THE

ONTARIO REPORTS,

VOLUME XXII.

CONTAINING

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

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

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

EDITOR:
JAMES F. SMITH, Q. C.

REPORTERS:

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

BARRISTERS-AT-LAW.

TORONTO:
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1893.

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JUDGES

OF THE

HIGH COURT OF JUSTICE

DURING THE PERIOD OF THESE REPORTS.

QUEEN'S BENCH DIVISION:

HON. JOHN DOUGLAS ARMOUR, C. J.
" WILLIAM GLENHOLME FALCONBRIDGE, J.
" WILLIAM PURVIS ROCHFORT STREET, J.

CHANCERY DIVISION:

HON. JOHN ALEXANDER BOYD, C.
" THOMAS FERGUSON, J.
" THOMAS ROBERTSON, J.
" RICHARD MARTIN MEREDITH, J.

COMMON PLEAS DIVISION:

HON. SIR THOMAS GALT, KNT., C. J.
" JOHN EDWARD ROSE, J.
" HUGH MACMAHON, J.

Attorney-General:

HON. OLIVER MOWAT.

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ERRATA.

Page 38. Line 1, for "1891" read "1892."

" 329. Line 1, and page 331, line 19, for "*Westmacott* v. *Cockerline*" read "*Westacott* v. *Cockerline*."

" 351. Line 9 of head note delete the word "not."

" 352. Line 7 from top "they also replied in the negative" read "they replied in the affirmative."

" 454. Line 12 from bottom for "conveyance" read "consequence."

" 457. Line 13 from top for "1445" read "1545."

" 460. Line 9 from top for "*Regina* v. *Whitney*" read "*Regina* v. *Whiting*."

" 578. Line 15 from bottom insert "L. R." before "10 Eq."

" 581. Line 18 from bottom for "arrived" read "aimed."

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.]

COVENTRY V. MCLEAN.

Evidence—Action for relief against re-entry for nonpayment of rent—Admissibility of evidence to shew misrepresentations by lessee in obtaining lease.

To an action for relief against a re-entry made by a landlord for nonpayment of rent, the defendant pleaded that she had been induced to grant the lease by reasons of representations made by the plaintiff to the effect that he would improve and beautify the demised premises, which would enhance the value of other lands of the defendant, but that the plaintiff had not done as he represented he would, and that the defendant had been thereby damnified :—

Held, that evidence tendered by the defendant to establish the truth of this defence was admissible in answer to the claim of the plaintiff for relief.

The origin both of the action for specific performance and of the action for relief against re-entry for nonpayment of rent is in the equitable jurisdiction of the Court; the compelling performance in the one and the granting relief in the other is in the judicial discretion of the Court; and in each the Court has regard to the conduct of the party seeking to compel such performance or to obtain such relief.

Statement.

THIS was an action brought by the plaintiff for relief against a re-entry made by the defendant upon certain lands demised by the defendant to the plaintiff by an indenture of lease dated the 30th day of September, 1887, to hold for five years from the first day of September, 1887, at a

Statement. yearly rental of $100, payable on the first day of September in each year, which lease contained a proviso for re-entry by the lessor on nonpayment of rent, whether lawfully demanded or not, and an agreement that the lessee should have the option and privilege of purchasing the demised lands, containing by admeasurement 8$\frac{78}{100}$ acres, at any time during the continuance of the term for the price of $300 per acre.

The defendant set up in answer to the action that the rent under the lease became due on the 1st September, 1890, and that the plaintiff paid no attention thereto until after the defendant had re-entered upon and taken possession of the property demised, on or about the 30th September, 1890; that the plaintiff was well aware at the time when the rent became due, and if he failed to pay said rent it was through his own neglect and a desire to withdraw from said lease; that the property mentioned in the lease was a beautiful grove situate at the village of Kingsville, and upon the shore of Lake Erie; that at the time of granting the lease there were good prospects that Kingsville would become a very desirable summer resort, and in the event of it becoming such, the grove and the property surrounding it and adjacent thereto would be the most desirable in the vicinity of the village for building residences; that the defendant was at the time of granting the lease, and still was, the owner of a great deal of property adjacent to and surrounding the grove, and on the strength of the representations thereinafter mentioned she had it sub-divided into lots for the purpose of selling; that the plaintiff represented to the defendant that he intended building a large summer hotel near the grove, and to dredge out the creek passing through it to the lake, and that he would take all necessary steps to make that part of the village of Kingsville attractive as a summer resort immediately upon his getting a lease thereof, thereby increasing the value of property surrounding it; that on the strength of said representations the defendant was induced by the plaintiff to grant him a lease of the grove for a

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period of five years at a smaller rental than she would have taken, believing as she did that plaintiff would do as he represented he would, and thereby her property surrounding the grove would sell rapidly, and she would thus be compensated for accepting a small rental; that upon said representations the defendant was further induced by the plaintiff to grant him the option of purchasing the grove at $300 per acre, a much less sum than what the property was worth; that said representations were made by the plaintiff for the purpose and with the intention of inducing the defendant to grant the said lease, and to enter into the agreements therein contained; that the plaintiff had not carried out any of his representations so made, and on account of the non-fulfilment thereof the defendant had suffered great damage in not being able to dispose of her property, and in other respects; that the defendant legally re-entered upon and retook possession of said property, and had released it to one S. A. King, of Kingsville, for $300 per year, with an agreement to purchase at $4,000, all of which was done prior to the plaintiff serving the defendant with the writ of summons herein, and said King was then in possession of said property, and was at work with his servants improving it so as to make it attractive as a summer resort.

The cause was tried at the Autumn sittings of this Court at Sandwich, 1891, by FALCONBRIDGE, J., without a jury.

It appeared that the plaintiff had paid to the defendant the rent which fell due in 1888 and 1889, and being under the impression that the rent was not payable till the 30th of September, the date of the lease, he omitted paying the rent for 1890, until he heard that the defendant had on the 30th September of that year re-entered; that the rent was afterwards tendered to the defendant, who refused to accept it; and this action was brought.

The plaintiff was examined as a witness, and upon cross-examination said that he bought some property the same time he got the lease; that he acquired both at the

Statement. same time, on the same day; that at that time he contemplated putting up a summer hotel or club-house there; that in talking of it to the defendant at that time in the negotiations for the lease, he referred to it as an hotel; that the defendant was the owner of a considerable block of land adjoining what was leased to him, part of it being on the water front; that he bought fifteen acres and leased eight and three-quarters, and bought another two acres of the same grove, and leased eight acres and three-quarters on the same terms mentioned in the lease, and got it at $100 a year; that at the time he stated that the intention was to build an hotel; that he might have mentioned incidentally, among other circumstances, that it would have a beneficial effect on the rest of the plaintiff's property; that he thought it would enhance the value of her property; that she had a farm some distance from there; that it would be a matter of moment to her to get as much as possible for the property; that it was a summer resort, distant about twenty-seven miles from Windsor; that it was a very pretty grove situated on the lake; that people were looking out for summer resorts, going long distances from there; that it occurred to him that it was a place within easy reach; that a railway had been projected, and, he believed, surveyed, at that time; that the prospects led him to think that it would be a good thing to have an hotel club-house there, and he believed the defendant would be benefited; that he and the defendant talked it over; that he might have mentioned it incidentally; that he might have spoken of the benefit it would be to her adjoining lands; that the result was he carried out his bargain with her; that the letter put in of the 8th August, 1887, was written by him to Mr. Copus, an agent of the defendant; that the negotiations were begun with Mr. Copus, and culminated directly with the defendant; that practically he spoke to the defendant in the same way that he wrote to Mr. Copus, and made the statement as to what he was going to do, and the benefits the defendant was to get from closing with him; that the letter put in of the 28th September, 1887, was written by him to Shaw & Shaw, barristers, Walkerton; that that was just carrying out what he said; that neither the hotel nor the club-house had been built. **Statement.**

And upon re-examination he said that there was a very large hotel put up since by the Walkers, the "Mattawa," and his private club-house would be madness.

The important parts of the letter of August 8th, 1887, were as follows: "The more I think of it the more I am persuaded that there should not be a street or road between the fourteen acres and the lake. It would take away from the privacy of the resort, for access to the lake along the front of it would be one of the principal charms" * * "I fancy we could get the hotel up in time for next season. The laying out of the ground and the perfection of the details of a summer resort, could proceed as fast as circumstances would warrant;" and the important part of the letter of September 28th, 1887, was as follows: "The plans of Mr. DeGursie will shew just what Mrs. McLean's intentions were respecting this matter, and I cannot consent to any alteration, as a road between a private hotel and the beach would be fatal to the project I have in view."

For the defence Mr. Copus was called, and objection being made that what he was about to prove was not receivable, counsel for defence said: "What I wish to prove and the evidence I tender to your lordship is this: I will prove affirmatively that before this lease was executed and as leading up to the lease, and as the inducement on the part of Mrs. McLean to make the lease, Dr. Coventry stated that he intended to build an hotel, promised to develop the property, pointed out to her that the effect of this would be to enhance the remaining portion of the property owned by the defendant, induced her by virtue of these representations to make the rent below what she was asking, got from her this lease at a reduced rent based upon these representations; that he has failed to perform these representations; that we have been damnified

Statement. in consequence; and by reason of that I purpose to argue when the evidence is in that the Court will not grant any equitable relief."

His lordship said: "Well, I reject all that evidence, I reject all substantive evidence of that kind." And he made a decree for the plaintiff with costs.

At the Michaelmas Sittings of the Divisional Court, 1891, the defendant moved to set aside the decree, and to enter judgment for her with costs, on the ground that the said decree was wrong for the following, among other, reasons: (1) Because the learned Judge erred in granting relief to the plaintiff, and in refusing to receive evidence tendered on behalf of the defendant at the trial. (2) Because the said decree was against law and evidence and the weight of evidence. (3) Because in the case of forfeiture the Court grants relief under its equitable jurisdiction, and both the evidence at the trial and the evidence tendered shewed such a state of circumstances as made it inequitable for the Court to relieve the plaintiff. (4) Because it appeared from the evidence adduced that the plaintiff obtained the lease in question by a misrepresentation sufficient to entitle the defendant to set aside the lease on the ground of fraud, and the plaintiff coming to this Court for equitable relief is therefore not entitled to any assistance from this Court in replacing himself in the position of tenant.

The motion was argued before **Armour**, C. J., and **Street**, J., on the 21st November, 1891.

Walter Cassels, Q. C., for the defendant. The plaintiff coming in to be relieved from a forfeiture is applying to the equitable jurisdiction of the Court, and the Court should consider his conduct. The plaintiff's own evidence given on cross-examination is almost as strong as what the defendant tendered at the trial. If what the defendant offered to prove is true, will the Court relieve the plaintiff? The defendant has re-entered. Is the Court to assist the plaintiff back to a position which he had obtained by fraud? I refer to *Barrow* v. *Isaacs* [1891], 1 Q. B. 417, and to *Bowser* v. *Colby*, 1 Ha. 109, 132, 133, 138. Argument.

Wallace Nesbitt, for the plaintiff. The defendant had no right to re-enter. Under sec. 31 of R. S. O. ch. 143, a demand of the rent was necessary; the premises were not vacant, and there was sufficient distress thereon to satisfy the rent. But if that were not so, could the defendant give such evidence as that tendered here? All these alleged representations were waived by the defendant accepting rent for the first year, and adopting the lease, followed up by her entering under it. Parol evidence was not admissible. The mere intention of the plaintiff to build cannot affect the lease; that intention might be altered. What the plaintiff said amounted at most to a declaration of intention; it could not be part of the consideration for granting the lease. Fraudulent representations of intention are not sufficient to invalidate a lease. The evidence was not admissible. I refer to Taylor on Evidence, 6th ed., sec. 1035; *Harding* v. *Wilson*, 2 B. & C. 96; *Smith* v. *Cooke* [1891], A. C. 297; *McNeeley* v. *McWilliams*, 13 A. R. 324, 329; *Croft* v. *London and County Banking Co.*, 14 Q. B. D. 347; *Buckley* v. *Beigle*, 8 O. R. 85; *Feret* v. *Hill*, 15 C. B. 207. The defendant must in any case have costs. It is statutory relief, not equitable relief, which is sought.

Cassels, in reply.

February 1, 1892. The judgment of the Court was delivered by

ARMOUR, C. J.:—

The validity of the re-entry was determinable by the provision of the lease which authorized the defendant to re-enter on nonpayment of rent, whether lawfully demanded or not, and the validity of the re-entry was not attacked by the plaintiff's statement of claim, but was assumed, and relief against such re-entry was the only case made.

The only question, therefore, for our determination is whether the rejected evidence was admissible as tending to establish an answer to the application for relief.

If the lease in question had not been executed, but there had been only an agreement for it, which the plaintiff was seeking to have specifically performed, it is quite clear that the rejected evidence would have been admissible as tending to establish an answer to his application.

In *Beaumont* v. *Dukes*, Jac. 422, specific performance was refused on the ground of representations having been made at the sale on the part of the vendor of improvements affecting the value of the premises intended by him, which were not carried into effect: *Meyers* v. *Watson*, 1 Sim. N. S. 523.

In *Lamare* v. *Dixon*, L. R. 6 H. L. 414, A. was the owner of some land on which he was about to erect buildings, and B. wished to have cellars there for wine vaults. A. promised that they should be made dry, but would not introduce that promise into the written agreement. B., however, confiding in the promise, signed the agreement, by which he undertook to accept from A. a lease of the vaults for a certain term, and at a certain rent. B. was to pay down £100, and was to pay another £100 on the execution of the lease. B. paid the first £100, and for his own convenience, before the day fixed, took possession of the vaults and placed therein a large quantity of wine, but soon complained that the vaults had not been made dry. These complaints he constantly renewed, and every time he paid his rent he paid it under protest; and finally, after more than two years' actual occupation of the cellars, refused to sign the lease on the ground that the cellars had not been made fit for his occupation, and he did not pay the second sum of £100, but removed his stock of wines to another place. A. filed his bill against B. for the specific performance of this agreement, but it was dismissed. And Lord Cairns in that case thus laid down the law, (p. 428):

"My Lords, I quite agree that this representation was not a guarantee. It was not introduced into the agreement on the face of it, and the result of that is, that in all probability Lamare could not sue in a Court of law for a breach of any such guarantee or undertaking; and very probably he could not maintain a suit in a Court of equity to cancel the agreement on the ground of misrepresentation. At the same time, if the misrepresentation was made, and if that representation has not been and cannot be fulfilled, it appears to me upon all the authorities, that that is a perfectly good defence in a suit for specific performance, if it is proved in point of fact that the representation so made has not been fulfilled."

It is impossible to assign any good reason why, if the rejected evidence would have been admissible in a suit for the specific performance of an agreement for this lease, it should not have been admissible in this suit.

The origin both of the suit for specific performance and of the suit for relief against a re-entry for nonpayment of rent is founded in the equitable jurisdiction of the Court.

The compelling performance in the one and the granting relief in the other, is in the judicial discretion of the Court, and in each the Court has regard to the conduct of the party seeking to compel such performance or to obtain such relief.

In *Lamare* v. *Dixon*, Lord Chelmsford said (p. 423): "Now, my Lords, the exercise of the jurisdiction of equity as to enforcing the specific performance of agreements, is not a matter of right in the party seeking relief, but of discretion in the Court—not an arbitrary or capricious discretion, but one to be governed as far as possible by fixed rules and principles. The conduct of the party applying for relief is always an important element for consideration."

And in *Bowser* v. *Colby*, 1 Ha. 109, which was a suit for relief against a re-entry, Wigram, V.-C., said (p. 138): "I admit that a case may well exist in which a lessee shall have so dealt with the property of his landlord, or otherwise so acted, as to deprive himself of all right to equitable inter-

Judgment.

Armour, C.J.

ference in redeeming his lease, forfeited by nonpayment of rent, although no covenant other than that for payment of rent may have been broken. * * In the absence of authority upon this specific point, I refer to the cases which appear to me most nearly analogous to the present; namely, those cases in which the Courts have had occasion to consider whether the acts or circumstances of a plaintiff, asking the specific performance of an agreement to grant a lease, are such as to deprive him of the aid of the Court in obtaining such lease by its decree."

The promises made by the plaintiff of which the evidence was rejected were promises made, it is true, before the lease was entered into, but the breach of these promises was made after it was entered into, and evidence of the conduct of the plaintiff in making these promises, as well as evidence of his conduct in breaking them, was properly admissible in answer to his application to the Court, for relief from the re-entry made by reason of his nonpayment of the rent reserved.

The maxim that he who seeks equity must do equity is as applicable to this as to any other case.

The cause must go down for a new trial; and, as the evidence was rejected at the instance of the plaintiff, he must pay the costs of the last trial and of this motion, immediately after the taxation thereof.

[QUEEN'S BENCH DIVISION.]

ORMSBY V. JARVIS,

CHAPMAN V. JARVIS.

Bill of sale—Affidavit of bonâ fides—Statement of consideration—R. S. O. ch. 125, sec. 5—54 Vic. ch 20, not retrospective.

The affidavit of bonâ fides on a bill of sale, which the evidence shewed was taken in satisfaction of a previous loan from the bargainee to the bargainor, stated that the sale was bonâ fide and for good consideration, namely $830 (which was the consideration expressed in the bill of sale), advanced by the bargainee by way of a loan:—

Held, (STREET, J., dissenting), that the affidavit substantially complied with section 5 of R. S. O. ch. 125, and that the addition of the words "advanced, etc., by way of a loan," did not render the affidavit defective.

54 Vic. ch 20, the "Act to amend the Act respecting Assignments and Preferences by Insolvent Persons" (R. S. O. ch. 124) is not retrospective, and does not apply to any gift, transfer, etc., made before the passing thereof, and no inference that the legislature intended it to be retrospective is to be drawn from the language of section 3, providing that nothing therein should affect any action pending, etc.

Statement.

THESE were interpleader issues brought to try whether certain goods, seized in execution by the sheriff of the county of Peel, were at the time of the seizure the goods of the respective claimants as against the execution creditor Jarvis, and were tried before ROSE, J., at the Autumn sittings, 1891, of this Court at Brampton. It appeared that John Y. Ormsby and George S. Chapman, the respective husbands of the respective claimants, were partners in the business of farming and importing stock horses, sheep, and pigs, from England: that Ormsby was married to the claimant Janet S. Ormsby, in June, 1889, who about Christmas of that year obtained from her grandfather's estate the sum of $2,400, $1,300 of which sum she lent to the firm of Ormsby & Chapman, taking from them the joint and several promissory note of the individual partners, dated the 30th day of December, 1889, for $1,300, payable on demand, with interest at eight per cent. per annum till paid: that Chapman was married to the claimant Amy B. Chapman in 1885, who had an allowance from her father of £100 a year: that

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in August, 1890, she lent the firm of Ormsby & Chapman the sum of $500, taking from them the joint and several promissory note of the individual partners, dated the 1st day of August, 1890, for $500, payable on demand, with interest at eight per cent. per annum: that in the beginning of the year 1891, the business of Ormsby & Chapman not prospering, they determined to dissolve partnership, and their respective wives, the claimants, pressing for their money, they on the 17th day of March, 1891, executed a bill of sale to the claimant Janet S. Ormsby, for the expressed consideration of $830, of part of the goods seized, which bill of sale was accompanied by an affidavit of the claimant Janet S. Ormsby, "That the sale therein made is bonâ fide and for good consideration, namely, in consideration of the sum of $830 advanced by me to John Y. Ormsby and George S. Chapman, by way of a loan, and not, etc:" that the property mentioned in this bill of sale had been valued at $750 or $760, but when they went to get the bill of sale drawn they had forgotton the amount of the valuation and called it $830, the amount of the expressed consideration for the bill of sale: that upon this bill of sale being completed the claimant Janet S. Ormsby indorsed the sum of $830 as paid upon the promissory note which she held for the $1,300. They also executed on the same day a bill of sale to the claimant Amy B. Chapman, for the expressed consideration of $500, of other part of the goods seized, which bill of sale was accompanied by an affidavit of the claimant Amy B. Chapman, "That the sale therein made is bonâ fide and for good consideration, namely, in consideration of the sum of $500 advanced by me to John Y. Ormsby and George S. Chapman by way of a loan, and not, etc:" that the property mentioned in this bill of sale was valued at either $2 or $3 less than $500, or $2 or $3 more than $500, but that, whichever way it was, the difference was made up in cash, and thereupon the promissory note for $500 held by the claimant Amy B. Chapman was cancelled.

It was admitted that the judgment upon which the execution was issued, under which the said goods were seized, was recovered on the 1st day of May, 1891, and it was proved that this judgment had been recovered on a promissory note which had been transferred to Jarvis after it became due, by one Anderson, who held the said note at the time of the making of the bills of sale, and that Ormsby & Chapman had informed Anderson of their intention to give these bills of sale, and that he had assented to their doing so. Statement.

The learned Judge gave judgment for the respective claimants in respect of the property in their respective bills of sale.

At the Michaelmas Sittings of the Divisional Court, 1891, the defendant moved to enter judgment for him, on the grounds that the judgment was contrary to law and evidence; that the bills of sale were invalid in not complying with the statutory requirements; and that they were void as being within the provisions of the Act 54 Vic. ch. 20, (O.); he also moved for a new trial, filing affidavits denying the fact proved that Anderson had assented to the bills of sale being given.

On the 21st November, 1891, the motion was argued before **Armour**, C. J., and **Falconbridge** and **Street**, JJ.

J. M. Clark, for the defendant. First, as to the form of the affidavit of *bonâ fides*. R. S. O. ch. 125, sec. 5, requires that the affidavit shall state "that the sale is *bonâ fide* and for good consideration, as set forth in the said conveyance." The words "as set forth in the said conveyance" are not in the affidavit at all. The words substituted are, "namely, the sum of $830, advanced by way of a loan." The affidavit should identify the amount set forth in the bill of sale. The consideration in the bill of sale is $830 paid by the grantee to the grantors. I refer to *Arnold* v. *Robertson*, 8 C. P. 147, at p. 151; per Draper, C. J. Apart from that, I submit it is quite manifest that neither the bill of sale nor the affidavit sets forth the true amount, and it is

Argument.

necessary that the true consideration should be stated: May on Fraudulent Conveyances, 2nd ed., p. 142. I refer also to *Marthinson* v. *Patterson*, 20 O. R. 720; *Cochrane* v. *Moore*, 25 Q. B. D. 57; *Sharp* v. *McHenry*, 38 Ch. D. 427; *Ex p. Firth*, 19 Ch. D. 419. The trial Judge has found that the statement in the affidavit was a mere mistake; it is not necessary that there should be intentional falsehood: *Roberts* v. *Roberts*, 13 Q. B. D. 794; per Brett, M. R., at p. 802. There was the same fault in the affidavit in the Chapman case as in the Ormsby case. As a matter of fact Mrs. Ormsby paid only $750. The note was reduced by $750.

Second, as to the effect of the Act of last session, 54 Vic. ch. 20 (O.), amending the Assignments and Preferences' Act. The bills of sale now in question were before the amendment, but were attacked within the sixty days allowed. Section 3 provides that the Act shall not apply to pending actions, but it is to be inferred from the very fact that the legislature made that provision, that it was intended that the Act should apply to past transactions and have a retrospective operation. As to the effect of such a clause I refer to *Bell* v. *Bilton*, 4 Bing. 615, per Best, C. J., at p. 618; *Attorney-General* v. *Theobald*, 24 Q. B. D. 557.

Third, as to Anderson's alleged consent. If the bills of sale are upheld on that ground, there should be a new trial on the ground of surprise.

Watson, Q. C., for the plaintiffs. The trial Judge found that *bonâ fide* pressure was exercised, and found also that the statements in the affidavits were true. As to the Act of last session, the case does not come within it; the learned Judge found there was no preference and no intent to prefer. Anderson's consent was clearly proved, and the defendant is estopped thereby.

There was an actual change of possession by reason of change of tenancy, Mrs. Chapman and Mrs. Ormsby becoming the tenants of the property. See *Danford* v. *Danford*, 8 A. R. 518; *Scribner* v. *Kinloch*, 12 A. R. 367, 372; *Whiting* v. *Hovey*, 13 A. R. 7.

As to the alleged falsity of the consideration, I refer to *Barber* v. *Macpherson*, 13 A. R. 356; *Tidey* v. *Craib*, 4 O. R. 696; *Boynton* v. *Boyd*, 12 C. P. 334. Argument.

Clark, in reply. The change in the tenancy was not till after the bills of sale had been given. As to the consideration, see Read on Bills of Sale, 8th ed., p. 111. The cases cited by my learned friend are under section 1 of the Act. The section which applies here is section 5, and it expressly requires the consideration to be set forth. I refer to *Fraser* v. *Gladstone*, 11 C. P. 125.

February 1, 1892. The judgment of ARMOUR, C. J., and FALCONBRIDGE, J., was delivered by

ARMOUR, C. J.:—

It was contended that the transactions evidenced by the bills of sales were really mortgage transactions and not absolute sales and ought to have been evidenced by mortgages and not by bills of sale, but the learned Judge found upon the evidence, and we think rightly, that the transactions were intended by the parties to be absolute sales and not mortgage transactions.

It was also contended that the affidavits of *bonâ fides* were defective in not stating that the sales were *bonâ fide* and for good consideration as set forth in the said bills of sale.

The expressed considerations in the bills of sale were $830 and $500 respectively, and the affidavits stated that the sales were *bonâ fide* and for good consideration, namely, in consideration of the sums of $830 and $500 respectively, advanced by the deponents respectively to John Y. Ormsby and George S. Chapman by way of loan.

We think that the affidavits substantially complied with the statute in setting out the amounts of the respective consideration moneys as expressed in the bills of sale, and that the addition of the words "advanced etc. by way of loan" did not render the affidavits defective. The consideration is by the instruments alleged to have been paid

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Armour, C. J.

at or before the sealing and delivery thereof, and anyone reading these instruments, which are in form instruments of absolute sale, with the affidavit of *bonâ fides*, would, we think, understand the word "advanced" as heretofore, and not here, advanced: *Haigh* v. *Brooks*, 10 A. & E. 309.

Nor do we think that the affidavits were defective by reason of anything determined in *Arnold* v. *Robertson*, 8 C. P. 147.

It was further contended that because the valuation of the property contained in the bill of sale to the claimant Janet S. Ormsby was less than the consideration money expressed in the bill of sale, this rendered the expressed consideration untrue, and that the consideration money was not, therefore, truly stated in the bill of sale nor in the affidavit of *bonâ fides*, and that therefore the bill of sale was void.

But the claimant Janet S. Ormsby did in fact give $830 for the property contained in the bill of sale, and so the expressed consideration of $830 in the bill of sale was the true consideration, and was truly stated as the consideration in the affidavit of *bonâ fides*, and the fact that she did not get property to the full value of the consideration money paid by her did not make the consideration untrue.

It is quite clear from the evidence in this case and from the construction which has been placed upon the Act R. S. O. ch. 124, by decisions binding upon this Court, that these bills of sale were not avoided by reason of anything contained in that Act, nor would they have been so avoided had it been shewn that Anderson had not assented to the giving of them.

So far, therefore, as the provisions of that Act are concerned, the judgment of the learned Judge cannot be interfered with, nor can a new trial be granted on the affidavits filed, for the evidence sought to be adduced could not affect the result arrived at by the judgment given.

But it was contended that the provisions of the Act 54 Vic. ch. 20, (O.) passed on the 4th May, 1891, applied to these bills of sale, which were given on the 17th day of March,

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1891, and that proceedings having been taken, as they were, to impeach them within sixty days after the giving of them, they must be presumed to have been given with the intent mentioned in that Act and to have been an unjust preference within the meaning thereof.

The argument in favour of this Act being retrospective is derived from its third section, which provides that "nothing in this Act contained shall affect any action, suit, or proceeding now pending, and every such action, suit, or proceeding shall in all respects and for all purposes be adjudicated upon and the said Act be construed as if this Act had not been passed;" and from inference therefrom that the legislature so provided because they intended that the Act should be retrospective.

But we think rather that the legislature enacted this third section *ex abundanti cautelâ*, and from fear of its being held to affect pending actions, suits, or proceedings, than that they enacted it as a manifestation of their intention that the Act should apply to all such existing rights as were not then the subject of some action, suit, or proceeding.

The inference to be drawn from this section that the legislature intended this Act to be retrospective is not so strong as was the inference to be drawn from the words used in the Act 8 & 9 Vic. ch. 109, sec. 18, which enacted "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void; and that no suit shall be brought or maintained in any Court of law or equity, for recovering any sum of money or valuable thing, alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." And in *Moon* v. *Durden*, 2 Ex. 22, the Court held that this enactment was not retrospective so as to defeat an action for a wager commenced before it was passed; and Rolfe, B., while admitting that the latter branch of the section was unnecessary if the section applied to future wagers, said that it was not inconsistent with a

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construction which gave the section a prospective operation only; and Parke, B., while admitting that the language of the section, if taken in its ordinary sense, as in the first instance ought to be done, applied to all contracts, both past and future, and to all actions, both present and future, on any wager, whether past or future, held that the language of the section could not be allowed to prevail over the general rule of construction, that statutes affecting existing rights are to be construed as prospective and not as retrospective.

In *Midland Railway Company* v. *Pye*, 10 C.B. N. S. 179, Erle, C. J., said (p. 191): "Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the legislature that it should be so construed is expressed in clear, plain, and unambiguous language; because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment. Modern legislation has almost entirely removed that blemish from the law; and, wherever it is possible to put upon an Act of Parliament a construction not retrospective, the Courts will always adopt that construction."

In *Urquhart* v. *Urquhart*, 1 Macq. 658, the Lord Chancellor (Cranworth) said (p. 662): "Now here, as a general proposition, I think it right to say that although, no doubt, cases may arise in which Parliament will enact retrospectively, yet *primâ facie* such retrospective legislation is not to be presumed; and great injustice would often be occasioned by it. Courts of justice consequently are slow to hold that Parliament means to act retrospectively on the rights of parties; and they will not so hold unless the language be such as to leave no doubt upon the subject."

