntosh v. *Rogers*, 12 P. R. 389, followed.

Cooper v. *Emery*, 1 Phil. 390, distinguished.

(2) That the purchasers were entitled to have removed from the registry as clouds upon the title: (*a*) A certain certificate of *lis pendens* in an action upon a mortgage which appeared by the registry to be discharged; because it could not be ascertained from the registry itself that the action was in respect of the discharged mortgage; (*b*) A second

certificate of *lis pendens* in an action to set aside as fraudulent a deed in the chain of title under which the vendors claimed, the vendors not being parties to it, because the vendors, and, if the title passed, the purchasers, might be added as parties; (c) A power of attorney to sell the lands in question, although registered after the mortgage under which the vendors were selling; because the vendors might be affected with notice of the interest claimed by the donor of the power, such interest having accrued, if at all, before the vendors obtained title.

(3) Upon the evidence, that the purchasers were not entitled to a conveyance of or compensation for a small part of the land contracted for, to which the vendors were not able to make title. *Re Bobier and Ontario Investment Association*, 259.

2. *R. S. O. (1887) ch. 112—Memorial of assignment of mortgage endorsed on mortgage—Discharge by assignee—Recital of assignment.*]—In an application under the Vendor and Purchaser Act R. S. O. (1887) ch. 112, it appeared that a registered memorial of a deed poll or indorsement executed by the party assigning made on the back of a mortgage (describing it) *habendum* "to have and to hold the said mortgaged premises unto (assignee) his heirs and assigns, &c., * * subject to the provisoes and conditions in said mortgage, which said deed poll or indorsement by way of assignment, is witnessed," &c., was offered as evidence of the assignment.

Held, sufficient.

A discharge of mortgage executed by an assignee thereof contained these words, "and that such mortgage has been assigned to me," without giving the particulars of the dates of and parties to the assignment, was also

Held sufficient. *Re Mara*, 391.

3. *R. S. O., 1887, ch. 112—Production of deeds—Evidence of trusts by recital in memorial 20 years old—Discharge of mortgage—Mortgage in fee by tenant for life—Necessity of discharge after death of life tenant.*]—A contract of sale of land provided that the vendors should not be bound to produce any deeds or evidence of title except such as they might have in their possession, but should show a good title, &c. It appeared that A. P., by an indenture of January 16th, 1858, conveyed the lands in question to trustees on certain trusts, which deed was registered by memorial not containing the the trusts. By deed of appointment dated July 4th, 1862, made in pursuance of the deed of 1858, also registered by memorial which purported to contain a full copy of the deed in which were recitals which set out what purported to be the trusts of the former deed, and showed a life estate in A. P., with a power of appointment in him, A. P. duly appointed to trustees who were represented by the vendors, with directions to sell after his death, which had recently occurred; neither o these deeds was in the possession or power of the vendors, the trustees. On an application under the Vendor and Purchaser Act.

Held, that the vendors were not bound to produce these two deeds, and that the production of the memorial of the deed of appointment twenty years old, reciting the trusts of the trust deed, was sufficient evidence of what those trusts were; and as there was an absolute trust for sale the purchaser should take the title.

A. P. in 1873, assumed to mortgage the lands in fee, and died in 1887.

Held, that the mortgage only bound his life estate, and that the vendors were not bound to procure a discharge thereof. *Re Ponton et al. and Swanston*, 669.

Mortgage—Power of sale—Vexatious user.]—*See* MORTGAGE, 2.

Mortgage—Power of sale.]—*See* MORTGAGE, 1.

Church property—Sale—Notice.]—*See* CHURCH, 1.

VERDICT.

1. *Malicious prosecution — Questions to jury without objection — Answering questions and giving general verdict.—Right to.*]—By secs. 263—4 of the C. L. P. Act, R. S. O., (1877,) ch. 50, except in certain actions including malicious prosecution, the Judge may require the jury to answer questions; and "in such case the jury shall answer such questions, and shall not give any verdict;" and by sec. 252, the parties in person, or by their attorney or counsel may waive trial by jury.

In an action for malicious prosecution, the trial judge, without objection, left certain questions to the jury which they answered, but added that their verdict was for the plaintiff. The Judge disregarded the general verdict, and entered judgment on the answers to the questions, for the defendant.

Held, that the parties must be assumed to have waived their right to a general verdict, and assented to judgment on the specific findings of fact; for if they could waive trial by jury altogether, there was no reason why they could not agree to the course adopted in this case. The jury therefore in finding a general verdict were doing what it was agreed they should not do, and what the parties and the Court dispensed with their doing. *Gower* v. *Lusse*, 88.