See also *Kerr* v. *Marquis of Ailsa*, 1 Macq. 736; *Gardner* v. *Lucas* 3 App. Cas. 582; *Hough* v. *Windus*, 12 Q. B. D. 224.

We think that there is nothing in the third section of the Act 54 Vic. ch. 20 (O.), inconsistent with our construing that Act as prospective only, and that no inference can be drawn from that section which prevents our giving that Act such a construction.

Judgment.

Armour, C.J.

Our opinion therefore is that these bills of sale are not affected by the provisions of that Act; and that the motions must be dismissed with costs.

STREET, J.:—

In my opinion we should give effect to the objection taken on the part of the defendant that the affidavits of *bonâ fides* filed with the bills of sale do not comply with the requirements of ch. 125, R. S. O.

In the case of an instrument intended to operate as a mortgage, the mortgagee is required to swear "that the mortgage was executed in good faith and for the express purpose of securing the payment of money justly due etc."; in the case of an absolute sale the bargainee must swear "that the sale is *bonâ fide* and for good consideration as set forth in the said conveyance."

The affidavits made by Mrs. Ormsby and Mrs. Chapman are in the same form, the amount only being different, so that it will be sufficient to refer to that made by the first named plaintiff to shew the objection which I think fatal to each.

The consideration stated in the body of the conveyance to Mrs. Ormsby is $830 paid to her by the judgment debtors; in her affidavit she swears "that the sale therein made is *bonâ fide* and for good consideration, namely, in consideration of $830 advanced by me to John Y. Ormsby and George S. Chapman by way of a loan."

The cases in our own Courts upon this statute have, I think, shewn that the mortgagee or bargainee who deviates at all from the form of words pointed out by it, does so at his peril. One who does so in any degree must, in order to sustain the validity of his instrument, shew not only that the language which he substitutes conveys the precise meaning contained in the statutory expressions, but also

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Street, J.

that no other construction can reasonably be placed upon it. The statute requires that the truth of certain facts appearing upon the instrument should be vouched for by the oath of the grantee, and that failing this the instrument shall be void against creditors; it would not accord with the object of the Act to permit defective or ambiguous language in the affidavit to be supplemented or explained by extrinsic evidence.

The affidavit here does not state, as required by the Act, that "the sale is *bonâ fide* and for good consideration, as set forth in the said conveyance," but "for good consideration, namely, in consideration of $830 advanced by me to John Y. Ormsby and George S. Chapman by way of a loan." The most obvious meaning of these words is that, in consideration of a loan of $830 made by Mrs. Chapman to Ormsby & Chapman, they were transferring to her the goods in question; and the plain inference is that the instrument is intended to operate as a mortgage and not as a sale.

It is true that the evidence shews that the real transaction was a sale and not a mortgage, and explains that the transfer was made in satisfaction of a previous advance, and not as security for a present one; but the explanation being outside the affidavit, the objection is not removed by it. The instrument is not verified by the affidavit, but is instead rather qualified and rendered ambiguous by it, and the object of the Act in requiring the affidavit is not attained.

There was no actual and continued change of possession accompanying the giving of the bills of sales; they were completed on the 20th March, 1891; the change in the tenancy of the property upon which the goods lay at that date, relied on as constituting a change of possession, did not take place until 1st April, 1891.

It is contended that the judgment creditor is prevented from contesting the validity of these bills of sale because one Anderson, who held the note upon which the judgment is founded, at the time they were given, assented to their being given, his note then being overdue; it is argued that Anderson could not have contested the validity of the bills of sale, and that Jarvis, the judgment creditor and defendant here, who became owner of the notes and recovered his judgment subsequently to the giving of the bills of sale, cannot do so.

I see no reason why Anderson, had he been the judgment creditor, should not have urged against these bills of sale, the same objections now being urged by Jarvis, notwithstanding anything appearing in the evidence. Had the bills of sale complied with the statute they would have been good against Anderson, whether he consented to their being given or not; but as they do not comply with it, they should have been held bad upon his application, as I think they should be upon that of Jarvis.

Admitting Anderson to have said some days before they were made, "I have no objection to your transferring goods to your wives to satisfy their claim," he would not have precluded himself from afterwards recovering judgment and seizing the goods before any transfer had in fact been made. And there has been no transfer made, in my judgment, here, because the attempted transfer is void.

I think, therefore, that the issue should be found for the defendant, and that the finding of the learned trial Judge should be reversed, and the motion allowed with costs, and that the defendant should have the costs of the issue.

[QUEEN'S BENCH DIVISION.]

RE DUNLOP.

Intoxicating liquors—Liquor License Act—R. S. O. ch. 194, sec. 91—Construction of—Transfer of license—Certificate of electors—53 Vic. ch. 56, sec. 1 (O.)—County Judge—Jurisdiction to revoke license—Mandamus.

Section 91 of the "Liquor License Act," R. S. O. ch. 194, is a penal enactment and is to be construed strictly; and, as it refers only to "a license issued" contrary to any of the provisions of the Act, and not to a "license transferred," and to the licensee and not to the transferee, a County Judge has no jurisdiction under it to entertain a complaint against a transferee that a license has been improperly transferred to him; and has no jurisdiction to revoke or cancel a license not already issued.

The applicant was in the month of March, 1891, the holder of a wholesale license to sell liquor in premises in polling sub-division 10 in a city. The holder of a shop license in polling sub-division 18 transferred his license to the applicant on the 26th March, 1891. On the same day the license commissioners, on the petition of the applicant, not accompanied by a certificate signed by a majority of the electors in polling sub-division 10, consented in writing to the transfer of the shop license and to its transfer to the premises in polling sub-division 10, and also cancelled the applicant's wholesale license:—

Held, that the commissioners erred in consenting to the transfer of the shop license to the premises of the applicant in polling sub-division 10 without his petition therefor being accompanied by the certificate required by 53 Vic. ch. 56, sec. 1 (O.).

Statement. THE applicant was in the month of March, 1891, the holder of a wholesale license to sell liquor in the premises number thirty on the west side of Market street in polling sub-division number ten in the city of Brantford. One T. E. King was the holder of a shop license to sell liquor at the same time in premises on lot 51 on the south side of Colborne street in polling sub-division number eighteen in the said city. On the 26th day of March, 1891, T. E. King transferred his license to the applicant, and on the same day the license commissioners, on the petition of the applicant, which was not however accompanied by a certificate signed by a majority of the electors entitled to vote at elections for the legislative assembly in polling sub-division number ten, such majority including at least one-third of the said electors who were at the time of such application resident within that polling sub-division, consented in writing to the transfer of such license, and to its transfer to the said premises number thirty in polling sub-division number ten, and on the same day cancelled the wholesale license of the applicant. Statement.

Thereupon, on the 18th day of April, the County Attorney for the county of Brant presented a petition to the County Judge of the county of Brant, under the provisions of sections 91 and 92 of the "Liquor License Act," R. S. O. ch. 194, setting forth the above facts and also that the applicant had applied for a shop license for the premises in polling sub-division number ten for the ensuing year to the license commissioners, and the license commissioners had granted the application, although notified that the applicant improperly and irregularly obtained the issue and transfer to him of the license to his premises in polling sub-division number ten, and by the petition prayed that the issue and transfer of the shop license to the applicant might be set aside and the license revoked and cancelled.

The County Court Judge thereupon issued a summons calling upon the applicant to shew cause why the said license should not be revoked, and after hearing the parties delivered the following judgment:—

This matter comes before me on the petition of the County Crown Attorney under the 91st section of the "Liquor License Act." It is an application to revoke and cancel a license granted by the license commissioners of the city of Brantford to R. S. Dunlop, for the sale of liquors by retail as a shop licensee, at his shop in Market street, in the Queen's ward.

Mr. Dunlop, before the granting to him of this license, had and still holds a wholesale license for these premises, and the question for me to determine is whether the fact of his holding this wholesale license makes him a "licensee" within the meaning of the provisions of the amended subsection 14 of section 11 of the Act. If he is not such licensee, then it is clear that the proceedings of the commissioners in granting him this shop license cannot be legally sustained. Mr. King was the holder of a shop license in the East ward. Mr. Dunlop, being desirous of selling by retail, 8

Statement.

which he could not do under his wholesale license, bought Mr. King's shop license. This transfer the commissioners sanctioned. He then obtained from them their sanction to the transfer of this license from the premises King occupied to Mr. Dunlop's shop in Market street. This latter place is in a different polling sub-division from that of King's in the East ward.

The contention by Mr. Woodyatt, who argued the case before me for Mr. Dunlop, was that, as Mr. Dunlop held a wholesale license, he was a licensee under the provisions of sub-section 14.

Mr. Wilkes, for the petition, contended that the word "licensee" in this sub-section refers only to those who hold shop or tavern licenses, authorizing them to sell by retail, and not to the holder of a wholesale license.

Any person can, under the 34th section of the Act, obtain a wholesale license providing he has proper premises for that purpose. He does not require to file any petition from the ratepayers of the polling sub-division where his place of business is situate, nor can such ratepayers petition against him. But the provisions of sub-section 14 require such petition, and also permit the ratepayers to petition against the granting of a tavern or shop license where the applicant is not already a licensee, that is, does not already hold such a license, or where it is sought to transfer such a license to premises that are not already so licensed.

I think it must be clear, on reading over this sub-section 14, as amended by the Act of 1890, that the whole of this sub-section is confined to shop and tavern licenses. This section, as it is framed, is clearly intended to prevent any licenses from being granted to new applicants or to new premises without the ratepayers having the power to interfere by petition. But if the contention of Mr. Dunlop and the act of the commissioners can be sustained, then this new provision of the Act becomes nugatory. All that a person need do to defeat the Act is to obtain a wholesale license, and then he can buy a tavern or shop license and have it transferred to his wholesale premises. This license is open to the further objection of being transferred to premises in a different polling sub-division to that for which it was originally granted.

Statement

I must, therefore, make an order revoking or cancelling the shop license so obtained by Mr. Dunlop, and also the license for the year commencing on the 1st May, 1891, if that has been granted or ordered.

And he granted his order that the shop license granted to the applicant for the sale of liquors in the premises situated on the west side of Market street in the city of Brantford, in polling sub-division number ten of the said city of Brantford, and also any shop license which might have been issued to him for the year commencing the 1st day of May, 1891, and ending on the 30th day of April, 1892, should be revoked.

The applicant had been advised that, being a licensee under a wholesale license, he did not require to accompany his petition for a consent by the license commissioners to the transfer of the license to his premises in polling sub-division number ten with a certificate signed by a majority of the electors entitled to vote at elections for the legislative assembly in that polling sub-division, and, thinking that he became a licensee under the shop license so transferred, he did not deem it necessary, although he petitioned for a shop license for the then ensuing year before the 1st day of April, 1891, to accompany this petition with such a certificate, nor did the license commissioners deem it necessary, for they consented to the transfer and acceded to the prayer of his petition for a shop license for the then ensuing year, and on the 16th day of April, 1891, granted him a certificate entitling him to a shop license for the then ensuing year.

After the making of the order by the learned Judge, and about the 25th day of April, 1891, the applicant procured and presented to the license commissioners the certificate of electors required by law, and on the 30th day of

Statement. April, 1891, he paid to the credit of the proper license fund the fees payable in respect of such license.

The applicant thereupon, upon an affidavit setting forth the above facts, and that the license commissioners were willing to waive the non-presentation of such certificate before the 1st day of April, 1891, and shewing that the order of the Judge alone stood in the way of his obtaining his license, applied to ROSE, J., in Chambers, for a mandamus ordering the license commissioners and the license inspector to issue such license, which motion that learned Judge refused with costs, delivering the following judgment:

This is an application for an order of mandamus to compel the inspector for the city of Brantford to issue a license to the applicant, the commissioners having on the 16th April granted a certificate under the Act, and the applicant having deposited in the bank the sum of $300 named in such statute.

The argument on behalf of the applicant is that, a certificate having been granted, the commissioners had discharged themselves under section 11, sub-section 13, and that the inspector was bound to issue the license under section 12, sub-section 2, his duty upon receipt of the certificate being ministerial merely. It was answered that subsequent to the issue of the certificate and prior to the demand upon the inspector, an order had been made by the learned Judge of the County Court of the county of Brant, under section 91, revoking a license held by the applicant for the year ending 30th April, 1891, and that by reason of such revocation the applicant became a person disqualified from obtaining any further or other license under the Act.

It appears that during the year 1890-1891 the applicant obtained a transfer, with the consent of the commissioners, from one King of a license to sell by retail in a polling sub-division other than the one in which the applicant carried on business, and subsequently, and also with the consent of the commissioners, such license was transferred from the polling sub-division in which King had previously carried on business to the sub-division in which Dunlop was carrying on business; such transfers were without any certificate signed by the majority of the electors, as required by sub-section 14 of section 11, as found in the amending Act, 53 Vic. ch. 56, (O.), and by such transfers the number of licensed premises in the polling sub-division in which the applicant carried on business was apparently increased.

The learned Judge in giving his decision based it upon the ground of want of certificate. It is neither necessary nor proper for me to consider the grounds upon which the learned Judge acted, if he had jurisdiction to inquire, because by section 92 his order is made final and conclusive, and is declared not to be the subject of appeal or revision by any Court whatever. But it was replied that he had not jurisdiction, because section 91 only gave jurisdiction upon complaint that the license had been issued contrary to any of the provisions of the Act, etc., and it was contended that no license had been issued, that is, that the transfer to Dunlop, the applicant, from King, with the consent of the commissioners, was not the issue of a license.

I think I cannot give effect to this contention, because it seems to me that when the license was transferred from King to Dunlop, King ceased to be a licensee, and Dunlop became a new licensee, and that by such transfer, with the sanction of the commissioners, a license was thereby issued to him to do that which prior to the consent of the commissioners being obtained he might not lawfully do; and when the commissioners consented to the transfer of the license to the new polling sub-division, premises became licensed which theretofore had not been licensed, and by such transfers it seems to me that a license was issued. In other words, I take the term "issue of license" to be a general term and to include all modes of granting authority or permission to any person to sell liquor in any manner which would be prohibited but for the granting of such permission.

It was further contended on the part of the applicant

Judgment.

Rose, J.

that he was not disqualified because the order of the learned Judge was subsequent to the granting of the certificate by the commissioners. The words of the section are "and the person to whom such license issued shall thereafter, during the full period of two years, be disqualified from obtaining any further or other license under this Act." I think what was meant by the section was that, by the Act which made it proper for the learned Judge to revoke the license, the penalty of disqualification was incurred, the disqualification to date during the period of two years from the adjudication or order of revocation, and, as the license had not in fact been issued, I think the applicant is brought literally within the clause, as he had not obtained a license, and by the clause was disqualified from obtaining it. I cannot, therefore, command the inspector to issue the license, for by section 67 any inspector who, contrary to the provisions of the Act, knowingly issues a license, is made liable to a penalty, and if the applicant was, at the time of the application to the inspector for a license, a person prohibited from receiving a license, it is clear that the issue of a license would be contrary to the provisions of the Act, and an inspector having knowledge of the facts, as he had, was not only justified in refraining from issuing a license but required so to refrain.

In my opinion, therefore, the application must be refused with costs.

The applicant appealed to the Divisional Court from the order of ROSE, J., and his appeal was argued before ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ., on the 19th November, 1891.

DuVernet, for the applicant. 53 Vic. ch. 56, section 1, (O.)* does not apply to this case, the applicant being

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*1. Sub-section 14 of section 11 of the Liquor License Act is hereby repealed and the following substituted therefor:

(14). In the case of an application for a tavern or shop license by a person who is not, at the time of making such application, a licensee under this Act, or in the case of an application for such license for or transfer

Argument.

already a licensee by virtue of his wholesale license. Under section 91 of R. S. O. ch. 194,† there is power only to cancel a license which has been issued. The Judge has no power to cancel a license which has not been issued. The clause in question, section 91, is a penal clause, and must be strictly construed. The Judge intervenes in a case in which he has no jurisdiction, and his order is a nullity. He revoked the license on the ground that no certificate was

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thereof to premises which are not then licensed, the petition must be accompanied by a certificate signed by a majority of the electors entitled to vote at elections for the Legislative Assembly in the polling sub-division in which the premises sought to be licensed are situated, and the said majority must include at least one-third of the said electors who are at the time of such application residents within the said polling sub-division. The foregoing shall not apply to the transfer of a license from the holder thereof to some other person for the same premises with the consent of the commissioners, nor to a licensee applying for a license for or permission of the commissioners to remove with his license to other premises in the same polling sub-division; provided that such license or permission shall not increase the number of licensed premises in such polling sub-division, and shall not be allowed if a majority of the electors duly qualified as aforesaid petition against the same on the grounds hereinbefore set forth or any of such grounds.

† 91. Upon the complaint of the inspector or the board of license commissioners or the county attorney, that a license has been issued contrary to any of the provisions of this Act or of any by-law in force in the said municipality, or that the license has been obtained by any fraud, or that the person licensed has been convicted on more than one occasion of any violation of the provisions of section 79 of this Act, or has been convicted on three several occasions of any violation of any of the provisions of this Act, whether the offences in respect of which such convictions were made were the same or different in their character, so long as such convictions were for offences committed on different days, the Judge of the County Court of the county in which any municipality is situate in any part of which the license granted is intended to take effect, shall summon the person to whom such license issued to appear, and shall proceed to hear and determine the matter of the said complaint in a summary manner, and may upon such hearing, or in default of appearance of the person summoned, determine or adjudge that such license upon any of the causes aforesaid, ought to be revoked, and thereupon shall order and adjudge that the same be revoked and cancelled accordingly, and thereupon, the license shall be and become inoperative and of none effect, and the person to whom such license issued shall thereafter, during the full period of two years, be disqualified from obtaining any further or other license under this Act.

Argument. filed by the applicant. His order has no effect, and the inspector should now issue the license. The applicant has obtained a certificate from the commissioners that he is entitled to the license. The inspector has merely a ministerial act to perform, and he should be ordered to perform it: *Re Massey Manufacturing Co.*, 11 O. R. 444; 13 A. R. 446. Section 12 of R. S. O. ch. 194 shews the procedure and the duty of the inspector.

Langton, Q. C., for the commissioners and inspector. The holder of a wholesale license is not a licensee within the meaning of 53 Vic. ch. 56, section 1. (O.). "The Liquor License Act" provides by sections 34 and 35 in regard to wholesale licenses. 53 Vic. ch. 56, section 1, merely substitutes new provisions for sub-section 14 of R. S. O. ch. 194, section 11, relating to tavern and shop licenses only, so that a licensee within the meaning of the Act is a tavern or shop licensee only. The decision of the County Judge was therefore correct, whether he had jurisdiction to make his order or not; and therefore, apart from his order and supposing it to be without jurisdiction and set aside or disregarded, it is clear, as the County Judge held, that the applicant has not complied with the law. Section 11, sub-section 21, is very express, that a license is not to be granted contrary to the provisions of sub-section 14, the very sub-section which has not been complied with. The Court should therefore in its discretion refuse to interfere by mandamus in favour of a person who has not complied with the law. The certificate granted to him by the commissioners is only authorized in the case of an applicant "who has complied with the requirements of the law" (see section 12), and the certificate being contrary to law is void: *Thompson* v. *Harvey*, 4 H. & N. 254. That certificate was issued without sufficient consideration, and now, after a new application made to them by the applicant, they have refused in their discretion to grant him a license. There is no power to issue a mandamus to force them to grant a license after a refusal in the exercise of their discretion: *Rex* v. *Farringdon*, 4 D. & Ry. 735; Shortt on Mandamus, p. 262;

Harrison's Mun. Man., 5th ed., pp. 897, 902, 903; *Leeson* v. *License Commissioners of Dufferin*, 19 O. R. 67. Section 9 shews that the inspector's duties are not merely ministerial, for by it licenses are to be issued under the direction of the commissioners. See also section 11, subsections 3, 18, and 21. I also rely upon the County Judge's order, and submit that it is final under section 91, and was made with jurisdiction, for the reasons given in the judgment of Rose, J., appealed from. Section 67 of R. S. O. ch. 194 imposes a penalty upon any commissioner or inspector who issues a certificate contrary to the provisions of the Act, so that it was their duty to refuse, as they have done, to issue the license. **Argument.**

Du Vernet, in reply, referred to Maxwell on Statutes, pp. 286, 288, 292, 462; *Regina* v. *Sykes*, 1 Q. B. D. 52; *Ex p. Smith*, 3 Q. B. D. 374; Addison on Torts, p. 680.

February 1, 1892. The judgment of the Court was delivered by

Armour, C. J.:—

We are of the opinion that the license commissioners erred in consenting to the transfer of King's shop license to the premises of the applicant in polling sub-division number ten, without his petition therefor being accompanied by a certificate signed by a majority of the electors of that polling sub-division, as provided by 53 Vic. ch. 56, sec. 1, (O.).

But the question is, had the learned Judge of the County Court, by reason of the transfer having been consented to by the license commissioners, without the petition therefor being accompanied by such certificate, any jurisdiction to revoke and cancel the license so transferred?

It may well be that such transfer and consent without such certificate were simply void acts and that the license so transferred to the applicant afforded him no protection in the sale of liquor which he assumed to sell thereunder; but whether the learned Judge had power by reason there-

Judgment.

Armour, C.J.

of to revoke and cancel the said license is a different question and depends upon the jurisdiction given to him by section 91 of the "Liquor License Act."

The provisions of that section are of a penal character and involve not only the revocation and cancellation of the license but also the disqualification of the licensee to obtain any further or other license under the said Act for the full period of two years from such revocation and cancellation.

The rules for the construction of penal statutes are clearly laid down in several cases and are lucidly set forth by the Judicial Committee in *The Gauntlet*, L. R. 4 P. C. 184, in which James, L. J., in delivering the judgment said (p. 191): "No doubt all penal statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common sense-meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."

Jenkinson v. *Thomas*, 4 T. R. 665; *The Alexandra Case*, 2 H. & C. 431, 574; *Nicholson* v. *Fields*, 31 L. J. Ex. 235; *Stephenson* v. *Higginson*, 3 H. L. Cas. at p. 686; *Nichols* v. *Hall*, L. R. 8 C. P. at p. 326; *Dickenson* v. *Fletcher*, L. R. 9 C. P. at p. 7; *Willis* v. *Thorp*, L. R. 10 Q. B. at p. 387; *Law Society* v. *Shaw*, 9 Q. B. D. 1; *Re Macdougall*, 13 O. R. 204.

Applying these rules to section 91 of the "Liquor License Act," we think it clear that the learned Judge had no juris-

Judgment.

Armour, C.J.

diction to entertain the complaint which he entertained, nor to make the order which he made thereon.

This section has only reference to "a license issued" contrary to any of the provisions of that Act, and not to a "license transferred" contrary to any of the provisions of the said Act, and the person to be summoned as therein provided is the person to whom such license issued and not the person to whom such license has been transferred, and the person to be disqualified is the person to whom such license issued and not the person to whom such license has been transferred.

Section 92 also shews that it is only the person to whom such license has been granted, and not the person to whom such license has been transferred, against whom the complaint is to be made.

In order to uphold the jurisdiction of the learned Judge we would be obliged to read the 91st section as if the words "or transferred" were inserted after the word "issued" in the third line thereof, and as if the words "or has been transferred" were inserted after the word "issued" in the fifteenth line thereof, and as if the words "or has been transferred" were inserted after the word "issued" in the twenty-third line thereof, and this would be legislation on our part.

It is clear also that the learned Judge had no jurisdiction under this section to revoke or cancel a license not already issued.

The order of the learned Judge should not, therefore, stand in the way of the applicant obtaining his license, and we grant a mandamus nisi to the license inspector and to the license commissioners, in order that upon their return thereto they may shew any other good reason for refusing to grant to the said applicant his license.

But from what appears before us it may not be necessary to issue it, and it will be unnecessary to issue it if they grant the license, in which latter case there will be no costs, and there will be no costs in any event of the motion in Chambers.

[CHANCERY DIVISION.]

MEARNS V. THE ANCIENT ORDER OF UNITED WORKMEN ET AL.

Life Insurance—Benevolent Society—Certificate payable to "legal heirs"—Effect of, between the children of first marriage and second wife.

A widower, having two children, insured in a benevolent society and took out his certificate payable "to his legal heirs" and subsequently married a second time, and died without having altered the certificate, leaving his wife surviving with the two children of the first marriage:—*Held*, that the two children took the whole fund payable under the certificate to the exclusion of the wife.

Statement

THIS was a special case stated in an action brought by Ella Mearns as widow of one Thomas Mearns, deceased, who held a beneficiary certificate in the Ancient Order of United Workmen against William Mearns and John Hughes Mearns two of his infant children by a former wife and the Toronto General Trusts Company as their guardians.

The following facts are taken from the judgment.

"The matter in question is brought before me in the form of a special case, which amongst other things states that the plaintiff is the widow of the late Thomas Mearns, who died on or about the 17th day of August, 1891; that at the time of his death he was a Workman degree member in good standing in the Order, which is a fraternal benevolent society incorporated on the 11th day of August, 1879, under the provisions of ch. 167, R. S. O., 1877; and was the holder of a beneficiary certificate issued by the Grand Lodge of Ontario of the said Order, dated the 7th day of April, 1887, wherein the sum of $2,000 was declared to be payable at his death out of the beneficiary fund of the Order 'to his legal heirs'; that at the time of his application for admission into the Order and at the date of the issue of the said certificate to him, he was a widower having two children, the infant defendants, Wm. Mearns and J. H. Mearns; that on the 4th day of October, 1890, he was married to the plaintiff, but that there were no children of such marriage.

Statement.

"The case further states that the certificate was issued in pursuance of section 1, of article 7, of the constitution of the Order, which provided that upon the death of a Workman degree member in good standing, etc., such person or persons, as such member may have named, while living, shall be entitled to receive of the beneficiary fund of the Order the sum of $2,000, subject to a proviso which as the case states, is not in question here; that the deceased died intestate and without having made any new or change of direction in respect to the payment of the said sum of $2,000, but that the same stood at the time of his death as of the original direction of payment, namely, 'to his legal heirs.' It is further stated that on the 12th day of January, 1892, letters of guardianship of the two infant defendants, the only children of the deceased, were duly issued to the Toronto General Trusts Company, and that on the 10th day of February, 1892, the defendants, the Order, paid to such guardians the sum of $1,333.33 as the share of these infant defendants in the said sum of $2,000, retaining the balance until it should be determined who is lawfully entitled to receive the same, the plaintiff or these infant defendants.

"The case also states, and reference to this was had by plaintiff's counsel during the argument, that the defendants, the Order, hold and declare themselves to be a fraternal, charitable, beneficial and benevolent society, organized for the promotion of the welfare, social and fraternal, of its members and the protection of those dependent upon them.

"The questions submitted for decision are:

1. Under the direction of payment in said beneficiary certificate 'to my legal heirs,' is the plaintiff entitled to any share in the said sum of $2,000, and, if so, how much?

2. Is the plaintiff, as the second wife of the said Thomas Mearns, entitled to participate in the said fund."

The case was argued on April 13th, 1892, before FERGUSON, J.

Argument.

Totten, Q. C. for the plaintiff and the Ancient Order of United Workmen (the latter of whom merely appeared as stakeholders of the fund in dispute). The plaintiff is entitled to one-third of the fund. The Order is a beneficial and benevolent society, organized for the protection of its members and those dependent upon them; that is their families, and a widow is included as well as children. It is true when the applicant got his certificate he was a widower with only two children and his then legal heirs were the children, but there was no special designation to his *then* legal heirs. Section 3 of R. S. O., ch. 136 was intended to benefit a wife as well as children and when the applicant issued the certificate to his legal heirs he intended his then children and any future wife or children he might have when the certificate fell in. A wife would be a legal heir as one of the next of kin. In construing the word "heirs" the intention is to be considered and it covers "family": Bacon on Benevolent Societies 260. "Heir" or "heirs" is to be construed to mean the person or persons to whom real estate would descend, R. S. O. ch. 109, sec. 31. Real estate is made personalty under the Devolution of Estates Act. "Heirs" includes personal representatives: *Burkitt* v. *Tozer*, 17 O. R. 587. "Lawful heirs" are defined in *Smith* v. *Butcher*, 10 Ch. D. 113. The word "heirs" includes widow: *Vaux* v. *Henderson* 1 J. & W. 388. I also refer to Theobald on Wills, 3rd edition pp. 256, 257 and 258; *Keay* v. *Boulton*, 25 Ch. D. 212; *Mounsey* v. *Blamire*, 4 Russ, 384; *Gittings* v. *M'Dermott*, 2 My. & K., 69 at p. 73; Hawkins on Wills, 93; *Re Porter's Trusts*, 4 K. & J., at p. 197.

E. T. Malone for The Toronto General Trusts Company, the guardians of the infants. The Order was incorporated under R. S. O., 1877, ch. 167. On a death occurring, the payment of the amount of the certificate is to be made to the party entitled under the rules of the Order: section 11. By article 7 of the constitution and by-laws of the Order it is provided that such person as the member may have *named* while living shall

Argument.

be entitled to receive the money. It is not confined to the family or even the relatives of the member. R. S. O. ch. 136 and amendments apply to this case, and control wherever its provisions are inconsistent with any rules or regulations of the Order: *Mingeaud* v. *Packer*, 21 O. R., 267; *Swift* v. *The Provincial Provident Institution*, 17 A. R. 66; *Re O'Heron*, 11 P. R. 422. In order that the plaintiff should take, the policy should have been payable to the "wife," or "wife and children," according to R. S. O. ch. 136. In such case the wife living at the death of the policy-holder would have taken as the person named or mentioned. By use of the words "legal heirs" the member intended his then legal heirs and those were his then children: R. S. O. ch. 136, secs. 5, 6, and 7. He settled the fund for their benefit, and he had the power to change it if he chose afterwards, when he changed his circumstances by marrying again: section 6. [FERGUSON, J., but if he intended to benefit his "legal heirs" at the time of his death, he would rest satisfied and make no change.] The person ordinarily meant as filling the technical description of "legal heirs" should be the person entitled to take unless the document in question shows that he meant to give another meaning than the technical or legal meaning of the word "heir." The intention of the member must be taken into account. It makes no difference that the estate consists of personality, the heirs take as *personæ designatæ*. I also refer to *In the goods of Isaac Dixon*, 47 L. J. P. C., P. and B. 57; *De Beauvoir* v. *De Beauvoir*, 3 H. L. C. 524, at p. 550; *Rees* v. *Fraser*, 25 Gr., 253; *Mounsey* v. *Blamire*, 4 Russ 384; *Re Crawford's Trusts*, 2 Drew at p. 234; *Elsey* v. *Odd Fellows Mutual Relief Ass.*, 142, Mass. 225; *Keteltas* v. *Keteltas*, 72 N.Y. 312. The American cases cited from Bacon on Friendly Societies cannot be relied on, as statutory laws in each State appear to have governed the cases.

Totten, Q. C., in reply. In *Mingeaud* v. *Packer*, 21 O. R. 267, a new certificate was taken out instead of making a new declaration, and the children were named in it.

Judgment.

Ferguson, J.

April 16th, 1891. FERGUSON, J. :—

The case was very thoroughly argued and many authorities referred to. The question as it appears to me is single and is whether or not this plaintiff, the widow of the deceased, is in the circumstances entitled under this certificate and the direction as to payment, to share in the fund, the $2,000, with the infant defendants, the children and only heirs-at-law of the deceased. If the plaintiff is not so entitled, then the balance of the fund should be paid to the guardians of these children. If, on the contrary, the plaintiff is so entitled, then counsel agreed in saying that the share that should be paid to her would be the one-third of the $2,000, and, in this I apprehend, counsel were right.

Most of the authorities cited were cases arising upon the construction of wills, and although this is not such a case, yet, it may I think be said that the words "legal heirs" should not receive a larger construction here than in a will.

The expression "legal heirs" occurred in the case *Low* v. *Smith*, 2 Jur. N. S. 344, a case referred to by the Master of the Rolls in *Smith* v. *Butcher*, 10 Ch. D. 113.

As it appears to me the words "legal heirs" mean nothing more or less than the word "heirs," and that this direction is the same in effect as if it had been a direction to pay to the "heirs" of the deceased.

As is said by Vice-Chancellor Proudfoot in the case *Rees* v. *Fraser*, 25 Gr. at p. 254, there is nothing to prevent the "heirs" taking personal property as *personæ designatæ*, nor the "next of kin" real estate in the same way.

In *Smith* v. *Butcher*, 10 Ch. D. 113, the decision was that under a gift of personal estate to the children of A. for their lives, and, after the death of either of them, his or her share of the principal to go to his or her lawful heir or heirs, the right heirs of the children were to take.

In the case *Keay* v. *Boulton*, 25 Ch. D. at p. 219, the case is distinguished from *Smith* v. *Butcher*, because there was context on which to do it, shewing that the words were not to be understood according to their technical meaning.

Judgment.

Ferguson, J.

In the present case there is no context whatever. The words have to be construed without the aid of any context, and in the setting of facts and circumstances in which they are found.

These facts and circumstances are, so far as I see, very simple. The deceased when he used the words was a widower, having these two children, who were no doubt his "heirs," or his "lawful heirs," if it is seen fit to use the adjective. They were the only heirs that he had. He might at any time have made a change in this direction as to payment of the money. He married the plaintiff, and did not then or at any time make any such change, the original direction being in force at the time of his death. The age of the deceased or his circumstances in life do not appear. There is the clause in the special case as to the declared objects of the order or society; but this, so far as it may extend, is controllable and controlled by the direction in each case of the member holding a certificate.

It appears to me that there are not any facts or circumstances by which one is called upon to give to the words of the direction to pay any meaning but the one that they naturally bear, and there being, as I have said, no context, I think the language of the Lord Chancellor in *De Beauvoir* v. *De Beauvoir*, 3 H. L. C. at p. 557, although used in respect of the construction of a will, apply with force here. It is: "As far, therefore, as the authorities go with respect to personal estate, whether the gift be an immediate gift, or whether it be a gift in remainder, the cases appear to me be uniform—to give to the words the sense which the testator himself has impressed upon them—that if he has given to the heir, though the heir could not by law be the person to take that property, he is the person who takes it as *personæ designatæ*. It is impossible to lay down any other rule of construction."

I do not see that the Act 51 Vic. ch. 22 (O.) referred to by counsel, or anything contained in chapter 136, R. S. O., militates against the view that the right heirs of the

Judgment.

Ferguson, J.

deceased are the persons to take under this direction. Nor do I see that 53 Vic. ch. 39 (O.) contains any provision against this view.

No such questions arise as those considered in the case *Mingeaud* v. *Packer*, 21 O. R. 267, the sole question, as I have said, being the construction to be given to the words of direction, "to his legal heirs;" and after a perusal of the authorities referred to on the argument, I am of the opinion that the two children of the deceased, being the heirs and the only heirs of the deceased, are entitled to the whole of the fund as *personæ designatæ*, and that the widow, the plaintiff, is not entitled to any share of it.

The American cases on the subject, or kindred subjects, are various. They, however, for the most part, depend upon various enactments in the different States, and do not afford any certain guide here.

The judgment on the special case is that these two children of the deceased are entitled to the whole of the fund in equal shares, and that the plaintiff, the widow, is not entitled to any share or part of it. This answers both the questions asked. I would rather have arrived at a different conclusion, but I cannot do so.

The case contains an agreement as to the costs, and I need therefore say nothing as to them.

G. A. B

[CHANCERY DIVISION.]

THE CANADA SOUTHERN RAILWAY CO. V. THE CORPORATION OF THE TOWN OF NIAGARA FALLS ET AL.

Railways—Power of "letting, conveying and otherwise departing" with their lands—Conveyance of easement—Ultra vires—Estoppel—Prescription—R. S. O. ch. 111, sec. 35.

The Act of incorporation of a railway company, the predecessors in title of the plaintiffs, and which was incorporated for the purpose of constructing and operating a certain line of railway, conferred upon the company in respect of the disposition of lands acquired by them, powers of "letting, conveying and otherwise departing therewith for the benefit and on account of the company from time to time as they should deem necessary."

Nearly forty years before the commencement of this action the predecessors in title of the defendants laid pipes for conveying water along the railway track of the plaintiffs' predecessors, using them for such purpose almost continuously up to the present time, such privilege having been given to them by resolution of the directors of the company, who a few years subsequently passed another resolution, and in pursuance thereof executed a deed granting, releasing and confirming such right and privilege which at the time this action was brought had become vested in the defendants.

The undertaking of the original railway company became vested in the plaintiffs, who, a few years before the commencement of this action desiring to alter the position of their track gave notice of expropriation to the immediate predecessors in title of the defendants, and placed the track over the water pipes.

The plaintiffs now sought to have the resolutions and deed mentioned declared *ultra vires*, and also claimed an injunction restraining the user of the water pipes, and if necessary an order for their removal:—

Held, that the resolutions and deed were *ultra vires* as not within the powers specified by the charter, or such as could fairly be regarded as incidental thereto, or reasonably derived by implication therefrom:—

Held, also, that the plaintiffs were not estopped from asserting their own title and denying the defendants':—

Held, lastly, that the defendants not having used and enjoyed their easement for forty years had not acquired a title thereto by prescription under R. S. O. ch. 111, sec. 35.

Statement.

THIS was an action by the Canada Southern Railway Company against the Corporation of the Town of Niagara Falls and the Board of Water Commissioners for the same town, to have two certain resolutions and a deed from the predecessors in title of the plaintiffs granting a privilege of laying certain water pipes along their right of way declared *ultra vires*, and for an injunction restraining their further use.

Argument. The action was tried at Toronto, on November 25th, 1891, and February 10th, 1892, before FERGUSON, J.

H. Symons, for the plaintiffs. Both the resolutions and the deed are *ultra vires*. The Erie and Ontario Railway Company, the plaintiffs' predecessors in title, was incorporated under 5 Wm. IV. ch. 91, and neither by that Act nor any subsequent legislation, was it empowered to grant any such easement as is here claimed, so that no rights adverse to the company passed to the defendants or their predecessors in title. Even if the railway were benefited by the construction of the pipes, no right adverse to the company could pass: Brice on Ultra Vires, 2nd ed., Rules 21, 22 and 23, p. 124 *et seq.* Nothing short of forty years user would confer any title. See the judgment of Senkler, Co. J., *Re Canada Southern R. W. Co. and Lewis*, 20 U. C. L. J. N. S. 241, at p. 243. The company is not estopped: Lindley's Law of Companies, 162 *et seq.*

Moss, Q.C., and *Alex. Fraser*, for the defendants. The plaintiffs have no higher right than their predecessors in title, and they are bound by length of time, nearly thirty-five years' possession. The fact that the company used the water for their own purposes was a consideration for the grant of the privilege, and so made the work for their own benefit. The plaintiffs have not shewn that what was done was outside of the Act of incorporation, or that it was prohibited, and it was their own act, and cannot be got rid of: *Bickford* v. *The Grand Junction R. W. Co.*, 1 S. C. R. 696, judgment of Strong, J.; *McDiarmid* v. *Hughes*, 16 O. R. 570, judgment of Street, J. A title by possession may be acquired against the plaintiffs: *The Erie and Niagara R. W. Co.* v. *Rousseau*, 17 A. R. 483. We also refer to *The Grand Junction Canal Co.* v. *Petty*, 21 Q. B. D. 273; *Norton* v. *London and North-Western R. W. Co.*, 9 Ch. D. 623; 13 Ch. D. 268; *Bobbett* v. *The South Eastern R. W. Co.*, 9 Q. B. D. 424; *The King* v. *Leake*, 5 B. & Ad. 469.

Argument.

Symons, in reply. *Norton* v. *The London and North-Western R. W. Co.*, 9 Ch. D. 623; 13 Ch. D. 268, and *Bobbett* v. *The South Eastern R. W. Co.*, 9 Q. B. D. 424, do not apply to this case.

March 31, 1892. FERGUSON, J.:—

The plaintiffs allege by the first paragraph of their statement of claim that the Erie and Ontario Railway Company, which was incorporated by an Act of the late Province of Canada, 5 Wm. IV. ch. 19, acquired for the use of its railway, for the right of way and track, the strip of land mentioned in that paragraph, which is the same land as that now occupied by the plaintiffs as their right of way and for the purposes of their rail[illegible]y, and by the paper of admissions put in at the trial, it is admitted that the plaintiffs are the owners in fee in possession of these lands.

While the railway on these lands was in the course of construction, and on the 18th day of October, 1853, the directors of the Erie and Ontario Railway Company passed a resolution purporting to confer upon the late Samuel Zimmerman the privilege of laying water pipes along the line of the railway track, for the purpose of conveying water to the town of Niagara Falls, then known as Elgin and afterwards as Clifton.

Acting upon this resolution, Zimmerman laid down a six inch pipe along the line of the railway and by means of it supplied water to the inhabitants of Elgin aforesaid, now Niagara Falls. This pipe still remains in the plaintiffs' said lands and is used for the same purpose by the defendants. So far as appears, this pipe has from the commencement been continuously used for this purpose, except probably short periods whilst changes were being made in the railway track and in the location in the ground of the pipe itself.

After the decease of Zimmerman, at or about the time of a sale of these water-works by the executors of his estate, and in the month of February, 1860, in pursuance of a resolution of the board of directors, the Erie and Ontario Railway Company executed a deed by which they professedly granted, released and confirmed unto Barber and Lewis, the then purchasers from Zimmerman's executors, the right and privilege to lay down and from time to time to maintain, repair and keep this pipe along the line of the railway in as full and ample a manner as Zimmerman had done, etc., etc.; with a proviso, however, that the track of the railway should not be opened, disturbed or interfered with, except upon due notice and under the superintendence of the proper officer of the railway company.

The defendants, through conveyances, became and are entitled to this line of pipe and the rights respecting the same, whatever these may be, and I think I need not state the various links in their chain of title, for it was freely admitted at the trial that whatever rights Zimmerman had, and whatever rights, if any, in addition thereto passed by the deed of the 11th February, 1860, called the deed of confirmation, the defendants now have, subject to whatever may be found contained in the deed to the defendants of the 10th day of April, 1884; and by the paper of admissions before referred to, it is admitted that the defendants are owners and in the enjoyment of this line of pipe for the conveyance of water under and along the plaintiffs' railway, and of the reservoirs, etc., etc., subject as set forth in the same deed of the 10th day of April, 1884; and I do not see that there is anything in this deed making against the defendants' contentions that is of importance here.

By virtue of certain Acts passed by the late Province of Canada all the franchises, rights, etc., of the Erie and Ontario Company became vested in the Erie and Niagara Railway Company. This occurred in or about the year 1863; and by a deed of amalgamation of the 2nd day of July, 1889, and certain Acts of Parliament, the Erie and Niagara company and the plaintiff company became amalgamated, and the plaintiffs were substituted for the Erie and Niagara company, and possessed of and entitled to possess and enjoy all the property, franchises, etc., of the company, including the land and railway track aforesaid.

Judgment.

Ferguson, J.

By the same paper of admissions, it is admitted that in the year 1883, the plaintiff company were engaged in the construction of their line of track in its present position at the place in question, and that they then gave to the said Lewis, through whom the defendants claim title, the notice of expropriation produced; and that afterwards the plaintiffs relaid, depressed, and lowered about one-half of the said water pipes, as proposed in such notice, and built and constructed the line of their railway track along and over the line of the said pipes, wherever the line of pipes is actually under the railway track; and that no portion of the line of pipe was actually under the railway track prior to the year 1884, except at some points under the ends of the ties. The part, if any, of this notice, material here is the part, as I think, proposing to do this work in respect of this pipe, which the plaintiffs did.

There is really now no dispute as to these facts, or, indeed, as to any of the facts that seem to me of importance here.

I do not, in the circumstances, see the necessity of stating here more fully the particular facts in regard to the plaintiffs' chain of title.

The action is brought for a declaration; (1) that the resolutions aforesaid of the 18th October, 1853, and the 11th of February, 1860, as well as the deed or instrument of the latter date were *ultra vires*, and that no right or title was conferred thereby or passed thereunder to the said Zimmerman or his successors; (2) a further declaration that the plaintiffs are entitled to hold, use, and enjoy the said land and track free and clear of any claim of the defendants to use and maintain the said pipes by reason of the said resolutions and instrument, or because of the laying, use, and maintenance of the said pipe in such track as aforesaid or otherwise; (3) an injunction against the defendants, and, if necessary, an order upon the defendants for the

Judgment.

Ferguson, J.

removal of the pipes and a restoration of the track at defendants' expense; (4) an order against the defendants to pay such sum as may be awarded for the use and occupation of the track by the pipes.

The defendants contend that these resolutions and the deed are good and valid, and had the effect of passing a title or right to their predecessors, which title they say they have. They also set up title by virtue of the operation of the Statute of Limitations, and amongst other things, they say that, in the circumstances, the plaintiffs are estopped from making the claim they now make, etc., etc.

It was stated at the bar by plaintiffs' counsel that the reasons for bringing this action are the facts that the period of forty years from the commencement of the user by the defendants, or those through whom they claim, is about expiring, and the unwillingness of the defendants to enter into any arrangement to prevent the running of the statute in their favour. On this immediate subject the letter of the 25th of April, 1884, a copy of which is contained in the admission paper before mentioned, may be referred to.

As to whether or not the resolutions spoken of and the deed of the 11th February, 1860, were *ultra vires*: The powers in respect to disposing of lands conferred upon the Erie and Ontario company by their charter, 5 Wm. IV. c. 19, were powers of "letting, conveying and otherwise departing therewith, for the benefit and on account of the company, from time to time, as they should deem necessary and expedient,"—section 1.

The Act 27 Vic. ch. 59, changing the name of the Fort Erie Railway Company to the Erie and Niagara Railway Company, confers powers upon that company in the identical words above (as to disposing of lands). That Act, however, incorporated parts of the Railway Clauses' Consolidation Act. The Act was not, however, passed till the year 1863, and more than three years after the execution of the deed in question here.

Although several statutes were referred to at the bar, it was not contended, so far as I was able to perceive, that at the time of the passing of the resolutions referred to, and of the execution of the deed in question, the company had any more comprehensive statutory powers in respect to ~~disposing of lands~~, etc., than those contained in their original charter, 5 Wm. IV. ch. 19. I think that at that time they had not.

Judgment.

Ferguson, J.

As I understand it, the Erie and Ontario company were incorporated for certain definite purposes only: the purposes of the contemplated railway.

In Lindley on Companies, p. 164, it is said: "It is agreed on all hands that a corporation cannot lawfully do that which its constitution does not expressly or impliedly warrant. The difference of opinion, if there really be any, is not as to that, but simply as to whether the Act of incorporation is to be regarded as conferring unlimited powers, except where the contrary can be shewn; or, whether alleged corporate powers are not rather to be denied, unless they can be shewn to have been conferred either expressly or by necessary implication." The author then says that the former is apparently the correct view so far as municipal and other corporations not created for any clearly limited purpose are concerned, but submits the latter as the correct view with respect to trading and similar corporations which are created for certain definite purposes only.

The case *Ashbury Railway Carriage and Iron Co.* v. *Riche*, L. R. 7 H. L. 653, seems to me to clearly support the proposition as regards corporations created for certain definite purposes. There it was held that the contract, being in its nature not included in the memorandum of association was *ultra vires*, not only of the directors, but of the whole company, so that even the subsequent assent of the whole body of shareholders would be of no avail to ratify it. And in the case *Baroness Wenlock* v. *River Dee Co.*, Lord Blackburn, at p. 360, 10 App. Cas., speaking of the case *Ashbury Railway Carriage Co.* v. *Riche*, says that it was not necessary for the decision to do more than decide what the law was with regard to a company formed

Judgment.

Ferguson, J.

under the Company's Act, but adds, "I think the law there laid down applies to all companies created by any statute for a particular purpose."

There are passages in the judgment in the case *Ashbury Railway Carriage Co.* v. *Riche*, which indicate (to me at all events) that the true reason is that where the corporation is created for a definite purpose the giving of the specified powers only, is, in effect, the prohibiting of the exercise of powers that are not specified.

It is at the same time to be borne in mind that whatever may fairly be regarded as incidental to, or consequential upon, those things that the legislature has authorized, ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*. See Lindley, p. 165, and cases there referred to.

In the case *Baroness Wenlock* v. *River Dee Co.*, 10 App. Cas. at p. 362, Lord Watson said : "Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred by the Act or derived by reasonable implication from its provisions. That appears to me to be the principle recognized in * * *Ashbury Company* v. *Riche*, and in *Attorney-General* v. *Great Eastern Railway Company*, 5 App. Cas. 473."

In the same case Lord Fitzgerald says, at p. 363 : "And the powers of the company must be taken to be limited to those expressed in the statute, or to be properly implied as incidents to the purposes for which the corporation was created."

In *Attorney-General* v. *Great Eastern R. W. Co.*, above, it was decided (I copy from the headnote of the case) that the doctrine of *ultra vires* as explained in the *Ashbury R. W. Co.* v. *Riche*, is to be maintained, but is to be applied reasonably, so that whatever is fairly incidental to those things which the legislature has authorized by an Act of Parliament, ought not (unless expressly prohibited) to be held as *ultra vires;* and that in an Act of this kind granting special powers, what is not permitted is prohibited; and per Lord Watson: The test applied in the *Ashbury Case* to the powers of a joint stock company (limited), registered under the Companies' Act of 1862, applies with equal force to the case of a railway company incorporated by Act of Parliament. See also Pollock on Contracts, 5th ed., 121, 122, 123, 124.

Judgment.

Ferguson, J.

On this branch of the case, the defendants referred to the case of *The Grand Junction Canal Co.* v. *Petty*, 21 Q. B. D. 273, where it was held that land acquired by a company under an Act of Parliament for the purposes of an undertaking as specified in such Act, may be dedicated by them as a public highway, if the use by the public be not incompatible with the objects prescribed by the Act. The land had been acquired and was used by the company for the purposes of a towing-path, and it appeared that the use of it as a public footpath, was not inconsistent with its use as a towing-path by the company. The learned Judge said that this holding was in accordance with the decision in *The King* v. *Leake*, 5 B. & Ad. 469; and that they were not deciding anything inconsistent with the judgment in *Mulliner* v. *Midland R. W. Co.*, 11 Ch. D. 611, in which, as I understand the case, is was decided by Sir George Jessel, M. R., that a railway company having the usual power under their special Act, to take and use land for the purpose of their railway and works, cannot, whether for a valuable consideration or otherwise, alienate for any purpose except the purposes of the Act any portion of the land (the same not being what is known in England as "superfluous land," and not being land taken for extraordinary purposes within section 45 of the Railway Clauses' Act of 1845), *nor any easement over the same.*

The easement in question in that case was one different in kind from the one in the present case; but assuming the words of the charter here to have no larger signification in favour of aliening by the company than in that case (and so far as I can see they have not), I think the principle of the case applies here.

In giving judgment the learned Judge said, at p. 619: "It would be a very odd thing, even if there were no enactment to the contrary, to allow a corporation formed to hold land for a special purpose, and to take that land compulsorily from the owners only for that purpose, to devote the land to another purpose, or to alienate the land generally under any notion of the ordinary rights of an ordinary proprietor."

The learned Judge then refers to the Act and says that the effect of it is that the company could only dispose of the lands for the purposes of the Act.

Further on the learned Judge said: "Now, of course, a gratuitous disposition could never be for the purposes of the Act." And at p. 623, the learned Judge is reported to have said: "It appears to me quite impossible that the railway company can have a right either to sell, grant, or dispose of this land, or of any easement or right of way over it, except for the purposes of their Act, that is to say, with a view to the traffic of their railway."

A case also relied on by the defendant is *The Edgeware Highway Board* v. *The Harrow District Gas Co.*, L. R. 10 Q. B. 92. That was a case in which the plaintiffs had agreed with the defendants that if the plaintiffs would give the defendants a license to open a highway in their jurisdiction, the defendants should make good the surface of the road, and pay the plaintiffs one shilling per yard of the highway broken up. The defendants opened the road but did not restore it or pay the one shilling per yard. The plaintiffs sued. The defendants demurred to the declaration. The question raised seems to have been one of illegality so tainting the contract that the defendants who had had the benefit could decline to perform it on their part, a question, as I think, clearly different from the one in the case before me.

I may here say that after having examined a very considerable number of authorities, I have not seen one that does, on this branch of the case, support the defendants' contention, unless it can be shown that the act of alienation of this easement was an act within the powers expressly conferred by the statute or derived by reasonable implication from its provisions.

It was attempted to be shewn that the laying of this water-pipe and the passing of the water through it were for the benefit and advantage of the railway, or at least partly so, and that for this reason the resolutions and deed aforesaid were for the purpose of departing with an interest in the lands for the benefit and on account of the railway company; and therefore acts within the powers specifically given by the charter; but I think the effort entirely failed. What was shewn was that the railway company had for a time—a very considerable time—purchased water coming from these pipes for the purposes of their engines and for some less important purposes. This, I think, fell far short of shewing what was attempted or intended. There is nothing, I think, to shew that the water-works in question were constructed as or intended to be a part of the works of the railway company, or for the benefit of the company; and I can arrive at no conclusion on the subject but that the parting with, or attempting to convey or part with, an interest in the lands of the company for the purposes of this water pipe was an act not within the powers specified in the charter, and not one that can fairly be regarded as incidental to or consequential upon such powers or any of them, or the exercise of any of such powers, or of any power reasonably derived by implication from the provisions of the statute.

Evidence was also adduced showing in a large measure the history of this road from its beginning, or from an early period of its existence; and that in its earlier days it was not of the importance as a road that it is at the present time and has been for many years past; and that at the time the water-pipes were first laid, they were not

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placed under the track to such an extent as they are at present.

I do not, however, see that these things can make the difference contended for. The road was from the beginning, whatever works the company may or may not have placed upon their line of road, a railway under the authority of the charter; and the question is, whether the acts done and now complained of, or alleged to be beyond the powers of the company were authorized.

Although the easement has existed and been used for a long period without any accident or trouble being occasioned so far as disclosed, beyond that which arose when the plaintiffs desired to make changes in the grade of their track or road in some places, I cannot but be of the opinion that such an easement is really inconsistent or incompatible with the objects prescribed by the charter under which the railway of the plaintiffs has its existence.

I apprehend it may be assumed that all water-pipes sometimes require attention and repair. To repair this one would disturb the road and be an inconvenience to traffic, even if done under the supervision of the plaintiffs' officers.

Again, although owing to there being no very great "head," if this can fairly be assumed, there may not be great or any danger to be apprehended from what is commonly called a "burst" of the pipe. Yet should the pipe give way—as pipes in time do—and commence leaking, the effect might be the saturating with water and softening of a part or parts of the plaintiffs' roadbed, to the detriment and danger of public traffic. Besides the plaintiffs ought not to be prevented by the existence of such an easement as this one, from being free to make such changes in their roadbed or the grade or grades thereof as to them may seem fit.

I have given this part of the case the best consideration that I am able, and I can arrive at no conclusion but that the attempt made by the resolutions that are referred to, and by the deed of the plaintiffs' predecessors in title, to

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transfer the right to the easement in question had not the effect of transferring it. I think these were beyond the powers that at the time existed, and were for this reason void.

Then, it was contended that even if this were considered to be so, yet that the plaintiffs are so estopped by their conduct in respect of the matter that they cannot say that the defendants have not a title to the easement. On this subject reference is made to the giving of the notice of expropriation in 1883, and therein connecting this easement with another property as appurtenant thereto, the arbitration that took place, and the fact that the plaintiffs themselves (for they were, I think it was admitted, then the equitable owners of the road) laid the water pipes as they are whilst changing the grades of their road; and it was urged that if there was not a consideration to the plaintiffs' predecessors in title in the beginning, a consideration virtually passed at this time.

I humbly think that, although the powers of the company may at this time have been somewhat enlarged, yet that they were not at all sufficient to enable them to sell and convey this easement directly, and that all this is answered by saying that assuming that there was not power to transfer the property in the easement by a conveyance or transfer, in a direct manner, then the plaintiffs, or their predecessors in title, were powerless to do any act or make any omission that would have the effect of transferring it, or of estopping themselves from asserting that the defendants had not a title to this easement.

It is broadly stated, in Lindley's Law of Companies, at p. 163, that a corporate body cannot be estopped, by deed or otherwise, from shewing that it had no power to do that which it purports to have done. The authority referred to by the learned author is not a case such as the present one, and perhaps the proposition, as stated, is not verbally of direct application here, yet, as it appears to me, the principle must apply, for were it otherwise it would always be in the power of a corporation to adopt an indirect mode of transfer in cases where they had not the power to make the same transfer directly.

I am, for the reasons I have sought to give, of the opinion that the attempted transfer of this easement to those through whom the defendants claim title was *ultra vires* and void, and that the plaintiffs are not estopped, as contended by the defendants, from denying the defendants' alleged title and asserting title in themselves.

As to the title by prescription claimed by the defendants, I am of opinion the same as that stated in the judgment of the learned Judge of the County Court of the county of Lincoln, in the matter of arbitration between these plaintiffs and Mr. Z. B. Lewis, through whom the plaintiffs are professedly claiming; a judgment concurred in by the other arbitrators, one of whom is also a learned Judge. It is reported in 20 C. L. J. N. S. p. 241. I have examined with care the authorities on which that judgment is based, and I think the conclusion arrived at is well supported by the decisions. I do not see how it is possible to arrive at any other or different conclusion so long as it is assumed that the easement, or supposed easement, could not have been validly and properly granted by the plaintiffs, or their predecessors in title. That conclusion was, that no right or title could be acquired by user and enjoyment for a period less than *forty years*, and these forty years from the commencement of the user and enjoyment had not expired before this action.

There are other authorities as well as those referred to in that judgment which support the conclusion there stated, and I might write at some length here upon the subject, but I cannot but consider it wholly unnecessary so to do.

The defendants relied upon the cases *Norton* v. *The London and North-Western R. W. Co.*, 13 Ch. D. 268; *Bobbett* v. *The South Eastern R. W. Co.*, 9 Q. B. D. 424; and *The Erie and Niagara R. W. Co.* v. *Rosseau*, 17 A. R. 483.

These cases are, however, I think, clearly distinguishable. They are cases decided under the provisions of the Statute of Limitations: "No person shall make any entry or distress, or bring any action to recover any land or rent," etc., etc., and not under the Act known as the Prescription Act, which was originally passed as an Act for shortening the times or periods of prescription in certain cases: see Gale on Easements, 5th ed., p. 165 *et seq.*, and chapter 111, R. S. O. sec. 35, under the latter of which this branch of the present case falls.

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Ferguson, J.

There are as well other clear differences between those cases and the present case, but it seems to me not necessary to pursue the matter further here.

I am of the opinion that the plaintiffs are entitled to succeed in the action. They ask that it may be declared that the resolutions referred to in the pleadings and the deed of the 11th February, 1860, also mentioned in the pleadings, were *ultra vires* and void, and that no title passed thereunder.

To this declaration, I think the plaintiffs are entitled, and it may be drawn in apt words and as nearly as may be in the words of the prayer therefor. The plaintiffs also ask that it be declared that they are entitled to hold, use, and enjoy the lands free and clear of any claim by the defendants, etc. To this, I think, the plaintiffs are entitled, and the declaration may be drawn with reference to the words of the prayer in this respect, and as nearly as may be in such words, if they are thought apt words.

As to the third clause of the prayer, the plaintiffs are entitled to the injunction asked; but they further ask that the defendants may be ordered to remove the water-pipes from their (the plaintiffs') railway track, and to restore the same track at the defendants' own expense.

I, at least, hesitate as to this last; I do not think that, in the circumstances, I am bound to grant this measure of relief, and looking at the conduct from the beginning of the parties from time to time concerned, I do not think it would be equitable or proper to grant it. I have not evidence on the subject, but, I think I may assume that the water pipes themselves are not of sufficient value to

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equal the cost of removing them and restoring the railway track; but if the defendants choose to remove them and restore the track (the restoration of the track being to the plaintiffs' satisfaction, or done under the supervision of an officer or engineer of the plaintiffs), they, the defendants, should be at liberty so to do; and they should, in such case, have a reasonable opportunity afforded them of taking the pipes away.