WAY.

1. *Way — Easement — Appurtenant to particular property—Restriction of user — Adjoining land.*]—Where a right of way is granted as appurtenant to certain lands, there is a right of unrestricted user of the way in connection with the beneficial enjoyment of the premises to which it is appurtenant by every part-owner of the property, but such part-ownership confers no right to further burden the land over which the way exists by using it in connection with other adjoining property to which the privilege is not annexed. *Telfer* v. *Jacobs*, 35.

WINDING-UP ACT.

Banks and banking—Shareholders within month of suspension.]—*See* BANKS AND BANKING, 2—COMPANY, 3.

WILL.

1. *Devise — "Properties" — Real estate covered—Occupation of tenant —Possession of testator.*]—A testator by his will provided as follows: "I will and bequeath to * * * C. H., all properties, monies, and personal effects now in my possession, for her own and sole use, to be disposed of as she may see proper."

Held, that the devise passed real estate.

Held, also, that real estate in the occupation of a tenant at the time of the testator's death, was in the possession of the testator. *Re Hargin and Fritzinger*, 28.

2. *Cujus est solum ejus est usque ad cœlum—Rebuttable presumption.*]—The maxim *cujus est solum ejus est usque ad cœlum*, is not a presumption of law applicable in all cases and under all circumstances, but the presumption may be rebutted by circumstances existing at the date of a will shewing it was not to apply.

Where therefore in a devise of land the boundaries according to the above maxim would have included an edifice built over a gangway or right of way, but the circumstances existing at the date of the devise shewed that it was not intended to pass, but was to be part of an adjoining edifice to which it was attached, and with which it was intended to be used, and was used, it was held to pass under the devise of such adjoining edifice. *Potts* v. *Bovine*, 152.

3. *Construction—Wrong description—Falsa demonstratio.*]—A testatrix by her will devised as follows: "I give, devise, and bequeath to my husband all my real estate, comprised of the north-west quarter of lot No. 10 in the 6th concession of the township of Mersea;" and it appeared that she had never owned the said lands, but had owned and lived upon the north-west quarter of lot ten in the 5th concession of the said township. There was no residuary devise.

Held, that as the will, taken apart from the erroneous description, contained a gift or devise of all the real estate of the testatrix, which would, if taken alone, be a sufficient description for the purpose of passing the lands really owned by her, the part of the description referring to lot ten in concession six, might be rejected as *falsa demonstratio*, and that the lands really owned by the testatrix, passed to the devisee.

Hickey v. *Stover*, 11 O. R. 106; *Re Shaver*, 6 O. R. 312; *Summers* v. *Summers*, 5 O. R. 110, distinguished. *Wright* v. *Collings*, 182.

4. *Devise—Heir-at-law—14 & 15 Vic. ch. 6, (C. S. U. C. ch. 82)—Moneys paid over six years—Moneys paid within six years under common mistake of law—Recovery of moneys which were the proceeds of lands vested by acts of the parties.*]—A. W. B. by his will, dated August 14th, 1850, after giving a life estate to his wife, provided as follows: "After the death of my said wife, I devise the lands * * known as 'Russell Hill' to my nephews the Hon. R. B. and W. A. B., sons of my brother, the late Hon. W. W. B., deceased, their heirs and assigns forever, or in case of the death of them or either of them, in my own lifetime, then I devise the share of such deceased, to the heir-at-law or heirs-at-law of such deceased, his, her, or their heirs and assigns," and died January 15th, 1866, leaving W. A. B. and two sons and two daughters of the Hon. R. B. (who predeceased him) him surviving. One of the daughters died July 10th, 1866, unmarried and intestate, during the lifetime of the life-tenant, who was in possession until her death, which happened on April 19th, 1870. On her death the two sons and surviving daughter entered into possession, collected rents, sold parts thereof, dividing the proceeds in equal shares amongst themselves) and partitioned part of the unsold balance thereof by deed,

dated January 31st, 1885, and in all respects dealt with the said lands and the proceeds thereof as if they were all equally interested therein; their father, the Hon. R. B., having by his will divided his estate equally between them.

In May, 1886, the plaintiff, the eldest son of the said Hon. R. B., was advised he was entitled to the whole as "heir-at-law" of his father.

In an action for the construction of the said will and recovery back of the moneys paid over, and the partitioned lands remaining unsold, and the proceeds of those sold, and for a declaration that the plaintiff was solely entitled to the unpartitioned land. It was

Held, following *Tylee* v. *Deal*, 19 Gr. 601, that the Act 14 & 15 Vic. ch. (C. S. U. C. ch. 82, abolishing primogeniture), which came into force January 1st, 1852, does not apply except in cases of intestacy, and that the plaintiff was heir-at-law.