If the defendants do not within a reasonable time (say six months or such further time as may upon application be granted) elect to remove the pipes, restore the track, etc., then the plaintiffs should be at liberty to remove them, which, when taken up, should remain the property of the defendants, and they should have a reasonable opportunity afforded them by the plaintiffs to remove them from the line of the railway.

If neither party elect or choose, as aforesaid, to remove the pipes, and it is thought that, there being no water passing through them, their being under the railway will not occasion any danger or mischief, or any apprehension of danger, they may remain where they are.

There may be portions of the pipes which either party may, as aforesaid, choose to remove without undertaking to remove the whole, and, if so, the matter should be the subject of an application or of applications from time to time.

As to the fourth clause in the prayer of the plaintiffs: I am of the opinion that no sum whatever should be allowed the plaintiffs for the use and occupation of the track in the past by the water pipes.

Costs of the action are asked by the plaintiffs, but I do not think it is a case for awarding costs against the defendants. If the plaintiffs have been put to costs and expenses, as no doubt they have, they clearly have their own conduct and that of their predecessors in title to blame for it. The case I consider very peculiar in this respect.

The judgment will be without costs.

Judgment.

Ferguson, J.

I cannot say that I entertain any grave doubt as to my conclusion being in law the correct one, yet the subject involved appears to me a very serious one indeed to the defendants, and I think that if the defendants desire it, the proceedings should be stayed to enable them to obtain the opinion of an appellate Court.

G. A. B.

[CHANCERY DIVISION.]

IN RE THE SUN LITHOGRAPHING COMPANY.
FARQUHAR'S CLAIM.

Company—Winding-up proceedings—Reference—Master-in-Ordinary—Jurisdiction—Claim that a conveyance is a fraudulent preference.

In the course of a reference made to the Master-in-Ordinary in winding-up proceedings under R. S. C. c. 129, s. 77, sub-s. 2, as amended by 52 Vict. c. 32, s. 20 (D.), a claim was made for rent, and the liquidator contended that the conveyance under which the claimant assumed to be owner of the demised premises was a fraudulent preference, and further that the alleged lease was never executed:—

Held, that the Master had no jurisdiction to adjudicate upon this contention; and the liquidator should be left to proceed under R. S. C. c. 129, s. 31, by way of action.

Statement.

THIS was an appeal from an interim certificate of the Master-in-Ordinary made in the course of the winding-up proceedings, under R. S. C. c. 129, under order of October 29th, 1891, in connection with the Sun Lithographing Company, and raised the question of the Master's jurisdiction to adjudicate in his office as to the validity of a certain lease under which rent was claimed as due from the company.

So far as is necessary to this report, the facts are set out in the judgment.

The appeal was argued upon February 25th and 26th, 1892, before FERGUSON, J.

Argument.

Arnoldi, Q. C., for C. Farquhar, the appellant. But for R. S. C. c. 129, s. 71, the liquidator would stand in the position of an assignee for the benefit of creditors. My client is not before the Master for any such purpose as that of deciding the questions which arise here. There cannot be a proper trial before the Master. He should have directed an action to be brought: R. S. C. c. 129, secs. 5, 7, 20, 31, 67, 70, 77; *Re the Essex Land and Timber Co.*, 21 O. R. 367; *Munroe* v. *Kerry*, 1 B. P. C. 67.

Kilmer for the liquidator, contra. The Master's jurisdiction arises incidentally in the proof of the claim for rent: *Re Iron Clay Brick Manufacturing Co., Turner's Case*, 19 O. R. 113; *West* v. *Sinclair*, 12 C. L. T. 44; *Re Bolt and Iron Co., Livingstone's Case*, 14 O. R. 211. *Merchants' Bank* v. *Monteith*, 10 Pr. 458, is by fair analogy in point to shew that under the ordinary practice of the Court there would be the jurisdiction. The powers are at least as great here. If Charles Farquhar were not a creditor, but a stranger to the proceedings, he could not have been brought into the Master's office. But having come in, his proof can be questioned at the instance of another creditor, and to the extent of trying any question such as the present one, for the purpose of determining the real rights: *In re Mercantile Trading Co., Stringer's Case*, L. R. 4 Ch. 475, 485, 493; R. S. C. c. 129, secs. 67, 80, 83, 86, 90; 52 Vict. c. 32, sec. 20 (D.)

Arnoldi, in reply. Buckley on Joint Stock Companies, 6th ed. p. 613, shews that the powers of delegation possessed by the Court in England are wider than with us. The reference here delegates only the powers conferred by the Act upon the Court. If the delegation had been of all the powers of the Court the case might be different: *Re Young*, 14 Pr. 303. The Court can only delegate the powers they derive from the provisions of the Act. The Master had no jurisdiction to deal with this matter: *Rowland* v. *Burwell*, 12 Pr. 607; *McDougall* v. *Lindsay Paper Mill Co.*, 20 L. J. N. S. 133; *Wiley* v. *Ledyard*, 20 L. J. N. S. 142; *Bickford* v. *Grand Junction R. W. Co.*, 1 S. C.

R., at p. 725. The scheme under the English Act is wholly different from that under our Act. We should not be deprived of the rights which we would have in an action, as to remedy over, bringing in third parties, etc. **Argument.**

March 12th, 1892. **Ferguson, J.**:—

The order for the winding up of the company was made on the 28th day of October, 1891. Presumably afterwards, but on the same day, the order of reference to the Master-in-Ordinary was made. Clause 5 of this latter order is in these words: "And this Court doth further order that for the purpose of dealing with the matters hereinbefore mentioned, and in relation to the winding up of the said The Sun Lithographing Company of Ontario (limited) the said Master do (subject to appeal) have as full and ample power as under the said statute and amending Acts is conferred upon a Judge of the High Court." During the proceedings before the learned Master, Charles Farquhar brought in a claim against the company for a large sum, one item of which, the only one giving rise to the question here, is thus stated:

"7. The company is further indebted to me in the sum of $3,400 for rent of certain premises lately occupied by them in carrying on their business under and by virtue of a certain lease bearing date the 16th day of April, 1891, made by me to the said company."

In the following paragraph of the claim the claimant states that he holds no security for the payment of this rent, and some other things in regard to the rights of distress, and his not waiving or desiring to waive the same to any extent. This claim seems to be verified by the affidavit of Mr. Farquhar.

In particulars of the claim, this rent is referred to, and it is stated that the premises demised are No. 99½ King street west, in the city of Toronto, let to the company for the term of five years, to be computed from the 16th day of April, 1891, at the sum of $3,400 for the first year of

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the term, * * the rent to be payable in even portions half-yearly in advance; the first payment to be made on the 16th April, 1891. It is further stated that the company, the lessees, covenanted in the lease to pay the rent reserved, giving many particulars of the covenant. The company entered upon the premises pursuant to the lease, and carried on business there. It was stated without contradiction before me, that no part of the rent was paid by them or on their behalf, and I assume this to have been one of the facts before the learned Master.

It appears by an order confirming a sale made by the liquidator, bearing date the 5th day of November, 1891, that all the interests of the company in this lease (if any) were sold to, and were by that order, together with other property, vested in, the purchaser. The order, however, on each occasion of mentioning this lease, or the rent arising thereunder, employs the words "if any," apparently indicating that there was or might be some question as to these.

The indenture of lease is produced before me, and I assume that it was before the learned Master during the discussions that took place before him.

The liquidator gave notice of his intention to dispute or contest this claim of Charles Farquhar on the grounds, (1) That the claimant (Farquhar) was not at the time of giving this notice, and never had been the owner of the premises for which the rent was claimed; (2) That the conveyance under which Farquhar, the claimant, claimed to be the owner of the equity of redemption in the premises was intended merely as a security to secure the repayments of certain moneys advanced by E. and C. Farquhar to the company, and that said conveyance, as such security, was and is fraudulent and void as against the creditors of the company. This notice also states that the lease was never executed, and that there was no rent due. Such appear to have been the statements of claim and contestation before the learned Master. As appears by a report of the proceedings which is before me there was much discussion

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before the Master as to whether or not he had jurisdiction or power to entertain and dispose of the questions or issues as to whether the conveyance to Charles Farquhar was fraudulent and void, for the reasons alleged, and as to whether or not in the circumstances this indenture of lease was good and valid. The learned Master was also requested not to proceed with his investigation and adjudication upon these matters, but to leave the issues or questions raised to be determined in an action where appropriate pleadings and proceedings could be had.

His jurisdiction having been objected to and this request made, the learned Master on the 23rd day of January last, on the request of counsel granted his certificate, which is as follows:

> "Upon the reference herein the claim of Charles Farquhar as a creditor of the above named company coming on to be heard before me on the 14th instant, and the liquidator having filed certain objections to so much of the claim as respects rent claimed to be due to the said Charles Farquhar for certain premises in the possession of the said company, the counsel for Farquhar thereupon objected to my jurisdiction to try the questions raised with respect to the said claim for rent, and contended that the liquidator should bring an action in respect of the same under the seventy-third section of the Winding-up Act, or that the said questions should be tried in an action; wherefore after hearing counsel for the parties I ruled that under the order of reference herein, and the said Act, I had jurisdiction to try and dispose of the said claim and of the objections thereto, and I declined to direct that an action should be brought by the liquidator."

The learned Master added to this some observations to the effect that no evidence had been given before him of any application having been made to the liquidator to bring such an action, or of any previous notice to the creditors, contributories, shareholders or members as required by the 31st section of the Act being given, and that for this reason he had no jurisdiction to give any directions in regard to an action.

The appeal is from this ruling and certificate of the learned Master. I have stated the facts at greater length than perhaps I otherwise should, for the reason that it appears by the report of the proceedings before referred to,

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that it was contended that a certificate in some respects different from the one granted should have been granted.

The questions argued upon this appeal were whether or not the learned Master has upon this reference jurisdiction to entertain and adjudicate upon a case to set aside a conveyance as fraudulent and void as against creditors under the provisions of the Statute of Elizabeth or our own statutes against fraudulent preference, etc., etc., or both statutes, and to determine as to the validity or not of the lease aforesaid in the circumstances appearing, and as to whether or not the Master should have stayed the proceedings in his office as to the questions raised as aforesaid, leaving the liquidator at liberty to apply for the necessary approval, and bring an action to try the questions. Other questions would arise as to the force of the covenant to pay the rent, estoppel, etc. The contention was, however, as I have stated above. It was not contended that there was not jurisdiction to ascertain whether or not rent was due and owing under the lease if the lease was assumed to be good and valid. It will be observed that the power professedly given by the order of reference is the power that by the statute and amending Acts is conferred upon a Judge of the High Court, which is in effect following the provisions of section 20 of cap. 32, of 52 Victoriæ, which repealed subs. 2 of sec. 77 of the Winding up Act, and substituted a new sub-section for it.

It was contended that the powers specifically given (by the Act and amendments) to the Court are for the purposes of "winding up" additional to the other powers of the Court, and that all these powers are conferred by the Act for the purposes of proceedings in "winding up." Sections 90 and 86, were relied on to support this proposition. It is plain, I think, that section 86 has reference to amendments only. Section 90 says that the powers by the Act conferred on the Court are in addition to and not in restriction of any other powers subsisting either at law or in equity of doing several specified things, (1) instituting proceedings against a contributory or the estate of a contributory,

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(2) or against any debtor of the company for the securing of any call or other sum due from such contributory or debtor, or his estate. Counsel also referred to section 80 in support of his contention. This contention, I think, failed. The purpose of this contention seemed to me to be to bring the present case under the authority of the case *Merchants' Bank* v. *Monteith*, 10 Pr. R., 458, which was an administration action, and, in this, as well as other respects, different from the present case, see L. R. 7 Ch. 649.

Many cases were referred to, *Re Essex Land and Timber Co.*, 21 O. R. 367; *Re Iron Clay Brick Manufacturing Co., Turner's Case*, 19 O. R. 113; *Re Bolt and Iron Co., Livingstone's Case*, 14 O. R. 211; *In re Mercantile Trading Co., Stringer's Case*, L. R. 4 Ch. 475, 485; *Re Young*, 14 Pr. 303-5; *Rowland* v. *Burwell*, 12 Pr. 607, and the cases referred to there by the learned Chief Justice. The cases *Munroe* v. *Kerry*, 1 B. P. C. 67 and *Doe Johnston* v. *Drayton*, were also referred to. These last have reference to the legal position of the lessor and lessee rather than the questions that have been before mentioned as being the particular subjects of contention and argument on the appeal. I have perused the cases that were cited and others. None of these is a direct authority for saying or deciding that the matters in question are matters in which the learned Master has, in the form in which they are before him, power to adjudicate, and many of them point, as I understand them, in the opposite direction.

Section 67 of the Act provides a certain mode of contestation, whereby any creditor, contributory, shareholder, or member may object to any claim filed with the liquidator, or to any dividend declared, and have the matter tried and adjudicated upon, but it seems clear to me that these provisions are not at all applicable, or intended to apply to a case such as the present one.

Here, the attempt is to sweep away as fraudulent and void (as against creditors at all events) conveyances which are the foundation of the claimant's claim to a very large

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sum of money, and the attack is made by the liquidator, and not by any of the powers mentioned or referred to in section 67.

One asks, What reason can there be for saying that it is not the appropriate and proper course for the liquidator to proceed under section 31 of the Act? Upon disclosing the notices and obtaining the approval there mentioned, he will be able to bring the action or more than one action, if that be considered necessary, in which the matters in dispute can be tried and adjudicated upon in the usual manner, and in which the parties concerned will have all the rights and advantages that the ordinary litigant has.

It seems to me that there is no answer to this question, and I cannot but think that the matters in dispute here present a case that ought to be tried in an action and not in the Master's office.

The question as to whether or not the Master has the jurisdiction contended for may be a difficult one to decide with entire certainty. I may say that my view is that he has not such jurisdiction. I do not, however, see that it is absolutely necessary that I should decide definitely upon this point, it being, as I think, so clear that, whether the learned Master has or has not such jurisdiction, the matters in contest here, and above referred to, are proper subjects for an action and should be adjudicated upon in an action rather than in the Master's office.

With great respect for the opinions of the learned Master, especially in regard to matters in which he has had a long, and, no doubt, varied experience, I cannot avoid being of the opinion that he is in error in this case in not declining to proceed to an adjudication upon the questions that are the subject of this appeal. I think he should have so declined and left the liquidator to obtain the necessary approval and bring his action, and, if it be thought necessary to support this conclusion, I would add my view that there was not the jurisdiction residing in the Master.

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Ferguson, J.

The applicant asks an order staying the proceedings before the Master in respect of the contestation so far as it involves the questions above spoken of as in dispute. It is most probable that no such order will be necessary, and that the liquidator and the learned Master will now adopt the course that is here indicated.

The judgment on this appeal will be in favour of the appellant, Farquhar. I think, however, that the matter of the costs of the appeal should not be decided till after the merits of the subject are known, when application may be made to me. If the questions are not further litigated, the allowance of the appeal will be with costs.

A. H. F. L.

[CHANCERY DIVISION.]

HASSON V. WOOD.

Negligence—Accident—Liability of hotel-keeper to guest—Falling down trapdoor.

The plaintiff went into the defendant's hotel, as a customer where he had been several times before. In passing through the building to go to the urinal he fell through an open trapdoor, which had been left unguarded, and received injuries:—

Held, that he was entitled to damages from the defendant.

Statement

THIS was an action brought by John Henry Hasson, against Alexander Wood, an hotel-keeper in Toronto, claiming damages by way of compensation for injuries alleged to have been sustained by him by reason of his having fallen into a trapdoor upon the premises. It appeared that he entered the hotel to get a glass of lager beer and that passing along a passage way to get to the urinal, he fell through the trapdoor, which, as he alleged, was negligently left open and unguarded by the defendant.

The action was tried at Toronto, on January 22nd, 1892, before FALCONBRIDGE, J., and a jury.

The jury found a verdict for the plaintiff, with $300 damages, and judgment was entered accordingly.

A motion was now made before the Divisional Court on behalf of the defendant for a nonsuit, or in the alternative, to set aside the verdict, or for a new trial.

The motion was argued before BOYD, C., and ROBERTSON and MEREDITH, JJ., on February 25th, 1892.

J. G. Holmes, for the defendant. The evidence is strongly against the right to recover; the plaintiff is not corroborated as to the accident. The plaintiff knew of the trapdoor, and knew that it was in a dangerous place, which distinguishes this from the case of *Denny* v. *The Montreal Telegraph Co.*, 42 U. C. R. 577. I refer, also, to

Beven on Negligence, pp. 1104-5; *Mason* v. *Langford*, 4 Times L. R. 407; *Allen* v. *North Metropolitan Tramways Co., ib.*, 561; *Walker* v. *Midland R. W. Co.*, 55 L. T. N. S. 489; *Wilkinson* v. *Fairrie*, 1 H. & C. 633; *Toomey* v. *London, Brighton and South Coast R. W. Co.*, 3 C. B. N. S. 146; Smith on Negligence, (Black's ed.,) pp. 157, 158-9; *Grand Trunk R. W. Co.* v. *Boulanger*, Cass S. C. Dig. p. 442; *Hutton* v. *The Corporation of the Town of Windsor*, 34 U. C. R. 487; *Nicholls* v. *The Great Western R. W. Co.*, 27 U. C. R. 382; *Miller* v. *Reid*, 10 O. R. 419; *The Town of Portland* v. *Griffiths*, 11 S. C. R. 333; *Griffiths* v. *East and West India Dock Co.*, 5 T. L. R. 371. Questions should have been submitted to the jury: *Collis* v. *Selden*, L. R. 3 C. P. 495; *Clark* v. *City of Lowell*, 1 Allen, 80; *Bridges* v. *North London R. W. Co.*, L. R. 6 Q. B. 377; *Davey* v. *The London and South Western R. W. Co.*, 12 Q. B. D. 70. Argument.

Bigelow, Q. C., for the plaintiff, cited *Denny* v. *The Montreal Telegraph Co.*, 3 A. R. 628; *Pickard* v. *Sears*, 6 A. & E. 476.

March 29th, 1892. BOYD, C.:—

More is to be said in support of the plaintiff's right to recover, than was before the jury under the Judge's charge. Although the plaintiff had been at the hotel (say) a hundred times, his attention was not called to this trapdoor more than once before the accident: viz., on May 31st, a Sunday, when he saw it open.

But the defendant tells us that the opening for the trapdoor was first made there in March, 1891. It is not shewn that the plaintiff knew that the beer was brought into the premises in that way, and on the Sunday he saw it, the defendant was working and cleaning the cellar. Sunday was a day when it might be safely opened, for there was no traffic then in the hotel or saloon; but on week days when business was brisk that was the usual way to the urinal, and a visitor was entitled to expect that it would be safe and free from pitfalls and snares.

Judgment.

Boyd, C.

But there was absolutely no protection supplied by the defendant when it was open on the day of the accident. No safeguard was put round it and no one was detailed to watch and warn persons passing through the door leading from the bar to this hall. The person said to be there came from the brewery and had no instructions or duty with respect to the frequenters of the hotel. After the accident, the plaintiff says he told Wood, the defendant, and that thereupon Wood locked this door and pocketed the key, saying that nobody would fall down there again. This is very significant; it shews he recognized the danger of the place, and only took steps for its protection after the accident, and he does not contradict what is thus said by the plaintiff. The case went to the jury with a most favourable charge for the defence; the questions of the reality of the accident was entirely for the jury, and they have credited the plaintiff, as against the defendant and his witnesses.

The plaintiff being a customer of the defendant, came to the defendant's place of business for the demand and supply of that which was for the mutual advantage of the parties, and so is to be treated not as a mere licensee, but as being on the premises by the invitation of the proprietors. That invitation is different in its legal consequences as to safety while on the premises, from the merely hospitable invitation which arises between host and guest. That is the point of distinction between this case and *Collis* v. *Selden*, L. R. 3 C. P. 495, which was decided on demurrer, and where for all that appeared the plaintiff may have been a guest and not a customer. Bovill, C. J., says, at p. 497, "I find nothing in the declaration to shew that any invitation was held out by the defendant to the plaintiff to place himself where he did." And Byles, J., at p. 498: "The plaintiff may have been a guest. That alone would not give him a cause of action." A greater degree of diligence is called for in the case of a customer than in that of a mere guest. There is also in this case the element of concealed or unexpected danger by way of a "trap," which is absent in the *Collis* v. *Selden* case.

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Boyd, C.

Upon the law applicable to these facts, I may note *Corby* v. *Hill*, 4 C. B. N. S. 556; *Bolch* v. *Smith*, 7 H. & N. 736; *Indermaur* v. *Dames*, L. R. 1 C. P. 274, 2 C. P. 311; *White* v. *France*, 2 C. P. D. 308; *Chapman* v. *Rothwell*, E. B. & E. 168, in addition to the cited cases.

After a consideration of law and evidence, I see no satisfactory ground on which to change the result. The judgment should be affirmed with costs.

Robertson and **Meredith**, JJ., concurred.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

McKELVIN V. THE CITY OF LONDON ET AL.

Damages—Remoteness—Action for negligence—Obstruction in highway—Remedy over—R. S. O. ch. 184, sec. 531, sub-sec. 4.

The plaintiff was driving a horse and sleigh along a highway belonging to a city corporation, when the runner of the sleigh came in contact with a large boulder, whereby both horse and sleigh were overturned. In endeavouring to raise his horse the plaintiff sustained a bodily injury, on account of which he sued the corporation for damages, alleging that his injury was due to their negligence:—

***Held*, that the damages were not too remote:—**

***Page* v. *Bucksport*, 64 Maine 51; and *Stickney* v. *Maidstone*, 30 Vermont 738, applied and followed:—**

***Held*, also, that the person who placed the boulder on the highway, and who had been added as a defendant under section 531 of the Municipal Act, R. S. O. ch. 184, was liable over to the corporation under sub-section 4.**

***Vespra* v. *Cook*, 26 C. P. 185, distinguished.**

***Balzer* v. *Gosfield*, 17 O. R. 700, followed.**

Statement. THIS action was tried before MACMAHON, J., and a jury, at the London Winter Assizes, 1892.

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

Hellmuth and *W. Thomas*, for the plaintiff.

W. R. Meredith, Q. C., and *T. G. Meredith*, for the defendants the city of London.

Gibbons, Q. C., for the defendant Colwell.

January 19, 1892. MACMAHON, J.:—

The action is to recover damages from the corporation of London for an injury to the plaintiff caused by the negligence of the defendants' corporation in permitting a large boulder to remain in the highway so rendering it dangerous for travel, especially when covered or partly covered by snow.

On motion by the defendants the city of London, Colwell was made a party defendant, under section 531 of the Municipal Act.

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MacMahon, J.

The injury to the plaintiff occurred while he was driving a horse and sleigh on the highway at the corner of Palace street and Princess avenue in London, the runner of his sleigh coming in contact with the said boulder—which had been placed there by the defendant Colwell,—the plaintiff's horse and sleigh being overturned and the plaintiff thrown from his sleigh, and in his endeavour to raise his horse, then lying on its side, he sustained a fracture of the right leg.

At the conclusion of the case I submitted the following questions to the jury:—

1st. Did the stone in question form an obstruction to the ordinary travel in the highway? Answer:—It did.

2nd. If you find the stone did form such obstruction, had the city reasonable notice of such obstruction being in existence? Answer:—Yes.

3rd. Did McKelvin, by the want of reasonable care and skill, contribute to the accident, so that but for the want of such reasonable care the sleigh would not have been upset? Answer:—No.

4th. Was McKelvin guilty of negligence in the manner in which he endeavoured to raise the horse? Answer:—No.

5th. Did the defendant Colwell place the stone in the position it was in the street where the accident took place? Answer:—He did.

6th. What damages do you say the plaintiff is entitled to? Answer:—$250.

The principal question raised at the trial was as to the damages being too remote, and I at that time entertained an opinion that the plaintiff was not entitled to recover by reason of such remoteness. The view I then had was founded on *Sharp* v. *Powell*, L. R. 7 C. P. 253, and some remarks in the judgment of Pollock, C. B., in *Greenland* v. *Chaplin*, 5 Ex. at p. 248.

A review of the authorities, however, has convinced me that I was in error in entertaining that opinion. A case on all fours with the one under consideration is *Page* v.

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MacMahon, J.

Bucksport, 64 Maine 51. The plaintiff was driving over a defective bridge within the defendant corporation, when, without his fault, the horse broke through the bridge and fell. The plaintiff, in trying to extricate the horse, received a blow from the horse's head and was injured by it. He was at the time exercising ordinary care. It was held in that case that the defect in the way was the proximate cause of the injury. Another parallel case is that of *Stickney* v. *Maidstone*, 30 Vermont 738, where the plaintiff was driving in the town of Maidstone over a bridge which the town was obliged by law to keep in repair. The horse driven by him, owing to a defect in the bridge, broke through and became so fastened therein that he could not extricate himself without assistance. While the plaintiff was rendering such assistance he was injured by the horse in his efforts to extricate himself. It was there held that the town was liable for such injury, and the defect in the bridge was held to be the proximate cause of the injury to the plaintiff.

In this case the jury have found that the plaintiff was not guilty of negligence in the manner in which he endeavoured to raise his horse. I also refer on this point to *Osborne* v. *London and North-Western R. W. Co.*, 21 Q. B. D. 220; Beven on Negligence, pp. 90 and 92; and, Shearman & Redfield on Negligence, sec. 31 *et seq.*

It was urged on behalf of the defendant Colwell that, although the city of London might be liable to the plaintiff by reason of their having allowed the street to be obstructed and so causing injury to the plaintiff, the defendant Colwell was not liable over to the city, although he had, as found by the jury, placed the obstruction in the highway which was the cause of the injury to the plaintiff, and *Vespra* v. *Cook*, 26 C. P. 182, was cited in support of that contention; it also being contended that the recent amendment embodied in sub-section 4 of section 531 of the Municipal Act did not effect any change in the law.

That contention is not tenable. The 4th sub-section provides, "In case an action is brought against a municipal

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corporation to recover damages sustained by reason of any obstruction * * in a public highway * * made, left, or maintained by another corporation or by any person other than a servant or agent of the municipal corporation, the last mentioned corporation shall have a remedy over against the other corporation or person for and may enforce payment accordingly of the damages and costs, if any, which the plaintiff in the action may recover against the municipal corporation; provided nevertheless that the municipal corporation shall only be entitled to the said remedy over if the other corporation or person shall be or be made a party to the action and if it shall be established in the action as against the * * person that the damages were sustained by reason of an obstruction * * placed, made, left, or maintained by the other corporation or person," etc.

It requires no argument to shew what was the design and intention of the legislature in making the amendment; it was to make the person who placed an obstruction in the highway and thus caused an accident—for which the municipality in which the streets were vested was primarily liable—liable over to such municipality.

In *Vespra* v. *Cook*, 26 C. P. at p. 185, HAGARTY, C. J., says: "American authorities are not very safe guides on the point, as many of their Road Acts specially give a remedy over against a party causing an obstruction, etc. The case of *Chicago City* v. *Robbins*, 4 Wall., U. S. S. C. R., 657, fully shews this."

The amendment to our Act by the 4th sub-section was designed to accomplish that which was accomplished by the State of Illinois in dealing with the law respecting municipal corporations in that State.

The question as to the right of liability over was fully considered in the case of *Balzer* v. *Gosfield*, 17 O. R. 700.

Upon the findings of the jury, I direct that judgment be entered after the second day of the sittings of the Divisional Court for the plaintiff against the defendants the corporation of the city of London for $250 with full costs

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MacMahon, J.

of suit; and I order that the corporation of London do have judgment in their favour, after the entry of such judgment against them by the plaintiff, to recover over from the defendant Colwell the amount of the judgment to be entered for the plaintiff against the defendants the corporation of the city of London, including the plaintiff's costs taxed therein, and the costs of the defendant corporation occasioned by defending the said action of the plaintiff.

Both defendants moved to set aside the judgment so entered, at the Hilary Sittings, 1892, of the Divisional Court.

The grounds upon which the defendants the city of London moved were as follows:—That the judgment was against law and evidence and the weight of evidence; that the injuries complained of were not caused by the action of the defendants, but by a second accident to the plaintiff while he was assisting his horse to rise, after the happening of the accident in question; that the damages were too remote; that the accident complained of was not the immediate and proximate cause of the damage; and on other grounds disclosed in the pleadings and evidence.

The defendant Colwell moved on the additional ground, as to the recovery over by the defendants the city of London against him, that the stone was placed on the street by him with the leave and license of the other defendants.

The motion was argued *coram* **Armour**, C. J., and **Falconbridge**, J., on the 8th February, 1892.

W. R. Meredith, Q. C., for the defendants the city of London.

Gibbons, Q. C., for the defendant Colwell.

Hellmuth, for the plaintiff.

The following authorities were referred to:—

Beven on Negligence (1889) pp. 75, 90-92, 93; Shearman & Redfield, 4th ed., vol. 1, sec. 31 *et seq.*; *Smith* v. *London and South Western R. W. Co.*, L. R. 6 C. P. 14, 22;

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The Parana, 2 P. D. 118; R. S. O. ch. 184, sec. 531, sub-sec. 4; *Foreman* v. *Canterbury*, L. R. 6 Q. B. 214; *Card* v. *Ellsworth*, 20 Am. Reports 722; *Harris* v. *Mobbs*, 3 Ex. D. 268; *Wilkins* v. *Day*, 12 Q. B. D. 110; *Metropolitan R. W. Co.* v. *Jackson*, 3 App. Cas. 193; *Hobbs* v. *London and South Western R. W. Co.*, L. R. 10 Q. B. 111; *McMahon* v. *Field*, 7 Q. B. D. 591; *Lilley* v. *Doubleday*, 7 Q. B. D. 510; *Bliss* v. *Boeckh*, 8 O. R. 451; *Gordon* v. *Belleville*, 15 O. R. 26; *Page* v. *Bucksport*, 64 Maine 51; *Stickney* v. *Maidstone*, 30 Vermont 738; *Liming* v. *Illinois Central R. Co.*, 47 N. W. Reporter 66; *Woods* v. *Caledonian R. W. Co.*, 23 Sc. L. Reporter 798; *Connell* v. *Town of Prescott* (not reported—decision of Chancery Divisional Court); *Clayards* v. *Dethick*, 12 Q. B. 439; *Lee* v. *Nixey*, 63 L. T. 285; *Balzer* v. *Gosfield*, 17 O. R. 700.

February 27, 1892. The judgment of the Court was delivered by

FALCONBRIDGE, J.:—

The evidence warrants the findings of the jury on the main question of negligence: *Foreman* v. *Canterbury*, L. R. 6 Q. B. 214; *Wilkins* v. *Day*, 12 Q. B. D. 110; and the only question between the plaintiff and the defendants is as to the alleged remoteness of the damage.

The defendants admit that (assuming the negligence of the defendants) if an injury had happened to the horse by reason of his own unaided efforts to rise, their negligence would have been the proximate cause of the injury, and they would have been liable.

The reasoning in the judgment in *Page* v. *Bucksport*, 64 Maine 51, is that it was the duty of the plaintiff to use care on his part to render the injury for which defendants were liable as light as possible. The findings of the jury here are that the plaintiff was not guilty of contributory negligence as regards the accident, and that he was not guilty of negligence in the way in which he endeavoured to raise the horse.

Judgment.

Falconbridge, J.

The opinions of the Courts in *Page* v. *Bucksport*, and in a similar case (*Stickney* v. *Maidstone*, 30 Vermont 738) are exactly in point, and I am inclined to apply them to the present case unless there is clear English or Canadian authority the other way.

In *Harris* v. *Mobbs*, 3 Ex. D. 268, the plaintiff's testator was driving his mare in a cart along a road. She was a kicker, but he was unaware of her vice. Passing the van negligently left on the side of the highway by the defendant, the mare shied, kicked, and galloped, kicking for 140 yards, then got her leg over the shaft, fell, and kicked her driver as he rolled out of the cart. He afterwards died from the kick so received. It was held that though the immediate cause of the accident was the kicking of the mare, still the unauthorized and dangerous appearance of the van and plough on the side of the highway was within the meaning of the law the proximate cause of the accident.

In *Hobbs* v. *London and South Western R. W. Co.*, L. R. 10 Q. B. 111, the plaintiffs were held entitled to damages for the inconvenience suffered by having to walk home, but not entitled to damages for the female plaintiff's illness occasioned by her taking cold. This case was commented on by Bramwell, L. J., and Brett, L. J., in *McMahon* v. *Field*, 7 Q. B. D. 591, in the Court of Appeal, and while *Hobbs' Case* was not expressly overruled, a very fine distinction was drawn between the facts of the two cases.

The *Hobbs' Case* was not followed by the Queen's Bench Division in *Lilley* v. *Doubleday*, 7 Q. B. D. 510.

Both the cases in 7 Q. B. D. arising out of contract are stronger authorities in favour of the present plaintiff, as any question of remoteness of damages will be construed more favourably to defendant in contract than in tort.

In *Sharp* v. *Powell*, L. R. 7 C. P. 253, a grating twenty-five yards from the place where defendant's servant washed a van became obstructed by ice, there being no evidence that defendant knew of its being obstructed. The water flooded over a portion of the causeway and froze. Plaintiff's horse slipped upon the ice and broke its leg: *Held*,

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that this was a consequence too remote to be attributed to the wrongful act of the defendant. Grove, J., says, at p. 260, "If the water had been allowed to accumulate round the spot where the washing of the van took place, and had there frozen obviously within the sight of the defendant, and the plaintiff's horse had fallen there, I should have been inclined to think that the defendant would have been responsible."

The question of remoteness of damage is a question of fact on the circumstances of each particular case, and we think the damage in the case just cited was more remote than in the one we are considering.

Much consideration has been given in the Courts of the United States to the subject of "intervening cause," and it has been held there that the intervening cause must be culpable, and if the intervening person's act is innocent the intervention is no defence: *Emporia* v. *Schmidling*, 33 Kans. 485; *Pastene* v. *Adams*, 49 Cal. 87. Nor is it if the intervener is a child of tender years and immature intellect, or a person of weak mind: *Binford* v. *Johnston*, 82 Ind. 426; or not a free agent—going back to the old case *Scott* v. *Shepherd*, 2 W. Bl. 893.

The intervening cause here, if there was one, was the assistance which the plaintiff was endeavouring to give to his horse, as to which he has been found guilty of no negligence, and which action of his is attributable to the duty which he owed to minimize the damages for which defendants might be liable, or to a desire to proceed with his journey—both being proper and laudable motives.

We think the judgment as entered should stand.

The case of *Balzer* v. *Gosfield*, 17 O. R. 700, seems to settle the rights and liabilities of the defendants as between themselves in the way in which the learned trial Judge has here disposed of them.

Both motions will be dismissed, with costs to the plaintiff. The motions were principally in the joint interest of both defendants, and the city will have no costs in the Divisional Court against Colwell.

[CHANCERY DIVISION.]

LANGSTAFF V. MCRAE, ET AL.

Waters and watercourses—Negligence—Overflowing of land—Bursting of timber boom—Right to erect booms across rivers—R. S. O. c. 121, s. 5.

In an action for damages caused by overflowage, it appeared that the defendants' boom in a river broke by reason of the heavy floods, whereupon they constructed another boom lower down near to a certain bridge, which also broke, and the logs became massed against the bridge, which the jury found, with the excess of rain, caused the injury complained of. They did not find negligence on the part of the defendants, but that they were guilty of a wrongful act in throwing the boom across the river:—

Held, that the defendants were entitled to judgment.

Per BOYD, C.—The use of the boom being lawful by statute (R. S. O. c. 121, s. 5), and no negligence in its construction being pretended, it was impossible to say that what is thus expressly legalized, can be made the ground of an action of tort.

Decision of MACMAHON, J., reversed.

Statement. THIS was an action brought by Miles Langstaff against William McRae, John Langworth and one Morris, claiming damages for the flooding of his land by reason of their wrongful act.

The action was tried before MACMAHON, J., and a jury at Sarnia, on October 1st, 1891.

The circumstances of the case and the findings of the jury, fully appear from the judgments.

Lister, Q. C., for the plaintiff.

J. B. Fraser, for the defendants.

January 5th, 1892. MACMAHON, J.:—

Action for damages to the plaintiff's lands and crops, caused, as it is alleged, by wrongful acts of the defendants, in constructing and maintaining a certain boom across the north branch of the river Sydenham lodging therein a large quantity of logs, amongst which were a considerable number of what are known as sinkers and bobbers, and which booms and logs formed a dam across the said river

Judgment: MacMahon, J.

and so caused the water to be dammed back upon the plaintiff's land.

At the conclusion of the plaintiff's case I directed that judgment be entered for the defendant Morris, dismissing the action as against him with costs.

Questions were submitted and answered as follows:

1st, How was the injury to Langstaff's crops caused? Ans. Caused by water and debris being carried on to his property.

2nd, If you find it was caused by the Sydenham river being raised was it so raised by the jam at Wallaceburg bridge? Ans. We find that by the excess of rain, and from the jam at the bridge that the water was so raised.

3rd, Who were the owners of the timber and logs forming the jam at such bridge? Ans. We find it impossible for us to tell the names of the owners, but believe they belonged to the parties whose marks were on them.

4th, Were the defendants McRae and Langworth guilty of any wrongful or negligent act? If so, what was such wrongful or negligent act? Ans. The wrongful act was the throwing of the boom.

5th, What damage has Langstaff suffered? Ans. Langstaff has in our opinion suffered to the extent of $200.

The answer to the fourth question would indicate that the jury regarded the collection by the defendants, McRae and Langworth of such a large quantity of logs as were confined in the boom as being a wrongful and negligent act, because such a quantity of logs coming down stream in a body when the boom broke caused the jam at Wallaceburg bridge, and thus injured the plaintiff.

It will thus be seen that the statement of claim does not accurately set out the cause of action, but that is immaterial if the plaintiff is entitled to succeed on the facts disclosed in evidence.

By the Rivers and Streams' Act R. S. O. ch. 120, sec. 1: "All persons shall, subject to the provisions in this Act contained, have * * during the spring, summer, and

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MacMahon, J.

autumn freshets, the right to, and may float and transmit sawlogs and all other timber of every kind, and all rafts and crafts, down all rivers, creeks, and streams; * * and in case it may be necessary to remove any obstruction from such river, creek or stream, or construct any apron, dam, slide, gate-lock, *boom*, or other work therein or thereon necessary to facilitate the floating and transmitting such sawlogs, etc., down the same, then it shall be lawful for the person requiring so to float and transmit such sawlogs, etc., * * to remove said obstruction, and to construct such apron, dam, slide, gate-lock, *boom*, or other work necessary for the purposes aforesaid, doing no unnecessary damage to the said river, creek or stream, or to the banks thereof."

The Sydenham is a navigable river above where the defendants boomed the logs.

The statute of Michigan, ch. 56, sec. 2041, has a somewhat similar provision as to the right of persons floating logs down a navigable stream to that contained in our own Act, and in the case of *Grand Rapids Booming Co.* v. *Jarvis*, 30 Mich. 309, it was held that persons exercising the public right of navigating a stream by running logs down it or collecting, directing and storing them are bound to do it with due regard to the concurrent rights of riparian owners to the use of their lands, and they cannot be allowed for the sake of rendering the business of thus navigating the stream more safe, convenient, and profitable to them to raise the water so as to overflow the lands of such owners. The head note to *White River Log and Booming Company* v. *Nelson*, 45 Mich. 578 is: "A booming company is not liable for damages caused to riparian owners by a proper and reasonable use of the right of floating logs; but it is liable if by wilful or negligent management it creates or enlarges jams in the stream, thereby overflowing its banks to their injury."

In *Gustave Anderson* v. *Thunder Bay River Boom Co.*, 61 Mich. 489, the defendants were charged that they

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had by accumulating large quantities of logs in booms on a river and so creating a jam caused the water to rise and flood the plaintiff's premises. It was held that if the natural flow of the waters was, by the defendants' wrongful and negligent act, impeded and the water and logs thrown upon the plaintiff's land, he would be entitled to recover reasonable damage for such wrongful act.

See also the very instructive case of *Haines* v. *Welch*, 12 Pac. Rep. 502.

The Act provides that obstructions may be removed and dams, slides, booms, etc., may be constructed to facilitate the floating of sawlogs and timber down all rivers, creeks and streams. This provision has regard to the different objects to be accomplished by the alternative licenses given by the Act namely: the license to remove obstructions and by such removal facilitate the floating of timber, logs, etc.; or a license to make certain erections in rivers or streams such as slides, dams, or booms so that the floating of timber, etc., may be facilitated. But the authority to erect a boom could not be considered as applying to navigable rivers so as in any manner to authorize impeding the navigation of such river as a public highway.

A dam or a slide would not be required where a river is navigable. But a boom may be required to be used, not for the purpose of floating single logs or sticks of timber which would float down such rivers without any artificial aid, but it may be necessary to collect the timber or logs in booms for the purpose of sorting or binding into cribs. This can be done by placing the booms on the sides of the rivers; and the jury have in this case found that the defendants were guilty of a wrongful act in throwing the boom across the river. That is, instead of placing the booms along the sides of the river, and so collecting the logs therein and thus avoiding the great risk caused by a boom thrown across the river creating a jam and backing up the water, or breaking and so causing the timber and logs to reach the bridge below in a body and thus create

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a jam, they adopted the latter method and gathered between 40,000 and 50,000 logs which formed a dam and so rendered a break in the boom almost inevitable. That the jam at the bridge was caused by the negligent act of the defendants in collecting such a large number of logs, as already stated, in the boom cannot be questioned. But the jury in answer to the third question have found that the Sydenham river was raised by the excess of rain and the jam at the Wallaceburg bridge, and the question is whether a judgment should be entered for the plaintiff for the amount of the damage which it is said resulted from these combined causes.

The point was somewhat considered in *White River Log, etc., Co.* v. *Nelson*, 45 Mich. 578. In that case the damages claimed were for a series of overflows extending over a period of six years. There was evidence tending to show that as to some of the years the overflows injuring the plaintiff's lands were caused by extraordinary rainfalls; and the court held that a direction to the jury was erroneous which did not deal with such evidence.

In the present case I referred during the charge to the rain that had fallen about the time the plaintiff's land was overflowed, and the jury have considered it in answering the second question, although the rainfall was not of an extraordinary character.

In the judgment of Graves, J., in the *White River Log Co.* v. *Nelson*, at p. 582, he puts the case between the plaintiffs and the defendant in this way: "As between the plaintiff and the Booming Co. it was the duty of the company to see that its connection with the logs did not result in causing any more flowage of the plaintiff's land than would occur by the passage of the logs in a purely natural way. It had no right to deal with them in any mode whereby jams would be formed or enlarged so as to cause the water to overflow the plaintiff's land, when it otherwise would not; or cause it to overflow there more than it would if the logs were left to themselves; and if jams were formed or enlarged in that way to such an extent

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that they did cause the water to overflow the plaintiff's land the company is liable for all that flowage beyond what the flowage would have been, had the logs been allowed to float down naturally and without artificial interference."

There had been at the time the plaintiff's land was overflowed rain for about two days, and the east branch of the Sydenham, which is much narrower than the north branch—the former being about fifty feet wide with steep banks, and the latter 200 feet wide with low banks—was raised by the rainfall several feet. But the plaintiff's evidence is that before the boom broke at Morris' Mill about twenty acres of his land had been flooded by reason of the jam above the boom, which extended up the river about three-fourths of a mile.

From the answers of the jury it must I think be assumed that the defendant's negligent act in throwing the boom must be considered as the proximate cause of the injury to the plaintiff. This being so judgment will be entered for the plaintiff for $200, with full costs.

The defendants now moved the Divisional Court, by way of appeal, and the appeal was argued on February 22nd, 1892, before BOYD, C., and ROBERTSON, J.

J. S. Fraser, for the defendants. The plaintiff's case on his pleadings is that he was injured by the defendants making a boom below his farm, and so raising the river; but the evidence shews that the boom was placed above the plaintiff's farm, and that the injury was caused by the bridge. The defendant had a right to put the logs where they were. I cite, as to whether there was negligence or not: *Murray* v. *New York Central R. W. Co.*, 3 N. Y. (Abb. C. of A.) 339; *Brown* v. *Susquehanna Boom Co.*, 1 Atlantic R. 156; *Searles* v. *Manhattan R. W. Co.*, 101 N. Y. 661; *Blyth* v. *Birmingham Water Works Co.*, 11 Exch: 781; *Nichols* v. *Marsland*, 10 Exch. 255; *Brown* v. *Collins*, 53 N. H. 442, at p. 450; *Holmes* v. *Mather*, L. R.

Argument. 10 Exch. 261; *Clarke* v. *Rama Timber Transport Co.*, 9 O. R. 68.

Hoyles, Q. C., for the plaintiff, *contra.* The defendants had no right to act so as to save his own property at the expense of other people.

[Boyd, C.—It is a question of negligence; whether this was an act of negligence?]

The jury have found the act was a negligent, and wrongful act, or at any rate a wrongful act which is sufficient for our purpose. I rely on *Dickson* v. *Burnham*, 14 Gr. 594, and the cases cited in the judgment appealed from.

March 29th, 1892. Boyd, C.

The defendants set up that the damage caused to the plaintiff's lands was from the mass of logs, trees and driftwood which became jammed at the piers of Wallaceburg bridge, and not by any negligence on their part. The jury in answer to questions find that the injury was caused by excess of rain, and from the jam at the bridge by which the water was raised. They do not find negligence on the part of the defendants, but say they were guilty of a wrongful act in throwing a boom across the river.

The judge interprets this to mean that the defendants negligently placed a boom across the river by which a quantity of logs coming down stream were collected in a body, and the boom breaking this body of logs came down and formed the jam at the bridge.

This is rather an extension of what the jury really say, and it is imputing to them a finding that this alleged negligence caused or contributed to the plaintiff's injury. This material point, however, they do not pass upon, and I should say upon the actual findings there is not sufficient precision to entitle the plaintiff to judgment. But upon the statutory right of the defendants given by R. S. O. cap. 120, sec. 1, it cannot be said that the mere throwing across of the boom was a wrongful act. This, however, is what the jury have found, and upon this finding it is not to be

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Boyd, C.

concluded that negligence is established against the defendants. The statute permits the use of booms subject to this that no unnecessary damage is to be done to the stream or to the banks (s. 1). The use of *booms* is not merely to facilitate the floating and transmitting of timber, but also, as an incident thereof, for the purpose of storing and sorting and keeping possession of the logs above the place of their destination. This is recognized in the provisions of R. S. O. cap. 121, sec. 5, and elsewhere. In Dr. Murray's Dictionary *boom* is defined "as a line of floating timber stretched across a river or round an area of water to retain floating logs." The timber of the defendants and others boomed some miles above broke loose by reason of an unusual fall of rain or freshet, and to capture these logs and to save them from going into the lake and so being lost, the plaintiffs constructed the boom, now said to be wrongful, across the stream above Running Creek. The witnesses consider this the ordinary and proper thing to do to seek to save their property. The employment of booms in this way was sanctioned by a local user of over forty years, and no such harm ever happened before. The use of a side-boom was not suggested in the evidence as in use or likely to be of use for this purpose, and although the stretching all the way across may have been an impediment to navigation that is not the question raised on this record or at the trial. *Quoad* the plaintiff, it appears to me the defendants were not doing a wrongful act in stretching the boom, nor did any particle of damage arise to him from this act.

The boom was stretched to stop the escaping logs; but such was the character and consequences of the unusual rainfall that quantities of driftwood, bolts, cordwood, brushwood and even trees were washed down with the logs, and the whole became in a manner jammed to the bottom at this boom, and so great was the mass that the boom broke and the whole moved slowly down to the bridge where the channel was narrowed and divided into two by the piers of the bridge; and here it stuck and formed the barrier

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Boyd, C.

which caused the overflowage upon the plaintiff's lands. The one stream of 200 feet was narrowed to two channels of fifty feet each by this bridge, and it is in evidence that a similar jam took place at the Dresden bridge where no boom had obstructed the progress of the timber and debris. The object of the defendants in placing the boom was legitimate, it was to stop the timber not to create a dam in the stream. Neither the natural nor the expected consequences of this boom can be said to have caused damages to the plaintiff's land. Causes over which the defendant had no control contributed to this: the vast quantity of debris and material that came down with the excessive fall of rain broke the boom and this mass was again permanently held at the bridge, an obstruction in the stream also legalized. According to English law a man may lawfully adopt precautions to save his property against what may be described as the extraordinary casualty of a great flood, and this is not actionable though injury result to his neighbour from "this reasonable selfishness:" *Neild* v. *London and North-Western R. W. Co.*, L. R. 10 Exch. 8. And again this use of the boom being lawful by statute and no negligence in its construction being pretended it is impossible to say that what is thus expressly legalized can be made the ground of an action of tort: per Cockburn, C. J. in *Dunn* v. *Birmingham Canal Co.*, L. R. 8 Q. B. 261.

See also *Lawler Baring Boom Co.*, 56 Maine 443; *Borchardt* v. *The Wausau Boom Co.*, 54 Wisc. 107 (1882); *Harold* v. *Jones*, 86 Ala. 274 (1886); *Goodin's Executor* v. *Kentucky Lumber Co.*, 14 South Western Rep. 775 (1890); *Field* v. *Apple River Log Driving Co.*, 67 Wis. 569. These cases may be contrasted with those cited by my brother MACMAHON and indicate a distinction between the liability of one who enjoys the use of the water-course as a highway at common law, and one who is empowered by statute to do certain acts thereon. In the latter case negligence in the act must be established to found liability. This is indeed suggested by the Ontario statute, which in warranting the

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Boyd, C.

construction of necessary booms, provides that no unnecessary damage is to be done thereby to the stream (*i. e.* the water) or to the banks thereof (c. 120, s. 1).

I think judgment should be entered for the defendant with costs.

ROBERTSON, J.:—

The R. S. O. 1887, ch. 120, sec. 1, authorizes the construction, *inter alia*, of booms on the rivers and streams in Ontario, for the purpose of facilitating the floating and transmitting of sawlogs and other timber, doing no unnecessary damage to the river, creek, or stream, or the banks thereof. The defendants availed themselves of this provision, and constructed a boom across the north branch of the Sydenham river, above Running Creek, for the legitimate purpose of preventing logs and timber which they were getting out, above the boom, from floating into Lake St. Clair, before they could be put together in rafts. A great number of logs belonging to the defendants had accumulated at and above this boom, in the spring of 1889. In May of that year, an unusual fall of rain took place, which swelled the north branch of the Sydenham to such an extent that an immense quantity of other logs, timber, trees, etc., were carried down the stream and lodged among the defendant's logs, at the boom in question, which had the effect of breaking the boom, and the whole mass floated down the river to the Wallaceburg bridge below the lands of the plaintiff, where they lodged and formed a jam, which became a dam, and caused the waters of the river to back up and to overflow these lands, whereby the plaintiff suffered damage.

At the trial the jury were asked five questions:

[Here the learned Judge stated the questions asked, and answers by the jury.]

And they found that the plaintiff had suffered damage to the amount of $200.

On these findings the learned trial Judge entered judgment for the plaintiffs.

Judgment.

Robertson, J.

The answer to the second question, is that the excess of rain, and the jam at the bridge caused the water to flow back on the plaintiff's land. And the answer to the fourth discloses that the wrongful act of the defendants was the "throwing" of the boom. As regards the latter, I cannot see how that finding can be supported on that evidence. In the first place the statute referred to authorized the construction of the boom, and the evidence showed that as far back as thirty or thirty-five years, booms for the like purpose for which the boom in question was constructed, had been thrown across this river. To say then it was a wrongful act, in my judgment is not correct, and cannot be upheld.

Then the answer to the second question, is that the injury to the plaintiff, was caused, not by the boom, but by the excess of rain, and the jam at the bridge, which caused the overflow of the waters of the Sydenham on to the plaintiff's land.

Now as the defendants were, within their legal and statutory rights, in constructing the boom, and as the excess of rain, was an act of God, for which the defendants could not be held responsible, and as it is not pretended that the defendants were, in any way responsible for the erection of the Wallaceburg bridge, which doubtless was the primary cause of the jam being formed there, I cannot understand how they can be held responsible for the consequential damages resulting from the formation of the jam at the bridge. The plaintiff no doubt has suffered damage, and so suffered by reason of the water being backed up from the jam which formed at the bridge. But there was an utter failure of evidence to shew that there was any negligence or unskilfulness on the part of the defendants. They had a right to construct the boom, and there can be no doubt that had it not been for the extraordinary freshet, which then took place, no damage would have followed from its construction. To maintain his action the plaintiff was bound to give evidence to shew that the damage sustained by him, was the consequence of some negligence, or unskilfulness chargeable to the defendants.

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Robertson, J.

The boom was constructed in the usual way and was sufficient for all purposes for which it was thrown across the river, and even if it is to be inferred that the jury found that there was negligence on the part of the defendants in the construction of the boom, they do not say that it was by reason of the boom alone that the plaintiff suffered damage, but they say it was "by excess of rain, and the jam at the bridge." Now for the present set aside the question of the jam, and consider the finding in regard to "excess of rain." That the jury found was one of the causes which occasioned the damage. Now if for argument sake, it is admitted that the other cause, was the negligent construction of the boom : How does that affect the case ?

The rule, as I understand it, is that when the fact is that the damages claimed were occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which he is not responsible, the plaintiff must fail, if his evidence does not shew that the damage was produced by the former cause ; and he must fail also if it is just as probable that they were caused by the one as the other, as the plaintiff is bound to make out a case by the preponderance of evidence. Here it is not necessary to critically examine the evidence, because the jury have expressly found, that there were two causes, which operated together, which caused the overflow, and one of these the defendants could not be held responsible for. In fact after reading the evidence I should think there could be little doubt left in the mind of any reasonably intelligent man, that the "excess of rain," was the primary cause of the plaintiff's misfortune. The breaking of the boom was an inevitable accident for which the defendants cannot be held responsible.

I have consulted a number of cases, both English and American, as well as several in our own Courts, and I may mention one in particular, referred to by Mr. Hoyles, Q.C., for plaintiff, *Ellis* v. *Clemens*, 21 O. R. 227, but in my judgment that case does not apply. There the defendants

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Robertson, J.

could have prevented the injury which was complained of, they could have prevented the water from flowing down the stream below their mill, during the excessive frosts, which would have obviated the difficulty, but they did not chose to do so: "It was a question whether they should incur a certain loss themselves, or run the risk of inflicting loss upon the plaintiff, and they preferred the latter alternative," per STREET, J., at p. 230.

The other cases referred to by me are *Blyth* v. *Birmingham Water Works Co.*, 11 Ex. 781; *Brown* v. *Susquehanna Boom Co.*, 1 Atlantic R. 156; *Searles* v. *Manhattan*, 101 N. Y. 661; *Brown* v. *Collins*, 53 N. Hamp. 442; *Holmes* v. *Mather*, L. R. 10 Ex. 261; *Stanley* v. *Powell*, 39 W. R. 76; *Dickson* v. *Burnham*, 14 Gr. 594; Gould on Waters, 2nd ed., sec. 103.

A. H. F. L.

[CHANCERY DIVISION.]

SCANLON V. SCANLON.

Will—Construction—Devise of land facing on two streets by description of house facing on one.

In 1886 a testator by his will devised to his brother "All that real estate now owned by me, being No. 32 on the north side of A. street for and during his life," and afterwards over, and then made a general residuary devise of the rest of his land to his sisters. It appeared that in 1867 the testator purchased the land in question with a frontage of twenty-six feet on A. street, by a depth of 200 feet to a lane twenty feet wide, which lane was in 1882 converted into P. street. At the time of purchase there was a house facing on A. street known as No. 32, and also one facing on the lane, afterwards known as No. 21 P. street, occupied as distinct tenements, and each with a fence in the rear, but with certain ground between the two fences used to some extent in common:—*Held* that the specific devise was confined to No. 32 A. street, and the lands appertaining to it, to the exclusion of the house on P. street and the lands appertaining to it, which passed under the residuary devise.

THIS was an action brought by John Scanlon for the construction of the will of his brother, Michael Scanlon, deceased, and to recover possession of certain property under it. Statement.

The provisions of the will and the circumstances under which the action was brought are set out in the judgment of FERGUSON, J.

The action came on for trial at Toronto, on January 18th, 1892, before BOYD, C., who gave judgment in favour of the defendant.

The plaintiff now moved the Divisional Court by way of appeal from this decision, and the motion was argued on February 27th, 1892, before FERGUSON and ROBERTSON, JJ.

Du Vernet, for the plaintiff. You cannot take away a man's rights by calling a lane a street. According to the defendant's contention, no effect whatever is given to the strong words, "All the real estate now owned by me being,

Argument.

etc." Earlier words must be taken to be the governing words: Theobald on Wills, 2nd ed., p. 100; *Doe d. Renow* v. *Ashley*, 10 Q. B. 663; *Smith* v. *Bonnisteel*, 13 Gr. 29, especially at p. 33; *Harman* v. *Gurner*, 35 Bea. 478: *Newton* v. *Lucas*, 6 Sim. p. 54, *S. C.* in App. 1 M. & Cr. 391; *Travers* v. *Blundell*, L. R. 6 Ch. D. 436. The learned Chancellor finds there was no exclusive use in regard to this property between the two houses. The onus is on the other side to shew where the property commences which they are entitled to. If the lane is not a street in the legal sense, it is not a street at all.

Armour, Q. C., for the defendants. *Travers* v. *Blundell*, was a case of a power of appointment, and is quite a different case. The Court held the intention was to exercise the whole power. *Smith* v. *Bonnisteel* was a case of a broken front, and the devise being the name of "my farm," the question was, what was meant by "my farm."

The devise is "all *that* real estate owned by me," not "all the real estate." The rule in Theobald does not apply. It is a particular description, not a general description. In *Lawrence* v. *Ketchum*, 4 A. R. 92, the matter was much discussed. *Webber* v. *Stanley*, 16 C. B. N. S. 698, seems the leading case; *Hardwick* v. *Hardwick*, L. R. 16 Eq. 168; *Smith* v. *Ridgway*, L. R. 1 Ex. 331, may also be referred to.

The cases cited for the plaintiff support our contention. Thus *Smith* v. *Verner* was a devise of "all that his freehold estate." The action turned on the meaning of "estate."

March 29th, 1892. FERGUSON, J.

In the year 1867 the late Michael Scanlon became the purchaser of and had conveyed to him the west part of lot number forty-six according to a plan of John Stoughton Dennis, P. L. S. In the conveyance the land is described by metes and bounds, which show that it had a width on the north side of St. Alban's street, in the city of Toronto, of twenty-six feet, more or less, and a depth of two

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Ferguson, J.

hundred feet, more or less, to a lane twenty feet wide. Of this land Michael Scanlon continued to be the owner till the period of his death, on or about the tenth day of July, 1886.

In the year 1882 this lane was in some way converted by the city corporation into a street and called Phipps' street. The houses on St. Alban's street and on Phipps' street were long before the publication of the will of Michael Scanlon, hereinafter mentioned, numbered. On this property there were at and before the time of the purchase of it by Michael Scanlon two houses, not far from being of equal dimensions, one fronting on St. Alban's street and the other fronting upon this lane, now Phipps' street. The number of the house fronting on St. Alban's street was 32. The number of the house fronting on Phipps' street was 21. The numbering of the one on Phipps' street took place, as nearly as I can learn from the evidence, soon after the lane was converted into a street in 1882, long before the making of his will by Michael Scanlon, and, no doubt, to his knowledge. The house on St. Alban's street had presumably been numbered many years before. Each of these houses had from the date of the purchase of the land by Michael Scanlon (and presumably from an earlier period) been occupied as separate and distinct tenements, though the ground between the two fences, one in the rear of each house, seems to have been used (but only a little) in common, or rather, as it appears by the evidence, in confusion, by the occupants of these tenements. Although there appears to be some confusion amongst the figures given by the witness as to assessment, it does appear that the house on Phipps' street was assessed during the lifetime of Michael Scanlon separately altogether from the one on St. Alban's street (the assessment paper naming him as owner), sometimes, at least, at a frontage of twenty-six feet by one hundred feet deep. It is contended that this was not uniformly so, and that sometimes the assessment was for a somewhat less frontage and at 112 feet deep. Owing to some uncertainty, in the notes of the evidence before me, I cannot say precisely how this is.