Held, also, that the several divisions of property and money did not come under the head of "Family arrangements." But,

Held, also, that the moneys paid over more than six years before action, could not be recovered; and following *Rogers* v. *Ingham*, 3 Ch. D. 351, that as to the moneys paid over within six years, an action for money had and received, would not lie for moneys paid by one party to another under a mistake of law common to both, when both had a full knowledge of all the facts.

Held, lastly, that moneys not paid over, being the proceeds of lately sold land, could not be recovered by the plaintiff, as the lands of which they were the proceeds had become vested in the different parties claiming them by possession as tenants in common and by the partition deed. *Baldwin* v. *Kingstone et al.*, 341.

5. *Construction—Specific bequest—Charge of debts—Devise of rents and profits between two to be equally divided between them, share and share alike—Tenants in common—Dower—Election—Devolution of Estates Act—R. S. O. ch. 108, sec. 4, sub-sec. 2.*]—By the first clause in his will, a testator directed that his executrix should pay his debts out of his personal estate, and then proceeded to leave to his wife, whom he named as his executrix, certain lands subject to incumbrances, and all his stock, cattle, etc., upon the said land, and then devised the residue of his real and personal estate, (after payment of his just debts and funeral expenses) and all the rents and issues thereof to a brother and sister for their lives, to be equally divided between them, share and share alike, and after their death, to their children, their heirs and assigns for ever, share and share alike. The brother pre-deceased the testator. The widow now brought this action for the construction of the will.

Held, that the bequest of the stock, cattle, &c., to the testator's wife was a specific legacy, and was not subject to the testator's debts, notwithstanding the first clause of the will.

Held, also, that the widow was not put to her election as to dower, there being no such intention to be gathered from the will.

Held, also, that the gift of the residue to the brother and sister was a gift to them as tenants in common, but that the brother having pre-deceased the testator, there was an intestacy as to his share.

Held, lastly, that it was too late now for the widow to elect to take her interest in her husband's undisposed of real estate under the Devolution of Estates Act, R. S. O. ch. 108, sec. 4, sub-sec. 2. By bringing this

action she had made her election. *Rudd* v. *Harper*, 422.

6. *Devise for life—Power of appointment by will—Exercise of power—Covenant not to revoke will—Title to land—R. S. O. ch. 100, sec. 19.*]—M. D. by her will devised certain land to trustees upon trust to hold one part to the use of her son C. S. C. for his life, and after his decease to convey the same to his children or to such of the testatrix's other three sons or their children as C. S. C. might by his last will appoint; and the other part to the use of her son W. D. in precisely the same way.

C. S. C. and W. D. each appointed his parcel to the other by will duly executed, and each conveyed to the other his life interest, and covenanted in the conveyance not to revoke the appointment made by the will. They then contracted to sell both parcels to a purchaser.

Held, that C. S. C. and W. D. each took under the will a life estate with a power to appoint the inheritance in fee by will amongst the specified objects, and that such a power could not be executed except by will, the intention being that the donee of the power should not deprive himself until the time of his death of his right to select such of the objects of the power as he might deem proper; and notwithstanding the covenants here given not to revoke the appointments, a subsequent appointment by will to one of the other objects of the power would be a good execution of it, and the covenants would not affect the title of the subsequent appointee, for he would take the estate under the original testatrix and not under the devisee for life.

Held, also, that the position of C. S. C. and W. D. was not aided by sec. 19 of R. S. O. ch. 100, which gives to the donee of a power the right to release or to contract not to exercise it; by so doing they could not confer upon themselves the right to give the purchaser a good title.

Upon a petition under the Vendor and Purchaser Act it was, therefore, declared that C. S. C. and W. D. could not make a good title. *Re Collard and Duckworth*, 735.

Charity – Mortmain — Methodist Church — Charitable uses.] — *See* MORTMAIN, 1.

Restraint on alienation—Validity.] —*See* HUSBAND AND WIFE, 2.

Evidence of devise — Registered memorial of will.]—*See* EVIDENCE, 2.

WORDS.

"*Colour of right*"—*Overholding Tenants' Act.*]—*See* LANDLORD AND TENANT, 1.

"*More or less.*"]—*See* CROWN PATENT, 1.

"*Not less than $50.*"]—*See* CANADA TEMPERANCE ACT, 4.

"*Solid brick.*"] — *See* SALE OF LAND, 1.

"*Weekly paper.*"]—*See* CHURCH, 1.