The house on St. Alban's street was assessed during the lifetime of Michael Scanlon as having a frontage of twenty-six feet by one hundred feet deep. It will be borne in mind that the distance, according to the conveyance to Michael Scanlon, in 1867, from St. Alban's street to Phipps' street is 200 feet more or less. The learned Judge, before whom the evidence was taken says, in his judgment, that each house had been assessed as having a frontage of twenty-six feet by one hundred feet deep, and I think this may be taken to be sufficiently accurate and in accord with the notes of the evidence that I have.

This being the condition of the properties, Michael Scanlon, the owner, made his will on the 21st day of April, 1886, and died, as before stated, on or about the 10th day of July in the same year. The parts of the will that are material here are in these words:—

"I devise unto my brother, John Scanlon, of Toronto, labourer, all that real estate now owned by me, being number thirty-two on the north side of St. Alban's street in the said city for and during his natural life, and after his death I devise the same unto the children then living of my brother, Cornelius Scanlon, share and share alike.

"I devise all the residue and remainder of my real estate wherever situate, owned by me at the time of my death, unto my sisters, Bridget and Kate Scanlon, their heirs and assigns, share and share alike."

Bridget and Kate Scanlon are in possession of the house on Phipps' street, and contend that it passed to them by the residuary devise.

John Scanlon contends that both these tenements and the whole half lot purchased in 1867 by the testator passed to him for an estate for his life under the devise to him in the will; and he brings this action to recover, amongst other things, possession of the house and land fronting on Phipps' street, calling it the "rear portion" of the lot, asking at the same time to have it declared that under the

Judgment.

Ferguson, J.

will he is entitled to the whole, of course, for an estate for life, though he does not in his prayer say so.

This being the matter of dispute between the parties, the question arises as to what, in this respect, is the true meaning of the will.

There is some evidence going to shew, and which it is contended does shew, that the testator in his lifetime mentioned and referred to this property (meaning the whole of it) as his property on St. Alban's street. Such evidence was, of course, quite admissible. I do not, however, think it of much force. It appears in the cross-examination of Kate Scanlon, and is in answers to leading questions framed by counsel. It does not appear to me to be of a pointed or forcible character. In the circumstances it was not an unnatural thing for him to refer to the property or properties in this way, and I cannot see that his having done so militates with any great force against the contention of the defendants. The case *Harman* v. *Gurner*, 35 Beav. 478, was referred to and relied upon to some extent by both counsel. There the testator by his will, dated in 1862, had devised to his son and his heirs "all that his freehold estate situate in Three Colt street, Old Ford, Bow, in the county of Middlesex." The Master of the Rolls, Lord Romilly, in giving judgment, said: "The only question is, what is the meaning of the word 'estate.' When the testator bought this property, his estate in Three Colt street consisted of this plot of land, 134 feet by fifteen feet, and I am required to say that I must cut down the word 'estate' and consider it 'house,' because he has built two houses on the property. Having this 'estate,' he devises 'all that his freehold estate situate in Three Colt street.' This includes all the houses upon it. He does not designate it by the number of the house. If he had said, 'my freehold house numbered 5 in Three Colt street,' there would be something which would exclude the other house."

In the present case, the devise to the plaintiff is a devise of all that real estate now owned by me, being number

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Ferguson, J.

thirty-two on the north side of St. Alban's street. It is common knowledge that it is the house that is numbered, and this was not at all disputed. The whole of the words descriptive of the subject of the gift must be read. The words "being number thirty-two" cannot be rejected as was contended. These words plainly, as I think, shew that the gift is of this house and the real estate, or land, upon which it is, and belonging or appertaining to it. Here the testator says, "all the real estate owned by me," etc., but the use of these words, "being number thirty-two," as they are used by the testator, I think, clearly confine the gift to the house number thirty-two on St. Alban's street, and the lands belonging or appertaining to this house to the exclusion of the other house and the lands belonging or appertaining to it. This is the view taken by the learned trial Judge. It seems to be in accord with what Lord Romilly in the case above referred to says would have been his opinion if the testator in the case had designated the property devised by the number of the house.

I have examined all the other cases and authorities referred to on the argument. As has often been said, it is difficult in cases involving the constructions of wills to find authorities which afford any certain guide to the proper conclusion. Yet I can scarcely entertain a doubt that the opinion expressed by the Chancellor, the trial Judge, as to the meaning of this devise to the plaintiff is the correct one.

As to the position of the boundary between the two properties. The evidence shews that there were two fences, one in the rear of each house, there being between them some land that was, in a way, used in common by the occupants of each house, the fence in the rear of the house on St. Alban's street not being so far back as the middle or centre line between the two streets. Also that there had been a fence at or not far from the centre line between the streets which had been allowed to fall into disrepair to such an extent as to be almost out of existence, but which was rebuilt by the defendants at or about the commencement of the dispute out of which this litigation arose. Possibly all the land that could be claimed as appurtenant or belonging to this house on St. Alban's street would be that extending back to the fence nearest to it in the rear. The learned Judge has, however, given in favour of the plaintiff the land as far back as the middle line between the streets—land 100 feet deep. This seems reasonable in the circumstances. It is in accordance, as nearly as I can see by the evidence on the subject, with the manner of assessment during the lifetime of the testator and to his knowledge, and the defendants, devisees of the residue of the estate, to whom the small strip of land would otherwise go, do not complain, and seem to have, by the construction of the fence, adopted the line of it, which is supposed to be upon, and is at or near the middle line between the streets as the true boundary.

Judgment.

Ferguson, J.

The judgment should be affirmed with costs.

ROBERTSON, J., concurred.

A. H. F. L.

[CHANCERY DIVISION.]

CAMPBELL ET AL. V. DUNN ET AL.

Life Insurance—Benefit of children—Will—Powers of executors and testamentary guardian as to proceeds—R. S. O., c. 136.

A testatrix having insured her life and made the policies payable to her two daughters, by her will requested her executors, the defendants, to place the amount thereof in some thoroughly safe investment until her daughters' majority or marriage, when the amounts and their accumulated interest should be divided equally between her daughters, and appointed her husband, the plaintiff, their guardian.

In an action brought by the guardian to have the proceeds of the policies handed over to him by the executors:—

Held, that the insurance moneys being made payable to the daughters were by 53 Vic. c. 39, sec. 4 (O.), severed from her estate at her death and her testamentary directions could not affect the fund beyond what was permitted by that statute, and R. S. O. c. 136:—

Held, also, that during the minority of the daughters the trustees appointed by the will as provided for by section 11, R. S. O. c. 136, might by section 13, invest in manner authorized by the will; but while the insured could give directions as to the investment, she was not to control the discretion of the lawful custodian of the fund and child, in case the income was needed for maintenance or education, or the *corpus* for advancement:—

Held, also, that the guardian was the custodian of the daughters with the incident of determining to a large extent what should be expended in their bringing up, and that the executors had charge of the preservation and utilization of the fund:—

Held, also, that section 12 of R. S. O. c. 136, does not justify an Insurance Company in paying the amount of a policy to a testamentary guardian; the guardian there named being one who has given security and that the Court should not transfer the moneys from the executors to the father as testamentary guardian, as his right to handle any part of the fund was subject to the trusts specified in the will, the execution of which was vested in the executors.

Statement. THIS was an action brought by Pearl Spinsby Walker Campbell and Queen May Campbell by their guardian and next friend George Benjamin Alderson, and the said George Benjamin Alderson, who was their stepfather, against Thomas Dunn and James Chambers the executors of their mother's estate.

The plaintiffs' statement of claim set out the provisions of the will of the mother, Mary Jane Anderson, which after making certain bequests of money, proceeded as follows:

"8. To my two daughters, Pearl Ann Campbell and Queen Campbell, two life insurances which I hold * * the amount of both of these life insurances I require my executors hereinafter named to place in some thoroughly safe investment until my said two daughters shall arrive at twenty-one years of age or earlier in the event of marriage when said amounts with their accumulated interest shall be divided equally between them.

"9. To my two daughters aforesaid two thousand dollars which are now deposited in the postoffice savings department, being one thousand dollars in the name of each of my said two daughters, but I require that the whole of said two thousand dollars remain where it now is until my said two daughters reach twenty-one years of age or marry, when said amount with the accumulated interest shall be equally divided between them.

"10. To my two daughters aforesaid all real estate and all mortgages * * of which I may die possessed to be equally divided between them share and share alike to come into possession of the same at twenty-one years of age or earlier in the event of marriage.

"11. The rentals of all real estate and the interest on all mortgages and other securities for money (except as heretofore and hereafter provided for) I require to be employed for the education and support of my two daughters aforesaid and for that of the two children of my husband by his former marriage.

"12. To my husband aforesaid I give the use of the house and grounds now occupied by myself and family being * * together with all the furniture in said house, to occupy until my said two daughters shall reach their majority or marry, free of rent, etc., etc.

* * * * * * *

"14. I hereby appoint my husband, George Benjamin Alderson, guardian of my said two daughters.

"15. I hereby appoint Thomas Dunn * * and James Chambers * * executors of this my last will and testament," etc., and the statement of claim then asked for an account of the dealings with the estate by the executors, and that the proceeds of the two policies of insurance

Statement. on the life of the mother in favour of the two daughters which had been received by the executors, as well as the moneys deposited in the postoffice savings bank by the deceased in her lifetime, should be handed over by the executors to the guardian."

The defendants set up that they were the proper custodians of the moneys in question, but offered to submit to any order made by the Court.

The action was tried at Woodstock, on April 1st, 1892, before BOYD, C.

Moss, Q. C., for the plaintiffs. The plaintiff, Alderson, as guardian, is the right person to receive the money, and any direction in the will to the contrary, is void: *Scott* v. *Scott*, 20 O. R. 313; R. S. O. ch. 136, secs. 5, 11, and 13. The testamentary guardian has the right to control and manage the whole estate: *Huggins* v. *Law*, 14 A. R. 383; R.S.O. ch. 137, secs. 14 and 18. The will (clause 8) assumes to tie up the whole of the insurance moneys to be accumulated until the daughters come of age, or marry, but there should be an investment and an application of the income for maintenance and education: R. S. O. ch. 136, sec. 13. The testatrix had merely power to appoint a trustee without giving him any directions or instructions which would be in conflict with the powers and duties conferred by the statutes.

Thomas Wells, contra. The insurance moneys are the creature of the statute: R. S. O. ch. 136. The testatrix had the power to appoint a trustee, and she did so to take care of the money: sec. 11. The money should not be paid to the plaintiff who is merely a testamentary guardian, and has not given security: secs. 12 and 14. The money was received by the defendants as executors under section 12. The guardian referred to in R. S. O. ch. 137, secs. 14 and 18, is appointed for a limited purpose, and has not the same power as one appointed under the Surrogate Act. It is in the discretion of the executors to accumulate the interest, or apply it for maintenance. It would be to the interest of the guardian to apply the interest for maintenance, and so his duty might conflict. *Scott* v. *Scott*, 20 O. R. 313, does not apply. The guardian in that case was appointed by the Surrogate Court, and the fund was in Court, and the devise to the executors there was inconsistent with the terms of the policy, which is not so here. The insurance company could not have paid the money to the testamentary guardian, and obtained a valid discharge. It had to come through the executors. Executors may be trustees: *Re Lynn, Lynn* v. *The Toronto General Trusts Co.*, 20 O. R. 475. Argument.

Moss, Q. C., in reply. There is no discretion to withhold any of the money under R. S. O. ch. 136, sec. 13. The provisions of the will conflict with the discretion of the trustees therein mentioned as to maintenance and advancement.

April 9, 1892. BOYD, C. :—

Reading the mere text of the will, a plainly-expressed purpose appears; first, that the amount of the life policies shall be received and placed in some "thoroughly safe investment" by the executors; and next that the husband shall be guardian of his two stepdaughters, and as incidental to this that he and they shall occupy the family house belonging to the testatrix till their majority or their marriage. (See secs. 8, 12, and 14 of will.)

The intention further appears that the rent and interest of the estate shall be employed for the education and support of the two daughters of the testatrix, and the two daughters of her husband by another wife; excepting, however, the income from the insurance policies, which is to be accumulated till the majority or marriage of her own daughters (secs. 8 and 11). I say nothing of other parts of the will which do not concern the custody of the insurance moneys.

This, without more, would indicate that the care of the insurance moneys was to be with the executors; the care of the infants' persons to be with the guardian. But the

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effect of the statute as to life insurance has to be considered, R. S. O. ch. 136, which is extended to *women* as well as men by 53 Vict. ch. 39 (O.). Section 4 of that Act declares "that a policy * * effected by any woman on her own life, and expressed to be for the benefit of her * * children * * shall be deemed a trust in favour of the objects therein named, and the moneys payable under such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the deceased or be subject to her debts."

These insurance moneys being made payable to the daughters by the terms of the policy are therefore by this legislation severed from the estate of the mother at her death, and her testamentary directions cannot affect the fund, beyond what is permitted by the statute.

Now section 11 of the revised Act (ch. 136) provides that the insured may by will appoint a trustee of the money payable under the policy, "and may * * make provision * * for the investment of the moneys payable under the policy." That provides for directions being given as to the manner in which the policy moneys are to be invested until the time when they are payable to those entitled, and will commonly be commensurate with the minority of the children to be benefited. Such a suspension of payment is contemplated by section 4 already quoted and till the trust (involved in making payment to the proper hand) is performed, these moneys shall not be regarded or dealt with as assets of the deceased.

Section 12 of the revised Act is in case of the companies and provides a suitable hand to receive payment so as to discharge the insurers while the beneficiaries are still minors. That payment may be to the trustee appointed as in section 11, or if no such trustee, then payment to the executors appointed by the deceased or to a guardian of the infants or a trustee judicially appointed, as mentioned in this section.

Then comes section 13 which throws light on the provisions to investment in section 11. The trustee named by the insured or the Court, and the executor or guardian may invest in certain specified securities "or in any other manner authorized by the will of the insured," and may apply all or any part of the annual income in and towards the maintenance and education of the children in such manner as the trustee, executor or guardian thinks fit, and may also advance the whole or part of the fund during minority upon suitable occasion as indicated in the section.

I read this as meaning, that while the insured can give directions as to the investment of the fund during minority (as in this case), these are not to control the discretion of the lawful custodian of the fund and of the child in case the income is needed for maintenance and education, or in case the *corpus* is needed for advancement.

Here the wish of the testatrix was that the moneys should be accumulated till each daughter was twenty-one years old and then divided; but with provision for earlier division in case of marriage.

The money has been received by the executors and actually invested so as to be payable in moieties as each girl arrives at the given age, but with interest payable half-yearly. That interest can be applied biennially, either for maintenance and education, or can be reinvested, according to circumstances.

Having regard to the doctrine of the Court that maintenance can be allowed in spite of a direction to accumulate, I consider that the law adds a parenthesis to the will of the testatrix by which the accumulated interest is to be divided at majority (unless earlier applied for maintenance and education). Thus read there is no repugnance between the will and the statute.

It is lamentable that the dual safeguard intended by the testatrix for her daughters should be the occasion of controversies which can neither benefit the children nor the estate. The first duty of the Court is to consider the welfare of the infants and to act so as to promote their best interests. That would be manifestly by the concurrence of both executors and guardian, in the tuition and main-

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tenance of the children and as to the manner of investment.

It is plain that the daughters were to be left in the custody of their stepfather, and that carries with it the incident of determining to a large extent what should be expended in their up-bringing, having regard to the extent of their inheritance, and their station and prospects in life.

On the other hand, the mother seems to have depended on the executors in caring for the preservation and utilization of the fund so that it should be forthcoming when required; but meanwhile this is to be so managed that the income shall be paid as needed to the guardian. The principles which guide the Court in the application of moneys for the benefit of infants are those which should govern the holders of the fund and the expenders of the income, and if they have not the good sense to work together amicably the whole estate may be seriously impaired in the conflicting attempts of each to administer it in a more excellent way than the other.

But leaving the ethics of the case, I come to the strict law which each party invoked.

Till the other day there was no power bestowed upon a mother to appoint a guardian by will to her children; for by the terms of the enabling Act, 12 Car. II., ch. 24, sec. 8, the privilege was confined to the father: *Ex parte Edwards*, 3 Atk. 519. But in 1887, following the English Act of 1886, by 50 Vict. ch. 21, sec. 3 (O.), the mother may by deed or will appoint a person to be guardian of her infant (if the infant be unmarried) after the death of herself and the father of the infant: R. S. O. ch. 137, sec. 14. By section 18 of the Revised Statutes, such a guardian shall have authority (unless such authority is otherwise limited) to act for the infant, and shall have charge and management of the infant's estate, real and personal, and the care of the infant's person and education.

Now the appointment of the stepfather as "guardian of the daughters," would import control of person and estate if not modified or limited otherwise. That modification is found in this will by the earlier provision made as to the investment by the executors of these insurance moneys, so that the estate and the persons of the infants are in different hands. Examples of this may be found in the books arising in cognate circumstances, *e. g.*, *Knott* v. *Cotter*, 2 Ph. 192, and *In re Lord Norbury*, Ir. R. 9 Eq. 134.

But again, is it competent for the testamentary guardian to receive this insurance money so as to discharge the companies? And, if not, should it be the function of the Court to transfer the moneys when received by the executors after investment to the guardian?

As to the first, I do not see that the Insurance Act, R. S. O. ch. 136, sec. 12, justifies in this case payment to a testamentary guardian. The guardian there named is one who has given security (secs. 12 & 14). See *Re Thin*, 10 P.R. 490. But here I think the testatrix has very plainly designated the executors as the trustees to whom these moneys are to be paid, and by whom they are to be invested. This decides the second point, because the right of the testamentary guardian to handle any part of this fund must be regarded as subject to the trusts legitimately specified in the will, the execution of which is vested in the executors.

The cases cited of *McCreight* v. *McCreight*, 13 Ir. Eq. R. 314; *Re Creswell*, 45 L. T. R. 468; *Huggins* v. *Law*, 14 A. R. 383; *Scott* v. *Scott*, 20 O. R. 313, to which I may add *O'Neill* v. *Hamill*, Beat. 618, have all some points of contact with the present case, but none of them is on all fours with it.

This estate has been before the Court of Appeal in a contention as to the guardianship where the executors having failed were ordered to pay costs personally. The allusions made by the Court as to the scope and effect of this will are in harmony with the judgment I have been obliged to pass upon the neat point, and those should have enabled the present contestants to have adjusted their rights without further resort to the Court.

For this reason I think the next friend should pay the costs of the action up to this point (less costs of the claim as to postoffice moneys); but I think he is entitled to a

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reference to ascertain whether the fund has been rightly invested so as to realize the current rate of interest—all things being considered—and as to whether the income has hitherto been rightly applied, and also to fix a scheme of maintenance if the parties cannot agree. Costs and further directions will be reserved.

On the settlement of the judgment, the question as to the disposition of the money deposited in the postoffice savings bank, was spoken to on May 27th, 1892, before the Chancellor.

W. Read, for the plaintiff, contended that the testamentary guardian should be declared entitled to the fund for the infants, the will being inoperative as to the same.

H. W. M. Murray, Q. C., for the executors, did not claim any interest in the fund.

John Hoskin, Q. C., the official guardian, contended the fund should be paid into Court.

THE CHANCELLOR.—The fund having been brought before the Court by the parties, and there being a contest as o its custody, I will order it to be paid into Court for the protection of the infants: *Huggins* v. *Law*, 14 A. R. 383; *Kingsmill* v. *Miller*, 15 Gr. 171.

G. A. B.

[COMMON PLEAS DIVISION.]

ROCHE V. RYAN.

Way—Plan—Registration of and sales under—Effect—Vesting of streets in municipality.

Under the Municipal and Surveyors' Acts by the filing of a plan, and the sale of lots according to it, abutting on a street, the property in the street becomes vested in the municipality, although they may have done no corporate act by which they have become liable to repair.

Decision of STREET, J., at the trial reversed.

THIS action was brought by the plaintiff to recover damages because, the defendant had, as alleged, wrongfully excavated upon and dug up, and otherwise interfered with and obstructed, certain streets laid out and described on a map or plan of a portion of the town of Smith's Falls. Statement.

The action was tried at Perth, at the Autumn Assizes of 1891, without a jury, before STREET, J., who reserved his decision, and subsequently delivered the following judgment, in which the facts are fully stated.

October 27th, 1891. STREET, J.:—

The plaintiff was the owner of a tract of land within the limits of the town of Smith's Falls. In 1886, he had it subdivided into small lots and ran streets through it, and registered his plan. Upon this plan two streets, called John street and Herbert street, are laid down as intersecting one another.

On 27th August, 1890, the plaintiff sold to the defendant lot number 7 on Herbert street, that lot being at the intersection of these streets. On 2nd September, 1890, he sold to the defendant lot number 15 on Herbert street, also at the intersection of these streets; and on 6th September, 1890, he sold to one Munroe lots 23 and 24, at the corner of the same streets. Conveyances were made at the dates above mentioned and registered shortly afterwards. Notwithstanding these sales, the whole tract surveyed continued to be fenced and enclosed, and to be used as a pasture field

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until the spring of 1891. Before making his survey the plaintiff applied to the council of the town for leave to lay out his streets of a width of forty feet, instead of sixty-six feet, but the leave was refused.

In March, 1889, Mr. Cromwell, P. L. S., under instructions from the town council, prepared a plan of the whole of the property comprised within the corporation limits, and this plan, signed by the mayor and sealed with the corporate seal, was registered in June, 1890. It embodied the survey made by the plaintiff, and shewed the lots and streets laid out by him of the property in question. In September and October, 1890, the defendant took from the land, shewn as John and Herbert streets, and from the lots he had purchased from the plaintiff, a quantity of building stone; and the action is brought to recover the value of the portion of it taken from the streets.

At the trial I fixed the quantity as being fifty-five cords, and its value to the plaintiff at $2 a cord. The defendant denied the plaintiff's right to recover, setting up that the property in the streets was in the corporation, whose leave he alleged himself to have obtained. He shewed that he had had conversations with two out of three street commissioners: that these two came up to the ground at his request and authorized him to take the stone, provided he made the street passable afterwards. The third street commissioner was not consulted upon the matter, nor was he notified to attend, and the leave given was merely verbal.

On 20th October, 1890, after all the stone sued for had been taken, the defendant applied to the council for leave, and a resolution was passed referring it to the street commissioners to open up these streets if they should think proper. No meeting of the commissioners is shewn to have taken place; but, on 5th February, 1891, an agreement was entered into between the corporation and the defendant, whereby he agreed to grade and level these streets in consideration of the corporation granting him the stone which he should excavate in the course of his work. The streets were afterwards graded and levelled by him to the satisfaction of the corporation.

The statutes bearing upon the law relating to streets laid out by private individuals have given rise to many questions which it is not always an easy matter to answer.

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Under sec. 65 of R. S. O. ch. 152, a plan of a sub-division is not binding upon the owner although it be registered, until sales have been made under it, and even then streets laid out upon it may be altered by order of a Judge upon notice to all parties concerned.

By section 62 of the same Act it is declared that all allowances for streets laid out by individuals, and upon which lots have been sold, shall be public highways; provided that the municipality shall not be bound to keep such streets in repair until they have been established by by-law, or otherwise assumed for public use by the corporation.

By section 525 of R. S. O. ch. 184, "Unless otherwise provided for, the soil and freehold of any highway or road altered, amended or laid out according to law, shall be vested in Her Majesty."

By section 527 of the same Act, "every public road, street, bridge or other highway * * shall be vested in the municipality: subject to any rights in the soil which the individuals who laid out such road, * * reserved."

By section 531, sub-section 1, the corporation is required to keep in repair all roads and highways in its jurisdiction in repair; and by sub-section 2 this provision is declared not to apply to any road, street, or highway laid out by any private person until established by by-law or otherwise assumed for public user by the corporation.

By section 550 of the same Act power is given to the corporation to close up, alter, etc., streets, roads and highways within its jurisdiction.

Of the conflicting views which have been taken of the effect and meaning of sections 525 and 527, I prefer that which interprets section 527 as relating only to roads and streets laid out by private individuals, and treat it as vesting not the surface merely but also the soil and freehold in the municipality. Its language is wide enough to

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cover the soil and freehold, as well as the surface, and it would be unnecessary to save to the individuals who laid out the streets the rights which they had reserved in the soil unless the effect of the section would otherwise have been to deprive them of all rights.

Then by section 565 the corporation are authorized to sell the minerals found under any public highway; and this power, although perhaps not inconsistent with the view that the Crown is owner of the freehold, is entirely inconsistent with the idea of a continued private ownership in it.

The question is thus, I think, narrowed to one between the ownership of the Crown and that of the municipality, when once it has passed from the private owner; and in the present case, if the right has passed out of the plaintiff, it is immaterial whether it has become vested in the Crown or the municipality, for in either case he could not recover.

It is argued for the defendant that the plaintiff's ownership ceased when he had sold lots fronting on the streets which he laid out through his land, because then, under sec. 62 of R. S. O. ch. 152, the streets became public highways. It is argued for the plaintiff that his ownership of the streets continued at all events until the corporation had assumed jurisdiction over the streets, and that they did not do this until after 20th October, 1890, when all the stone in question had already been taken.

Assuming the law to be that at some particular period of the dedication to the public, the freehold passed out of the plaintiff and became vested in the corporation, I think it must be taken that having become so vested it remained vested, and was not subject to be divested again and revested in the owner without the consent of the corporation. It must also, I think, be taken to be law that when once a road laid out by an individual has been assumed as a public highway by a corporation, thereafter it can be closed and altered only by by-law of the corporation and not by the order of a Judge. There appears to be an intermediate stage between the act of selling a lot fronting

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on one of his streets by a proprietor, and the assumption by the corporation of the street as a public highway, during which, with the consent of the purchaser of the lot and by order of a Judge, the proprietor may close up the street and terminate the intended dedication, and it is difficult to conceive that during this stage the ownership can be otherwise than in the original proprietor. See *O'Brien* v. *Village of Trenton*, 6 C. P. 350, 7 C. P. 246; *Re Morton and Corporation of St. Thomas*, 6 A. R. 323, at pp. 333-4.

My conclusion therefore is, that until the corporation have assumed as a public highway, which they are bound to keep in repair, a road laid out by an individual—so long in fact as they have not accepted the dedication offered to them—that proposed dedication is revocable, and the property in the streets remains in the individual.

In the present case the acts relied on by the defendant as shewing the assumption of the streets by the corporation as public highways seem to be insufficient to establish it. The public had never by travelling over them accepted the proposed dedication, and the council had done nothing but embody the plaintiff's registered map with their own. This was not a corporate act which rendered them responsible to keep the streets in repair; it was merely such a recognition of the existence of a private sub-division as corporations are constantly making with regard to the original survey. A municipality, for instance, is not bound to keep in repair an unopened road allowance in the original survey, because it has assessed the lots fronting upon it for their share of the municipal taxes. The conversations between the defendant and two of the street commissioners upon which the defendant relies were of too informal a character to justify me in treating the corporation as bound by them to assume the streets and keep them in repair. Nothing of a corporate character in fact was done to this end until the resolution of 20th October, 1890, which authorized the street commissioners, if they should deem proper to do so, to open up these streets. Until then, and perhaps until the execution of the agreement with the

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defendant in February, 1891, the title to the soil and the freehold remained in the plaintiff, and his possession was not interfered with. The injuries complained of were committed before the 20th October, 1890; and I think the plaintiff is entitled to recover for fifty-five cords of stone at $2 a cord, together with his full costs of this action upon the High Court scale.

I have referred to *Kronsbien* v. *Gage*, 10 Gr. 573; *Re Trent Valley Canal*, 11 O. R. 687; *Corporation of Sarnia* v. *Great Western R. W. Co.*, 21 U. C. R. 59; *Rowe* v. *Sinclair*, 26 C. P. 233, at p. 246; *Corporation of Wyoming* v. *Bell*, 24 Gr. 564; *Cox* v. *Glue*, 5 C. B. 533, and the cases referred to in them.

The defendant moved on notice to set aside the judgment entered for the plaintiff, and to have the judgment entered for the defendant.

In Michaelmas Sittings, November 28th, 1881, before a Divisional Court composed of GALT, C.J. and MACMAHON, J., *G.H. Watson*, Q.C., supported the motion. The lands in question were streets or highways, a plan having been filed and lots sold according to it. This is expressly laid down in *Gooderham* v. *Corporation of Toronto*, by the judgment of FERGUSON, J., which is affirmed by this Court, 21 O. R. 120, 128. See also *O'Brien* v. *Village of Trenton*, 6 C. P. 350; *Regina* v. *Boulton*, 15 U. C. R. 272; *Re Morton and Corporation of St. Thomas*, 6 A. R. 323; Glen on Highways, 29; Dillon on Municipal Corporations, 4th ed., 640, 643; Tiffany on Registration, 350. But apart from this the evidence shews that there was actual acceptance of the dedication of the streets. The plaintiff, moreover, by the sale of the lots parted with all his interest in the streets. And further, the defendant as the owner of the lands fronting on the street, has the fee in the land to the middle of the street, and therefore had a right to do what he did: *Rowe* v. *Sinclair*, 26 C. P. 233, 245; *Berridge* v. *Ward*, 10 C. B. N. S. 400; *Simpson* v. *Dendy*, 8 C. B. N. S. 433, 472. The defendant in

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any event should have costs of the part of the claim abandoned by the plaintiff.

McCarthy, Q. C., contra. The first point is that the trespass was committed before the sale of the lots took place. The trespass was committed in August, and the sale took place in September; and moreover the trespass was committed on a part of the street which was not opposite the lands sold. There was no dedication of the street here. To create a dedication there must be an acceptance by the municipality of the dedication. The registration of the plan is merely an offer on the part of the owner to dedicate, and until the municipality does some act of acceptance, or there has being an acceptance by user, there is no complete dedication. There has been no acceptance, and certainly no user. The judgment in *Gooderham* v. *Corporation of Toronto*, 21 O. R. 120, is not binding in this Court, as this Court did not affirm the decision of Ferguson, J., there being a difference of opinion and the point is still open. The Municipal and Registry Acts must be read in conjunction with the Surveyors' Act, and so read would bear out his contention. The principle laid down in *Re Morton and Corporation of St. Thomas*, 6 A. R. 323, is still good law. The street commissioners had no authority to accept a dedication, their powers are limited to looking after the streets. Then as to the principle of *usque ad medium filum viæ*, the cases cited by the other side are qualified by the later decisions, and it is now held that the principle applies only to where there is a conveyance of a large tract of land adjoining the highway, and not to the case of the sale of small lots: *Plumstead Board of Works* v. *British Land Co.*, L. R. 10 Q. B. 16; Glen on Highways, 41; *Smith* v. *Millions*, 16 A. R. 140. But clearly nothing passes where there is merely an intended highway as here: *Leigh* v. *Jack*, 5 Ex. D. 264.

February 27th, 1892. Galt, C. J.:—

The following statement is taken from the judgment of the learned trial Judge, and states clearly and distinctly

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the cause of action. [The learned judge set out the statement of facts from the judgment of STREET, J., *ante*, and continued.]

The learned Judge has given a most carefully considered judgment, and refers to the different sections of the Municipal and Land Surveyors' Acts bearing on this question. After fully going into the question, he arrives at the following conclusion: "My conclusion, therefore, is, that until the corporation have assumed as a public highway, which they are bound to keep in repair, a road laid out by an individual,—so long, in fact, as they have not accepted the dedication offered to them—that proposed dedication is revocable, and the property in the streets remains in the individual."

It is upon this question, and this only, that this case depends.

By section 62, of the Land Surveyors' Act, R. S. O. ch. 152, "All allowances for roads, streets or commons, surveyed in cities, towns and villages, or any part thereof, which have been or may be surveyed and laid out by companies and individuals and laid down on the plans thereof, and upon which lots of land fronting on or adjoining such allowances for roads, streets or commons have been or may be sold to purchasers, shall be public highways, streets, and commons."

This enactment appears to me to be positive.

By sec. 527, of the Municipal Act, R. S. O. ch. 184, "Every public road, street, bridge or other highway, in a city, township, town or incorporated village, shall be vested in the municipality."

It appears to me that this enactment was necessary for this reason:—in cases where persons sell lands adjoining on a highway, either shewn on a plan or described in a deed, would transfer the moiety of such street to the person in whose favour the deed had been executed.

This is clearly laid down in the case of *Berridge* v. *Ward*, 10 C. B. N. S. p. 400, in which the law is summed up by Williams, J., as follows, at p. 416: "The general rule *

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* I take to be this,—that a conveyance of a piece of land to which belongs a moiety of an adjoining highway, passes the moiety of the highway by the general description of the piece of land. There is nothing in the present case to take it out of the general rule."

And in the same case, Erle, C. J., in his judgment, at p. 415, states that "Where a close is conveyed with a description by measurement and colour in a plan annexed to and forming part of the conveyance, and the close abuts on a highway, and there is nothing to exclude it, the presumption of law is that the soil of the highway *usque ad medium filum* passes by the conveyance."

In the present case there had been several sales, as stated by the learned Judge, two of them to this defendant.

In my opinion, therefore, with great respect for the decision of the learned Judge, I am unable to arrive at the same conclusion. I consider that when lots have been sold abutting on a street, the property in that street is absolutely vested in the corporation, unless a change in the plan should be made with the consent of the persons to whom the various lots have been sold.

It was admitted at the trial by Mr. McCarthy, as follows: "I do not dispute we caused streets to get their names, and caused a plan to be made and registered, and sold these four lots in reference to the plan." The four lots had been sold, two to defendant and two to Munroe.

By section 62, of 50 Vic. ch. 25 (O.), to which I have already referred, "All allowances for streets surveyed in villages, or any part thereof, which have been, or may be, surveyed or laid down on the plan thereof, and upon which lots of land fronting on or adjoining such allowances for streets have been or may be sold to purchasers shall be public highways, streets and commons."

I refer to this in reference to the argument of Mr. McCarthy that the law in England as respects public highways does not extend to streets laid down in towns, as shewn by the case of *Leigh* v. *Jack*, 5 Ex. D. 264, in which Cockburn, C. J., says, at p. 270: "I think that the legal

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Galt, C.J.

presumption as to the ownership of the soil of a highway does not apply to intended streets." This opinion was also expressed by the other learned Judges.

It is, however, manifest that whatever may have been the right of adjoining owners, or of the original proprietor, under the common law, they are settled by the positive provision already referred to in the Municipal Act, sec. 527, viz.: "Every public road, street, bridge or other highway, in a city, township, town, or incorporated village, shall be vested in the municipality, subject to any rights in the soil which may have been reserved." In the present case no rights had been reserved, consequently the streets vested absolutely in the municipality.

By section 65, of 50 Vic. ch. 25, "it is enacted that in no case shall any plan or survey, although filed and registered, be binding on any person so filing or registering the same, or upon any other person, unless a sale has been made according to such plan or survey." In the present case it is admitted that sales had been made in accordance with the plan and survey, consequently the plan was binding.

MacMahon, J.:—

The first question to consider is, whether what was done by the plaintiff was a dedication by him of Herbert and John streets as public highways.

By the Surveyors' Act, R. S. O. ch. 152, sec. 62 (1), "All allowances for roads, streets or commons, surveyed in cities, towns and villages, or any part thereof, which have been or may be surveyed and laid out by companies and individuals and laid down on the plans thereof, and upon which lots of land fronting on or adjoining such allowances for roads, streets, or commons have been or may be sold to purchasers, shall be public highways, streets, and commons: * * provided that the municipal corporation shall not be liable to keep in repair any road, street, bridge or highway laid out by any private person until established by by-law of the corporation or otherwise assumed for public use by such corporation, as provided by the Municipal Act."

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MacMahon, J.

The amendment made by sec. 62 to the Surveyors' Act, was after the decisions in *Re Morton and Corporation of St. Thomas*, 6 A. R. 323, and *Re Waldie and Corporation of Burlington*, 13 A. R. 104. The latter part of the above section is in substance the same as sec. 531, sub-sec. 2 of the Municipal Act (R. S. O. ch. 184).

By section 527 of the Municipal Act, every public street in a town shall be vested in the municipality.

When the plaintiff, in 1886, caused a survey to be made and lots laid out fronting on the streets mentioned, and a plan thereof registered, and he afterwards sold lots fronting on such streets to the defendants and to Munro, the plaintiff constituted such streets public streets within the town of Smith's Falls.

Although the acts of the plaintiff constituted such streets public streets, and such streets, by virtue of sec. 527, became vested in the municipality, still the above sec. 62 of R. S. O. ch. 152, and sec. 531, sub-sec. 2, of the Municipal Act, free the municipal corporation from liability to keep the streets in repair, unless they are established by by-law, or assumed for public use by the corporation. And where no by-law has been passed establishing such streets, the acts required to mark an assumption by the corporation of the streets must be corporate acts, such as clearly and unequivocally indicate the intention of the corporation to assume the street: *Hubert* v. *Township of Yarmouth*, 18 O. R. 458.

The defendant paid into Court the sum of $5, in satisfaction of the trespass and damage claimed to have been sustained by the plaintiff by the removal of stone from the lots owned by him, and referred to in the third paragraph of the statement of claim.

This sum counsel for the plaintiff admitted at the trial was sufficient to satisfy the cause of action in respect of which it was paid into Court.

The plaintiff's main cause of action is the removal from Herbert and John streets of large quantities of stone, the property of the plaintiff, which the defendant converted to his own use.

Judgment.

MacMahon, J.

The defendant made his first purchase from the plaintiff of lot 7 on the west side of Herbert street, intending to remove the stone therefrom to use for building purposes; and so informed the plaintiff when negotiating for the purchase. He (the defendant) commenced quarrying about the time he paid the plaintiff the purchase money, although he did not receive his deed for some days thereafter. The dates of the other purchases from the plaintiff by the defendant and Munroe are given in the judgment of his Lordship the Chief Justice.

Ryan in his evidence stated—and in this he was corroborated by a member of the street committee of the corporation—that in August, 1890, prior to proceeding with the excavation on the streets, he obtained the sanction of the street committee to remove the stone from the streets named, providing it was removed in such a manner as would cause the streets to be graded. The evidence is, that the streets were graded to the satisfaction of the street committee and the corporation.

At the time the street committee sanctioned the grading of the streets and consequent removal of the stone by the defendant, two of the members of the committee visited the locality and saw what was necessary to be done in order to a proper grading of the streets; but no resolution of the council of Smith's Falls was passed until the 20th of October, 1890, when the street committee were authorized, if they deemed it advisable, to open up these streets for traffic. In pursuance of the action taken on this resolution, a contract under seal was entered into between the town of Smith's Falls and Ryan and Munro, whereby the latter were to level and grade up in a thorough and proper manner to the satisfaction of the street committee, on or before the 15th of June, 1891, certain portions of Herbert and John streets therein mentioned. In consideration of Munroe and the defendant grading such streets, they were to have all the stone which they took out of said streets in connection with the grading.

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MacMahon, J.

The portions of the streets graded by Ryan and Munroe, under said contract, are those portions thereof in respect of which the plaintiff claims compensation for the stone removed therefrom.

The contract, although executed on the 5th February, 1891, originally had the date of the 21st of October, 1890, inserted therein; and Mr. Sparham, the town clerk at Smith's Falls, and the solicitor for the plaintiff in this action, said the contract was prepared by him on the 21st of October, under instructions, and as the outcome of the resolution of the council of the previous day. Ryan stated in evidence he called several times at Mr. Sparham's office to execute the agreement, but could not find him in.

What was done by the street committee in assenting to the grading and opening up of these streets was afterwards ratified by the corporation in passing the resolution of the 20th of October, and directing a contract to be prepared to carry out the agreement between the corporation and the defendant and Munro. What was done by the corporation was such an act as unequivocally shewed its intention to assume the streets in question.

I do not discuss the other position urged by Mr. Watson for the defendant, that the deeds from the plaintiff to Ryan and Munro conveyed to them, as grantees of the lots, *ad medium filum* of the street. That has been answered by the reference of the learned Chief Justice to the provisions of sec. 527 of the Municipal Act.

I agree that the motion must be made absolute, dismissing the action with costs.

[COMMON PLEAS DIVISION.]

BRUNKER V. THE CORPORATION OF THE TOWNSHIP OF MARIPOSA.

Intoxicating liquors—Sale of liquors—Sale by retail—Quantity—Locality—Days named for appointment of agents and declaring the result of polling—Sufficiency of—Notice—Sufficiency—Christmas and New Years' days—Publication on.

A by-law passed by a township council under 53 Vic. ch. 56, sec. 18 (O.), was entituled a by-law to prohibit the retail sale of intoxicating liquors in the township of Mariposa; and enacted that "the sale by retail of spirituous liquors is and shall be prohibited in every tavern, inn, or other house or place of public entertainment: and the sale thereof is altogether prohibited in every shop or place other than a house of public entertainment":—

Held, that the last part of the clause must be read in connection with the previous part so as to limit the prohibition to a sale by retail, which is now put beyond question by 54 Vic. ch. 46, sec. 1 (O.).

Slavin v. *Corporation of Orillia*, 36 U. C. R. 159, and *Re Local Option Act*, 18 A. R. 573, followed:—

Held, also, that the quantity of liquor to be deemed a sale by retail need not appear in the by-law being defined by the statute: that the locality within which the liquor could be sold was sufficiently indicated; and that the want of penalty in the by-law did not invalidate it.

The day named in the by-law for the appointment of agents to attend at the final summing up of the votes was nearly three weeks after the first publication of the by-law, and the day named for the clerk to declare the result of the polling was the second after said polling:—

Held, both days sufficient.

The notice at the foot of the by-law after certifying that the foregoing (*i. e.* the copy of the by-law published) was a true copy of the proposed by-law of the township of Mariposa which had been taken into consideration by the council thereof, and which would be finally passed in the event of the electors' assent being obtained thereto after one month's publication in a named paper, stated that all persons were required to take notice that on the 4th of January, 1892, a poll will be opened, naming the statutory hours, at the several polling places named in the by-law for the purpose of receiving the votes of the electors on the same. Two of the days of publication were Christmas and New Year:—

Held, that the formal notice was sufficient; and the fact of publication on the days named did not render the publication invalid; publication not being a judicial act so as to prevent publication on those days.

Statement. THIS was a motion to quash a by-law passed by the Municipal Corporation of the township of Mariposa on the following grounds:

1. "That the by-law absolutely prohibits the sale of liquor.

2. The by-law is bad for not defining the quantity of liquor, the sale of which is to be deemed a sale by retail,

and that if any, which might lawfully be sold in a house of public entertainment. Statement.

3. That the by-law should indicate the locality within which the sale of liquor is to be permitted.

4. The by-law provided no penalties for infraction thereof.

5. That the by-law fixes a day for the appointment of agents to attend at the polling places at the final summing up of the votes by the clerk earlier than the date of the last necessary publication of the by-law in the newspaper.

6. That the by-law announces an improper date for the declaring of the result by the clerk.

7. That the by-law is bad because the first branch of the prohibition therein extends to "a place."

8. That the form at the foot of the proposed by-law is not a proper or sufficient notice to the electors of the facts therein stated.

9. That the publication was not according to law, having been made on non-juridical days."

The applicant in his affidavit filed on the motion stated that he was a resident ratepayer of the township of Mariposa and the owner of hotel premises therein under license for the current license year; that the two latest issues of the newspaper in which the proposed by-law was published were the 21st of December, 1891, and the 1st of January, 1892.

The council of the township of Mariposa, under the authority conferred by the Local Option Act, 53 Vic. ch. 56, sec. 18, (O.), as amended by 54 Vic. ch. 46, sec. 1, (O.), passed the following by-law with the notice thereunder attached by the clerk of the municipality :—

BY-LAW No. 411.

A by-law to prohibit the retail sale of intoxicating liquors in the township of Mariposa.

The municipal council of the township of Mariposa enacts as follows :—

1. That the sale by retail of spirituous, fermented or other manufactured liquors is, and shall be, prohibited in every tavern, inn or other house or place of public entertainment; and the sale thereof is altogether prohibited in every shop or place other than a house of public entertainment.

Statement. 2. That the vote of the electors of the said township of Mariposa will be taken on the by-law by the deputy-returning officers hereinafter named, on the fourth day of January, one thousand eight hundred and ninety-two, commencing at nine o'clock in the morning and continuing until five o'clock in the afternoon, at the undermentioned places :—

[The places are then set out.]

3. That on the twenty-second day of December, A.D. 1891, at his office in the village of Little Britain, at the hour of two o'clock in the afternoon, the reeve shall appoint in writing, signed by himself, two persons to attend at the final summing up of the votes by the clerk, and one person to attend at each polling place on behalf of the persons interested in and desirous of promoting the passing of this by-law, and a like number on behalf of the persons interested in and desirous of opposing the passing of this by-law.

4. That the clerk of the said municipal council of the township of Mariposa shall attend at the Town Hall, in the village of Oakwood, at the hour of twelve o'clock at noon, on the sixth day of January, A.D. 1892, to sum up the number of votes given for and against this by-law.

5. That this by-law shall come in force and take effect on the first day of May, A.D. 1892.

(Notice referred to thereunder).

This is to certify that the foregoing is a true and correct copy of by-law No. 411 of the township of Mariposa, which has been taken into consideration by the council of the said municipality, and which will be finally passed (in the event of the assent of the electors being obtained thereto) after one month from the first publication in "The Canadian Post," newspaper, the publication of the same being the eleventh day of December, A.D. 1891.

All persons interested are hereby required to take notice that on the fourth day of January, A.D. 1892, a poll will be opened at nine o'clock in the forenoon and continue open till five o'clock in the afternoon, at the several polling divisions as set forth in the said by-law, for the purpose of receiving the votes of the electors on the same.

JOHN F. CUNNINGS,
Township Clerk.

Township Clerk's Office, Oakwood, December 4th, 1891.

On the 12th February, 1892, *E. A. DuVernet* and *Jones* supported the motion.

MacLaren, Q. C., and *McIntyre*, Q. C., contra.

March 7th, 1892. MACMAHON, J. :—

As to the first ground taken. The by-law follows the very words of the statute 53 Vic. ch. 56, sec. 18 (O.).

The question now raised came up in *Re Slavin and Corporation of Orillia*, 36 U. C. R. 159, on a motion to quash a prohibitory by-law passed under 32 Vic. ch. 32, sec. 6, sub-sec. 7 (O.). The *ipsissima verba* almost of that section have been followed in the recent legislation, 53 Vic. ch. 56, sec. 18 (O.). And Richards, C. J., in delivering judgment in the *Slavin* case, stated that the section had reference and was confined to the retail business. And in *Re Local Option Act*, 18 A. R. 573, at p. 582, Hagarty, C. J. O., states that although the Act of 1868 (32 Vic. ch. 32 (O.), uses the words "prohibiting totally the sale thereof" that "these words must refer to the preceding words which deal with the selling by retail, and merely prohibit such selling in every place."

The legislature has, however, by 54 Vic. ch. 46, sec. 1 (O.), declared that the 18th section of 53 Vic. ch. 56 (O.), was not intended to affect the provisions of 29 & 30 Vic. ch. 51 (being sec. 252 of the Consolidated Municipal Act of 1866), which provided that no tavern or shop license shall be required for the sale of liquors in the original packages in which the same have been received from the importer or manufacturer, provided such packages contain respectively not less than five gallons or one dozen bottles, save in so far as sec. 252 may have been affected by sub-sec. 9 of sec. 249 of the same Act, (which is in effect the same as 32 Vic. ch. 32, and the 18 sec. of 53 Vic. ch. 56), and save in so far as licenses for sales of such quantities as are required by "The Liquor License Act;" and so has endeavoured to put the meaning of the Act beyond question.

As to the second ground: the quantity of liquor, the sale of which is to be deemed a sale by retail, is defined by the statute, and therefore need not appear in the by-law at all. See "The Liquor License Act," R. S. O. ch. 194, sec. 2, sub-secs. 2 and 3.

The third ground taken is: "That the by-law should indicate the locality within which the sale of liquor is to be permitted." The by-law was passed by the township council of Mariposa, has reference to the township of Mariposa, and includes the whole of the electors of the municipality who

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MacMahon, J.

are called upon to vote on the by-law. Had it been intended to confine it to any particular locality within the township the by-law would, doubtless, have provided for such limitation. The by-law includes the township, and limits the prohibition intended to be effected within the boundaries of the township.

The fourth ground is disposed of by the judgment of the Court of Appeal in *Re Local Option Act*, 18 A. R. 573, Hagarty, C. J., at p. 584, saying: "I do not consider that a by-law omitting to provide a penalty is necessarily bad;" and the judgment of BURTON, J. A. is to the same effect, at page 592. MACLENNAN, J. A. at page 598 says:— "In answer to the fourth question, I am of opinion that the want of a penalty does not invalidate such a by-law."

As to the fifth ground. The 22nd of December is the date named in the by-law for the appointment of agents to attend at the final summing up of the votes. By sec. 296 of the Municipal Act the council must, in the by-law fix the time and place for the appointment of persons to attend at the various polling places at the final summing up of the votes by the clerk, etc. The length of notice required to be given is not provided by the statute, so that reasonable notice must be given to enable the parties to select the scrutineers for the purposes named, which was in this instance nearly three weeks after the first publication of the notice, which should, I consider, be ample for the purpose.

It is difficult to understand what is meant by the sixth objection, "That the by-law announces an improper date for the declaring of the result by the clerk."

By sec. 296 of the Municipal Act, the council is required "by the by-law" to "fix a time when and a place where the clerk of the council * * shall sum up the number of votes given for and against the by-law." That time was fixed by the by-law two days after the polling, namely the 6th of January.

Where an election has been held under the Municipal Act for "the election for aldermen, councillors, etc., the clerk shall at noon on the next day * * publicly declare to be elected the candidate or candidates having the largest number of votes polled:" Sec. 160 Municipal Act. By the 296th sec. of the Municipal Act, the by-law is to fix the time when the clerk shall sum up, etc. Having regard to the provisions of sec. 160 the second day after the polling would not be an improper date for the performance of this duty.

The seventh objection as to the prohibition extending to "a place," has virtually been disposed of by a reference to the third objection taken.

I regard the form at the foot of the by-law as being ample and sufficient notice to the electors of the facts stated.

The last objection, No. 9, is "That the publication was not according to law, having been made on non-juridical days."

"The Canadian Post" newspaper in which the publication took place, according to the notice annexed to the by-law, is published on Fridays. Christmas-day, in the year 1891, and New Year's-day, 1892, were on Fridays, and those were consequently the days of the publication of the paper. In an affidavit made by the assistant editor, of the "Post," he states that the issue, bearing date the 25th day of December, was (as is usual with weekly papers), published the day prior to the expressed date of publication, and was published before midnight of the 24th of December, and copies of that issue were handed out before midnight of that day, and copies were also mailed on the 24th; and that for the issue of the 1st of January, the paper was published the day prior to the expressed date of publication, namely, on the 31st of December, and copies were delivered to parties calling at the office for them, and that copies were mailed to subscribers on the 31st December.

The interpretation Act, R. S. O., ch. 1, sec. 8, sub-sec. 16 provides that "holiday" shall include Christmas and New Years' days, *i. e.*, these days are non-juridical days or days on which the law is not administered or upon which the court cannot do any judicial act: *Harrison* v. *Smith*, 9 B. & C. 243.

The publication of the notices required, is in no manner a judicial act; and, therefore, the publication thereof on Christmas and New Years' days cannot affect the question as to the sufficiency of the publication. The Municipal Act, sec. 293, sub-sec. 2, requires publication "in at least one number of such newspaper each week for three consecutive weeks." The first publication in the "Canadian Post" was on the 11th, the second on the 18th, the third on the 25th of December, 1891, and the fourth on the 1st day of January, 1892. Had the Act required publication of the notices in the "Ontario Gazette," the fact of the "Gazette" being dated on days bearing the dates of Christmas and New Years' days (although actually published on the days previous to these respective events of Christmas and New Year), would not have invalidated the notices.

On the question of notice I refer to *Re Boon and Corporation of Halton*, 24 U. C. R., 361; *Re Coe and Corporation of Pickering*, *ib.* 439; *Re Wycott and Corporation of Ernestown*, 38 U. C. R. 533; *Re Mace and Corporation of Frontenac*, 42 U. C. R. 70, at p. 79; *Re Lake and Corporation of Prince Edward*, 26 U. C. C. P. 173.

On all the grounds taken the motion fails and must be dismissed with costs.

[CHANCERY DIVISION.]

THOMPSON v. WRIGHT.

Master and servant—Workmen's compensation for Injuries' Act—Machinery—Stamping-machine—Employer's liability—Neglect to supply proper material—Factories' Act—R. S. O. 1887, ch. 141, 208.

The plaintiff, a lad of seventeen, worked at a stamp-machine in the defendants' factory, his duty being to keep it clean. Being refused proper material for this purpose, he resorted to pieces of bagging. Attempting to clean it while in motion, the bagging got caught in the cog-wheel, and he was injured :—

Held, that the defendants knowing that the plaintiff was working with improper appliances in a dangerous place, were guilty of negligence in not making provision for his safety, by supplying him with proper material, and in not having the machinery stopped while the cleaning was going on, and the plaintiff was entitled to retain the verdict found in his favour at the trial.

As the place where the plaintiff worked was dangerous, and called for a guard under the provisions of the Factories' Act, the failure to furnish one was *per se* evidence of negligence on the part of the defendants.

THIS was an action of negligence brought by James **Statement.** Thompson against E. T. Wright & Co., claiming damages for injuries sustained while in their employment in connection with certain machinery, under circumstances sufficiently set out in the judgment.

The action was tried before MACMAHON, J., and a jury at Hamilton, on January 11th, 1892, and resulted in judgment being entered for the plaintiff for $1,400 damages.

The defendants now moved before the Divisional Court, by way of appeal, from this judgment.

The motion was argued before BOYD, C., and ROBERTSON, J., on February 18th, 1892.

McCarthy, Q. C., and *Carscallen* for the defendants. The judgment cannot rest on the findings here. The alleged charge of negligence is that the plaintiff could not obtain proper material, but he was not bound to use improper material.

[ROBERTSON, J.—Wasn't it the duty of the defendants to see that the plaintiff was supplied with proper material ?]

Granted, but it does not justify the plaintiff in using improper material.

Argument.

Lynch-Staunton and *Livingstone*, for the plaintiff. The verdict can be supported on the ground that proper materials were not supplied: *Smith* v. *Baker & Sons*, [1891] A. C. 325, 362. *Bartonshill Coal Co.* v. *Reid*, 3 Macq. 266, at p. 288, also is in point. Another case is *Britton* v. *Great Western Cotton Co.*, L. R. 7 Ex. 130; *McCloherty* v. *Gale Manufacturing Co.*, 19 A. R. 117; *Dean* v. *Ontario Cotton Mills Co.*, 14 O. R. 119; *Finlay* v. *Miscampbell*, 20 O. R. 292; *Crocker* v. *Banks*, 4 Times L. R. 324.

McCarthy in reply.—*Rudd* v. *Bell*, 13 O. R. 47, shews the law to be applied. It is not pretended that the machine is not in proper order; that point was considered in *Hamilton* v. *Groesbeck*, 19 O. R., 76, affirmed by the Court of Appeal, 18 A. R. 437. The cause of the accident was the plaintiff's use of an entirely improper material for cleaning the machine. What the plaintiff complains of is that the wheels of the machine were not guarded as required by the Factory Act, and as they were subsequent to the accident in fact protected. The nonprotection of the wheels in this way is, under *Finlay* v. *Miscampbell*, claimed to be negligence on the defendants' part. Granting that that is so surely that does not justify the plaintiff putting in his hand into the machine so as to be crushed. What is aimed at by the Factory Act is to guard persons, acting prudently from injury, not persons acting rashly and imprudently. The boy admits he knew what he was using was dangerous. On the common law rule he is out of Court. If the act which caused the injury is the act of the master, then knowledge is not under *Smith* v. *Baker* conclusive evidence that the plaintiff is *volens*. But if the plaintiff has done the act, it is impossible to say that he is not *volens*. *Thomas* v. *Quatermaine*, 18 Q. B. D. 685, was really decided on that point.

If the want of the guard gives rise to the cause of action he certainly knew that, and so has no ground at common law. So also he knew of the danger of using the wrong material: *Membery* v. *The Great Western R. W. Co.*, 14

App. Cas. 179. See also *Smith* v. *Baker & Sons*, [1891] A. C., at p. 357. **Argument.**

Carscallen on same side.

Lynch-Staunton in reply.—*Thomas* v. *Quatermaine* and *Baddeley* v. *Earl Granville*, 19 Q. B. D. 423, and *Brookes* v. *Ramsden*, 63 L. T. 287, and *Clarke* v. *Holmes*, 7 H. & N. 937, shew that where there is a breach of a statutory duty, it is not necessary for the plaintiff to shew ignorance on his, or knowledge, on the master's part.

March 29th, 1892. BOYD, C.:—

The plaintiff when injured was a lad of about seventeen years of age. He had been working at a stamp machine (off and on, as he says) for some six months before he was hurt. Part of his duty was to clean the upright part from oil which ran down from the oil holes over the shafting. There was a space of about twelve inches between the upright and the cogwheel, and to clean when the wheel was in motion was very dangerous. In the first five months he used waste from the engine-room, after that he used rags, because the engineer upon request had refused to give him waste. Then the plaintiff says he was begrudged even the rags by the foreman, who would not let him have them, (p. 3), and then he had to take pieces of bagging. He says the bagging was the only thing he could get, and this he had used two or three days before he got hurt. He says also the "boss" thought the waste was too expensive, and would not let him have it. The "boss" admits in his examination that he did not warn the plaintiff against cleaning the machine while in motion, and that he has seen him using a rag in size a quarter of a yard square. On the occasion of the accident the defendant says the size of the bagging was six inches wide by a yard long. The plaintiff had wrapped this about his hand, but one end flapped loose, and catching in the cogs drew in his hand, which was crushed. The plaintiff's testimony (corroborated by the other depositions), is that the master was daily in the workshop, and saw him cleaning

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the machine under the same circumstances in which he was hurt, and did not forbid him, and was, indeed, within a couple of yards of him when the accident happened. No instructions were given to the plaintiff except that he was to clean the machine, and it had to be cleaned while the cogwheel was in motion, as it had been going steadily from seven to six for a week before the injury.

After the boy was hurt the factory inspector directed a guard to be placed over the cogwheel, a simple and inexpensive contrivance, by which the cleaning can be done with perfect ease and safety while the machine is at full speed. These seem to be all the material facts as laid before the jury; who, with a rather adverse charge, have found that there was no contributory negligence on the part of the plaintiff; that he could not have obtained the necessary material for cleaning the machinery by applying for the same, and that he is entitled to recover $1,400.

Upon the evidence (as illustrated by the photographs put in), I should judge that the place where the plaintiff worked and cleaned the machinery was dangerous and called for a guard under the provisions of the Factory Act; so that the failure to furnish such a guard was *per se* evidence of negligence on the part of the defendants. See *McCloherty* v. *Gale Manufacturing Co.*, per *Osler, J. A.*, 19 A. R. 117.

The master was also chargeable with personal negligence in seeing this lad, a minor, working with improper appliances in a dangerous place, and not making proper provision for his safety by supplying him with waste, or with having the machinery stopped while the cleaning was going on.

The jury have no doubt negatived contributory negligence, because the lad was not able to appreciate the danger of what he was doing to the same extent as the master and those in authority acting for the master who forced him to the alternative of doing his work as best he could, or losing his place. There is also the express admission of the master (the defendant), not contradicted when

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bearing testimony to the careful manner in which the plaintiff was working at the time of the accident, that "the boy could not have helped it."

In the evidence, after the boy's endeavour to get proper material to wipe off the oil, and the master's observation that he was using improper stuff, the jury may have held the defendant estopped from setting up that the boy was to blame, and from denying that he was acting as reasonably as could be expected from servants of his age. Had the master supplied "waste" (he being well aware that that was the proper material to be used), the boy would not have been hurt. Hence the real negligence was that of the master, and not of the comparatively inexperienced youth in his employment: *Britton* v. *Great Western Cotton Co.*, L. R. 7 Ex. at p. 135.

The jury have, in effect, found that the plaintiff manifested no negligence, no want of ordinary care, but was in truth in the proper discharge of his duty as directed and sanctioned by the master at the time of the injury. See *Caswell* v. *Worth*, 5 E. & B. 849, and the comment of Pigott, B., thereon in *Britton* v. *Great Western Cotton Co.*, L. R. 7, Exch. 139; *Weblin* v. *Ballard*, 17 Q. B. D. 127; *Thrussell* v. *Handyside*, 20 Q. B. D. 359. The verdict of the jury places the operative fault on the defendant, and exculpates the plaintiff from any want of ordinary caution in the observance of his duties, and this the evidence warrants. As said by Cockburn, C.J. in *Clark* v. *Holmes*, 7 H. & N., at p. 945, as to this kind of case "the question whether the injury of which a plaintiff complains is to be ascribed wholly to the negligence of the defendant or whether the plaintiff has had any share in bringing it about is one wholly for the jury."

It was contended that no judgment should be entered on the findings, but having regard to the third question, which reads: "If you find the plaintiff is entitled to recover, what damages do you award him?", the answer of the jury thereto awarding $1,400 implies a verdict gen-

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erally for the plaintiff, apart from what is specially found by them.

I think the judgment should be affirmed with costs.

ROBERTSON, J.:—There were three questions submitted to the jury: 1st, Could the plaintiff have obtained the necessary material for cleaning the machine by applying for it? 2nd, Was young Thompson guilty of contributory negligence? If so, what was such negligence? 3rd, If you find the plaintiff is entitled to recover, what damages do you award him?

The jury answered the first and second in the negative, and the third by awarding the plaintiff $1,400 as damages.

It is contended before us that the whole case was not properly put before the jury, in other words, that the attention of the jury was not drawn to the fact of want of knowledge on the part of the defendants that plaintiff was using the linen bagging, which is admitted to be more dangerous than the cotton waste which had been formerly supplied to him, to be used in cleaning the machine. And it is further contended that the jury should have been asked a question specifically setting forth whether the defendants had that knowledge. On the other hand, it is contended that the whole case went clearly before the jury, with a charge, however, which leaned in favour of the defendants, and that the third question involved every ingredient which was necessary for the jury to consider in order to enable them to dispose of the case. That question by itself covered the two first, because if the plaintiff was entitled to recover, it must be assumed that the jury found that the plaintiff could not have obtained the necessary material with which to safely clean the machine, and that he was not guilty of contributory negligence. These two facts, coupled with another fact, which was in evidence and which was also involved in the third question, as to the right of the plaintiff to recover, and as to which the learned Judge specifically charged the jury, I think plainly shew that the whole case was duly considered by the jury and that they found on the evidence that the defendants well

Judgment.

Robertson, J.

knew that the plaintiff was using the dangerous material, and not what they had formerly supplied him with. The learned Judge charged the jury on this point in these words: "The fact is in evidence, gentlemen of the jury, that Wright was two or three times, or three or four times a day, in fact, according to his own evidence read to you, the evidence given on examination for discovery, he said he was there several times in the morning, and also in the afternoon, and what is urged is that he should have known that Thompson was using the bagging. If he did not see him using the bagging or was not told that he was using the bagging it is not likely that he would know what he was using. The question after all for you is, was it not Thompson's duty to inform Wright that he had to resort to that bagging if he is seeking to make Wright & Co. liable, because it is not shewn that either Wright or the foreman knew the material that he was using, and thus placed him in jeopardy by reason of having to use this bagging. That is something that you will have to consider in looking at the evidence in every way. Just say what you think from what the boy stated here, and from what is said from Wright's own evidence."

It will be observed that the learned Judge did not fully appreciate a very material part of the evidence in favour of the plaintiff, *i.e.*, a statement made by one of the defendants, Wright, on his examination for discovery, in regard to his having seen the plaintiff using the bagging, etc., judging from the learned Judge's remark: "If he did not see him using the bagging, or was not told that he was using the bagging, it is not likely he would know what he was using." The defendant, however, states on his examination, in answer to questions put:

Q. You used to see him cleaning that machine around there? A. Yes, I saw him wiping off the machine as I passed through very often.

Q. What did he use when he was wiping off the machine? A. Sometimes rags, sometimes waste.

Q. What kind of rags did he use? A. Cotton rags, linen, all sorts.

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Q. What is the material generally used? A. In machine shops they usually use waste.

Q. There is a regular stuff what they call cotton waste? A. Yes.

Q. That pulls to pieces easily? A. Yes.

Q. That is the proper stuff for cleaning; it is what engineers use? A. Yes, engineers use waste.

Q. Did you ever tell him not to clean it while it was in motion? A. No, I don't know as I ever did.

Q. About what part of the day would you be in that room? A. Seven o'clock, half-past seven, nine, probably ten, sometimes half-a-day, sometimes all day.

Q. Were you there when the accident took place? A. I was near there.

Q. About how far away? A. I suppose two or three yards.

Q. Did you see this accident? A. I seen it after it happened.

Q. Then what did you do? A. I turned around to see what was wrong.

Q. What did you see? A. I saw the boy had got caught in the cogs.

Q. Did the machine stop when his hand got caught? A. Yes.

Q. Did you see the rag after? A. Yes, I took it out.

Q. About what size was it? A. It would be about six inches wide by a yard long, I should judge.

Q. What was it made of? A. Coarse canvas.

Q. Coarse bagging, the plaintiff said, that is the stuff it is? A. Yes.

Now, this makes it pretty clear that the defendants were cognizant of the important fact that the plaintiff was using this dangerous material, and the charge was such that it makes it reasonable to conclude that the jury must have considered the question of knowledge, and answered it against the defendants, before they made up their minds as to the damages. Besides all this, it was the duty of the defendants to see that the plaintiff was supplied with the proper material for cleaning the machine. It must be

Judgment.

Robertson, J.

borne in mind that he was a mere lad, the learned Judge in his charge refers to him as "a little boy." He was only seventeen years of age, and although an intelligent lad it does not appear that he was of a forward self-asserting disposition, and taking into account that he was met with an unequivocal refusal, when he applied to the person who had formerly supplied him with the cotton waste, and had been told by him, that the "boss thought it was too expensive, and would not let us have it," he naturally would be diffident in asking "the boss" himself, and took what he could get for the purpose.

Under all the circumstances which came out in evidence, and in the face of the fact that neither of these defendants denied their knowledge in the witness box that the plaintiff was using this material, and the further fact that the defendant was within a few feet of the plaintiff when he was using it at the time of the accident, I cannot say that the jury were wrong in their conclusions. In *Rudd* v. *Bell*, 13 O. R. 47, it was held that negligence on the part of the foreman is not negligence on the part of the master, the foreman being a fellow-servant.

Again, it is clear from the defendant's statement made at the time he took the plaintiff home to his parents, immediately after the accident, that he did not attribute it in any way to the plaintiff's carelessness. He said he was a most careful boy, and it was purely accidental, and it seems most reasonable to assume that the defendants knowing well that the boy was a most careful lad, relied on that and took the risk; this they should not have done; it was their duty to provide the proper and safe material. The plaintiff has suffered by reason of their neglect in that regard, and they should be held responsible for the consequences.

Then again the evidence shows conclusively that if the machine had been properly guarded, as it was after the accident, the misfortune could not have happened. That is a circumstance which might fairly be taken into consideration by the jury. On the whole I think the verdict and judgment must be allowed to stand.

A. H. F. L.

[CHANCERY DIVISION.]

O'BRIEN V. SANFORD.

Master and servant—Workmen's Compensation for Injuries' Act—Elevator —Accident —Negligence — Employment of infant under twelve—Factories' Act—R. S. O. 1887, ch. 208, sec. 12—52 Vict. ch. 43, sec. 7, sub-sec. 2.

The plaintiff, a boy under twelve years of age, was hired to work a hoist for the defendants in their factory. The elevator was worked by ropes on the outside of the cab or frame which were handled by the person standing within, through a square opening cut in the framework. The plaintiff was instructed for a few hours by a bigger boy how to raise and lower the hoist, and was cautioned not to put his head out of the opening when the hoist was going. On the occasion in question the elevator stopped when going up, and the plaintiff put his head out of the opening to see what stopped it, when, the elevator starting again, the plaintiff received the injuries complained of. On this evidence the plaintiff was nonsuited in his action, which he brought against the defendants for negligence:—

Held, that the nonsuit should be set aside, and a new trial ordered with costs to the plaintiff in any event.

Per BOYD, C. The employment of a child under twelve to work an elevator for the uses of a manufacturing concern is made illegal by the Factories' Act; and, for this reason, the employer has to exercise more than ordinary precautions for the well-being and safe-guarding of minors who have been put into factory work contrary to the prohibition of the legislature.

Statement. THIS was an action of negligence brought by George H. O'Brien, by Henry O'Brien, his next friend, against the W. E. Sanford Manufacturing Company for damages sustained owing to an accident when in their employment.

The circumstances under which the accident occurred are set out in the judgments.

The action came on for trial at Hamilton on January 7th, 1892, before MACMAHON, J., who nonsuited the plaintiff.

The plaintiff now moved before the Divisional Court to have the nonsuit set aside, and for a new trial.

The motion was argued on February 20th, 1892, before BOYD, C. and ROBERTSON, J.

Lynch-Staunton for the plaintiff. The defendants violated the provision of the Factories' Act in employing the boy at all: R. S. O. 1887, ch. 208, sec. 12, as amended by subsection 2, section 7, 52 Vict. ch. 43 (O.). The case is within

Argument.

Crocker v. *Banks*, 4 Times L. R. 324. I refer also to *Vicary* v. *Keith*, 34 U. C. R. 212; *Railroad Company* v. *Stout*, 17 Wall. 657, 660; *Railroad Company* v. *Gladmon*, 15 Wall. 401, 408; *Grizzle* v. *Frost*, 3 F. & F. 622; *Rudd* v. *Bell*, 13 O. R. at p. 51; *Morgan* v. *Hutchins*, 6 Times L. R. 219; *Brannigan* v. *Robinson*, 8 Times L. R. 244; *Smith* v. *Baker & Son*, [1891] A. C. at p. 354.

G. T. Blackstock, Q.C., and *McKay* for the defendants. A child, like an adult, subject to certain limitations, may be guilty of contributory negligence: *Thomas* v. *Quatermaine*, 18 Q. B. D. 685.

[Boyd, C., To employ such a child is at least negligence, is it not? We have held in *Finlay* v. *Miscampbell*, 20 O. R. 29, that not to put a guard prescribed by the Act is negligence; and by parity of reasoning, is not the employment of a child in the face of the [illegible]hibition negligence?]

It is an element no doubt. Here, when employed, the boy was within two months of twelve years of age.

[Boyd, C., referred to *Sharp* v. *The Pathhead Spinning Company*, Rettie (Sc. C. of Sess. Cas.), 4th series, vol. 12, p. 574.]

As to the alleged defect there was no evidence of any. You cannot require the employer to warn the child against something which the evidence shews he had never had experience of.

[Boyd, C. You are dealing with a child under twelve years of age, whom you had no right to employ at all. You must be held to have employed him with all risks. Under twelve the presumption would be that the child did not understand, over twelve it would be for the jury to say whether he understood or not.]

The Factories' Act has no civil bearing. This was held in *Finlay* v. *Miscampbell*, 20 O. R. 29. The presumption of negligence, if it exists, is rebuttable. It is going further than any case to say that the employer is liable when the boy went and did the very thing he was told not to do: *Lay* v. *The Midland R. W. Co.*, 34 L. T. N. S. 30. There is no approved case in which it is said an infant cannot be

Argument.

guilty of contributory negligence: Simpson on Infants, 2nd ed., pp. 110, 111.

[BOYD, C. Your argument is very strong if one could suppose this was a thing quite unheard of. The slipping of a belt is spoken of. I should deduce from Allan's evidence that all the belts do this.]

There is no evidence that this machine was ever known on any former occasion to stop and then go on again.

March 29th, 1892. BOYD, C.:

The plaintiff, a lad under twelve, was hired to work an elevator for the defendant company. A larger boy who had been in charge before was detailed for a few hours one afternoon to go up and down with the plaintiff, so as to shew him how to raise and lower the hoist. The plaintiff's mother was assured when arranging for his wages that there was no danger connected with the employment, if the boy did not "monkey" as she expressed it. The boy upon examination, himself supplies the details of the instructions given. The elevator was worked by ropes on the outside of the cab or frame, which were handled by the person standing within, through a square opening cut in the frame work. The plaintiff was cautioned by the bigger boy against putting his head out at this place when the hoist was going, but he did not know and was not told that there was any danger about the machine when it was not moving.

It is fairly to be inferred from the evidence as far as given that the plaintiff did not by this means acquire any competent knowledge of what to do or how to behave in various contingencies that might be expected in the working of the machine. He was puzzled, for instance, by the elevator not stopping at the ground floor, but going down to the cellar: he had no warning as to what was to be done if the elevator stopped (as it was in the habit of doing) between floors in its upward or downward course.

On the second day of his employment an emergency

Judgment.

Boyd, C.

arose for which he was not prepared. After passing the second flat going upwards the elevator began to shake and then stopped short. The lad thereupon looked down through the hole to see what stopped it as he said, and as he looked, it started to go up. His head was caught against a beam, but escaped with painful scalp injuries. The whole affair was probably one of seconds, not of minutes, and the act of the child was one of inexperienced, and even unwarned, curiosity. The question is whether on the plaintiff's own case there is a right of redress against the company, and in my opinion he should not have been nonsuited. There was evidence to submit for the consideration of the jury as to whether this child (under the statutory age of employment) was competent to manage this unusually, if not dangerously constructed elevator; and again as to whether, if possibly competent, he had been adequately instructed so as to be competent in all the circumstances which might be expected to arise in its working from such causes as the slipping, the unlacing or the breaking of the belts, and others which are mentioned in the evidence. There may be, besides, aspects of liability not needful to discuss at this stage of investigation. But those I have indicated as matters for the jury are the result of deductions from such authorities as *Grizzle* v. *Frost*, 3 F. & F. 622; *Vicary* v. *Keith*, 34 U. C. R. at p. 222, and *Sharp* v. *The Pathhead Spinning Company*, 12 Rettie (Sc. Court of Sess. Cas.) 574.

The employment of a child under twelve to work an elevator for the uses of a manufacturing concern is made illegal by the Factories' Act, R. S. O. ch. 208, sec. 6, sub-sec. 1; sec. 2, sub-sec. 1; and sec. 15, sub-sec. 4. For this reason, and beyond the mere penalty which is provided, I think that the employer has to exercise more than ordinary precautions for the wellbeing and safe-guarding of minors who have been taken into factory work contrary to the prohibition of the legislature.

We were urged to make costs payable forthwith; but looking at the progress of the trial, it appears that the

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Boyd, C.

case was stopped by the trial judge upon the defendants' moving for a nonsuit. There was a decided ruling that there was not a tittle of evidence to be submitted, and a refusal by him to have the damages estimated. This was not induced as in *Coventry* v. *McLean*, 22 O. R. 1, by the insistence of the plaintiff, and I see no good reason for changing the usual practice of making the costs of the last trial and this motion to be in the cause to the plaintiff in any event.

ROBERTSON, J.:—

The contention on behalf of the defendant company is that the plaintiff was warned not to put his head out of the aperture on the side of the elevator, when it was moving and having disregarded that warning, in consequence of which he suffered the injury, he cannot now be heard to complain. The evidence of the plaintiff, a mere child under twelve years of age was, that he was told by the other boy who had run the elevator previously, not to put his head out through the hole when the elevator was moving, and the instructions he received were confined to that; it so happened, however, that on its way up, and when it reached a point between the second and third flat, the elevator suddenly began to shake, and then stopped. The child not having been told that such might happen, was taken by surprise, and as was most natural for him, he put his head out of the hole to ascertain if he could, what caused it to stop. No sooner had he done so, than the elevator shot upwards, and before he could withdraw his head it was caught between part of the elevator which forms the lower part of the aperture, and a beam which runs across outside of it, and he thus sustained the injury complained of. The plaintiff had never been instructed what to do, under such circumstances, and it is in evidence, that the elevator had on former occasions stopped in going up; and it appears it did on one occasion, with the plaintiff, go to the bottom of the cellar, when it should have stopped at the first floor. Now, this shows that the machinery connected with it was not in first-rate order; it was liable to stop, or to get beyond the control of whoever was in charge: it was therefore a dangerous work to set this mere child at, and it also appears that in its construction it was not what it should have been if it was intended to be worked by so young a lad. The fact of the ropes being outside of it, and not being reachable except by the aperture in question, was not a safe contrivance; that is to say, not so safe as to have them run up within the elevator itself. This aperture was a veritable trap, dangerous to every one who might go into the elevator. The bottom of it was several feet from the floor on which those using it were obliged to stand, and if one should inadvertently place his arm or hand in it when ascending, there would be a danger of his arm being caught between it and the stationary beam outside. This must have been patent to whoever took notice of it, if they were persons who would be capable of judging of what is dangerous. Certainly the proprietors must be held to know that fact, and it was incumbent upon them, when they determined to place so young a child in charge, that he should receive most thorough instructions. It is clear that that care was not exercised, and when the machine stopped in its ascent the child was taken by surprise; he did what most likely an older person on the spur of the moment would have done; and even had he been told in a casual way not on any occasion to put his head out of that opening, I doubt whether he could have been held guilty of contributory negligence. There was nothing more natural than for him to look to see, if he could, what was the cause of what was to him an extraordinary event in the passage of the elevator; it should not have stopped, it was an indication that something had interfered with its progress, and such an event was entirely novel to him.

This was not a case where the danger was unknown to the master and known to the servant; it was the converse of that; the danger was known to the master and wholly

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Robertson, J.

unknown to the servant; and *Griffiths* v. *London and St. Katharine Dock Co.*, 13 Q. B. D. 259, applies, and for the reasons given by the learned Chancellor in the judgment just read, I think the nonsuit should be set aside, with costs of the last trial, and of this motion to the plaintiff in any event.

A. H. F. L.

[CHANCERY DIVISION.]

COLVIN V. COLVIN ET AL.

Will—Devise without mentioning what—Intention—Unintentional omission—Words read into will.

A testator being possessed of personalty and realty bequeathed pecuniary legacies to a much greater amount than the personalty left by him, and then bequeathed to his "executors * * in trust, to dispose thereof to best advantage in trust, to be divided and paid over to my children in the sums mentioned and as soon as may be agreeable to the terms and conditions of certain mortgages and leases now standing against the property" without mentioning any property:—

Held, that the words "my property" presumably unintentionally omitted should be read into the will.

Statement.

THIS was an action brought by William Colvin against Andrew George Colvin, and several other persons interested under the will of Robert Colvin, deceased, for the construction of the said will.

It was admitted that the testator at the time of his death was seized of and entitled to both real and personal estate, and that he had made a will duly executed by which he devised several pecuniary legacies to an amount more than sufficient to exhaust the personal estate, and then proceeded as follows: "I give and bequeath unto my executors hereinafter mentioned in trust to dispose thereof to the best advantage in trust to be divided and paid over to my children in the sums mentioned, and as soon as may be agreeable to the terms and conditions of certain mortgages and leases now standing against the property."

The action came on by way of motion for judgment and was argued on May 25, 1892, before ROBERTSON, J.

J. J. Stephens, for the plaintiff. The personal estate may be applied in payment of the debts and legacies as far as it will go, but the real estate goes to the heirs-at-law, as it is not devised under the clause in question. **Argument.**

C. J. Holman, for some of the defendants, referred to *Re Wilson and Toronto Incandescent Electric Light Co.*, 20 O. R. 397; and *Martin* v. *Magee*, 19 O. R. 705, reversed in 18 A. R. 384.

F. W. Harcourt, for the infants. There is no intestacy. The clause in question vested the whole estate in the executors for the payment of the legacies. Real estate is now personalty in the hands of executors: R. S. O. c. 108, 54 Vic. c. 18 (O.); *In re Ferguson*, 11 C. L. T. 201. The testator did not intend to die intestate, and unless some words are supplied the clause would not make sense: Theobald on Wills, 3rd ed. 537; Hawkins on Wills, 2 Am. ed. p. 6.

May 28th, 1892. ROBERTSON, J.:—

The plaintiff is a son, and one of the legatees under the will of the late Robert Colvin, who died on 21st August, 1887, and the action is brought to have the construction of the said will by the Court. The defendants are the executors and next of kin of the testator. The will bears date on 12th of October, 1885. **Judgment.**

The testator left personal estate to the value of $2,700, and a farm of 100 acres in Culross worth $4,000. The debts are all paid and $1,600 of the personalty is in the hands of the executors and the farm is still unsold or undisposed of.

The will is as follows: "This is the last will and testament of me Robert Colvin, of the township of Culross in the county of Bruce and Province of Ontario, farmer, made the twelfth day of October, in the year of our Lord one thousand eight hundred and eighty-five. I will and devise that all my just debts, funeral and testamentary expenses be paid by my executors as soon as conveniently may be

Judgment.

Robertson, J.

after my decease, and as to my worldly estate, I give and dispose of the same as follows: To my son William I give the sum of fifty dollars; to my son Andrew George the sum of five hundred dollars; to my daughter Sarah Jane, wife of Alexander Horn, the sum of one hundred and fifty dollars; to my daughter Mary Ann, wife of James Collin, the sum of one hundred and fifty dollars; to my son Robert Miller the sum of one thousand dollars; to my son David, the sum of three hundred dollars; to my son John McCullough, the sum of eight hundred dollars; to my son James, the sum of eight hundred dollars; to my son Thomas, the sum of eight hundred dollars; to my daughter Martha the sum of eight hundred dollars and all the household furniture I may be possessed of on the day of my death; to my son William Alexander Buchanan the sum of eight hundred dollars. I also desire that the balance of the money that I received from my brother John be paid to my sister Mary Ann (if not sooner paid), and that my executors pay the same in three instalments if called for, and I hereby appoint my brother William Colvin guardian of the person and estate of my son William Alexander Buchanan until he shall arrive at the age of twenty-one years.

"I give and bequeath unto my executors, hereinafter mentioned, in trust to dispose thereof to the best advantage in trust, to be divided and paid over to my children in the sums mentioned, and as soon as may be agreeable to the terms and conditions of certain mortgages and leases now standing against the property.

"And I nominate and appoint * * executors," etc.

The clause next preceding the clause appointing executors, is the one which has created the difficulty.

In my judgment, the intention of the testator, and I gather that intention from the will itself, was to devise the whole of his estate, real as well as personal, to his executors, for the purpose of paying all his debts and the legacies as mentioned in the will. He had no intention of dying intestate, I am satisfied. These legacies amount to $6,200, one of which for $800, has lapsed; the legatee John McC. Colvin, having predeceased the testator, unmarried and without issue—this reduces the amount of them to $5,400: to meet these there is $1,600 in the hands of the executors in money, and it must be presumed the testator knew what his personal estate amounted to, and he could not have supposed that the legacies and debts could be paid out of it; he must, therefore, have intended that the real estate should be converted into money, and the proceeds added to the personalty for that purpose; and the farm it is said can be sold for $4,000, which makes a sum which, after paying costs of this action, should be nearly sufficient to pay the legacies, if not quite, in full.

It appears to me, that there has been an unintentional omission of two words in the clause of the will above referred to, without which sense cannot be made of it. And I think these words may be presumed to be "my property," which, if added after the words, "I give and bequeath," will give the clause the meaning intended by the testator, which was, that all his lands should be sold, and the proceeds, with the personal estate, divided among the legatees, as his will provides. This is the opinion I expressed on the argument, and since then, Mr. Harcourt has referred me to *Woodside* v. *Logan*, 15 Gr. 145, which I think supports that view.

I therefore declare accordingly; the costs of all parties, as between solicitor and client up to this time, to be paid out of the estate. The whole estate should be administered, accounts taken, costs taxed, etc.; and I refer it to the Master at Walkerton for that purpose; further directions and costs of the reference reserved.

G. A. B.

[QUEEN'S BENCH DIVISION.]

ASHBRIDGE V. ASHBRIDGE ET AL.

Will—Construction—Devise to sons without words of limitation—" Die without lawful issue"—" Survivor"—Estate in fee simple—Estate tail.

The testator died in 1845, and by his will devised a farm to his two sons, without words of limitation, to be equally divided between them, adding : " And in case either of my sons should die without lawful issue of their bodies, then his share to go to the remaining survivor" :—

Held, that the gift in the earlier part of the devise, though without words of limitation, was sufficient to carry the fee to the sons, unless a lesser estate appeared to be intended on the face of the will.

Both sons outlived the father ; one died in 1874 leaving issue ; the other died without issue in 1890 :—

Held, that the son who first died had an estate in fee simple absolute in one-half of the land ; and, as the other left no survivor, he was not within the words of the will, and nothing had happened to divest him of the estate in fee given by the earlier part of the will, and therefore he also died seized in fee simple of one-half of the land.

The word "survivor" is to be read as meaning "longest liver," not "other."

The words "die without issue" do not mean an indefinite failure of issue which would give rise to an estate tail.

Statement.

JONATHAN ASHBRIDGE was in his lifetime and at the time of his death seized in fee simple of certain lands in the township of Scarborough. By his last will, made and executed on the 15th November, 1843, in writing sufficient to pass real estate, he devised *inter alia* as follows :—

" Also I give and bequeath unto my sons Jonathan and Jesse Ashbridge all the remaining part of the broken front on the east half of lot number nine and also the east half," etc., " to be equally divided between my two above named sons. *And in case either of my sons should die without lawful issue of their bodies, then his share to go to the remaining survivor.*"

The testator died in April, 1845, leaving him surviving his widow, his eldest son Isaac Ashbridge, his daughters Rebecca Ashbridge and Amy Lambert, and the two sons above named, Jonathan and Jesse.

The widow died in 1850; Rebecca died in 1861 without issue and intestate; the testator's son Jesse died in 1874, leaving him surviving his sons Jesse Ashbridge and Wellington Thomas Ashbridge, his only surviving children Statement. and heirs-at-law; and the testator's son Jonathan died without issue and intestate in November, 1890.

This action was begun on the 10th November, 1891, by Isaac Ashbridge, the eldest son of the testator, against Jesse Ashbridge and Wellington Thomas Ashbridge, his nephews, and Amy Lambert, his sister.

The plaintiff claimed that on the death of his brother, Jonathan Ashbridge, the undivided one-half interest in the lands devised to Jonathan as above vested in him (the plaintiff), as the eldest son and heir-at-law of the testator, and asked to have a declaration to that effect; or, if it should be held that he was not so entitled, he claimed that he was entitled as one of the heirs-at law of his brother Jonathan to an undivided one-third interest therein.

The defendants Jesse Ashbridge and Wellington Thomas Ashbridge by their statement of defence submitted that, upon the true construction of the will of their grandfather, they became entitled, upon the death of their uncle Jonathan, to the property in question absolutely.

The defendant Amy Lambert by her statement of defence submitted that she was entitled to an undivided one-third interest as an heiress-at-law of her brother Jonathan.

The action was tried before **Boyd, C.**, on the 13th May, 1892.

The facts were all admitted by the parties, and argument was heard.

Shepley, Q. C., for the plaintiff. Jonathan having sur- Argument. vived his brother Jesse and died without issue, the estate cannot go to the children of Jesse, for Jesse is not the survivor. The event of Jonathan surviving Jesse and dying without issue was not provided for by the will; and there is therefore an intestacy as to Jonathan's half, and the plaintiff takes it as the heir-at-law of the original testator. The survivor of two persons is that one who

Argument. survives the other, and not merely the "other." At any rate, the son Jonathan died intestate, and his half should go to his heirs-at-law in equal shares, if he died entitled absolutely. I refer to *Ferguson* v. *Dunbar*, 3 Bro. C. C. 468, *n.*; *Milsom* v. *Awdry*, 5 Ves. 465; *Wollen* v. *Andrewes*, 2 Bing. 126; *Davidson* v. *Dallas*, 14 Ves. 576; *Crowder* v. *Stone*, 3 Russ. 217; *Ranelagh* v. *Ranelagh*, 2 M. & K. 441; *Leeming* v. *Sherratt*, 2 Ha. 14; *Willetts* v. *Willetts*, 7 Ha. 38; *Lee* v. *Stone*, 1 Ex. 674; *Parsons* v. *Coke*, 4 Drew. 296; *Re Corbett's Trusts*, Johns. 591; *Greenwood* v. *Percy*, 26 Beav. 572; *Blundell* v. *Chapman*, 33 Beav. 648; *Wake* v. *Varah*, 2 Ch. D. 348; *Beckwith* v. *Beckwith*, 46 L. J. N. S. Ch. 97; *Travers* v. *Gustin*, 20 Gr. 106, 110; *Re Benn*, 29 Ch. D. 839; Theobald on Wills, 3rd ed., 466-7; Jarman on Wills, 689-710.

S. H. Blake, Q. C., for the defendants Jesse Ashbridge and Wellington Thomas Ashbridge. The gift was either an estate in fee or an estate tail with cross-remainders. I submit it is a conditional fee simple. If a son has issue, the estate vests; if he has not, it does not vest, but goes to the other; the survivor with children takes the cross-remainder. I refer to *Re Bowman*, 41 Ch. D. 525, 529, 531; *Re Walker's Estate*, 12 Ch. D. 205; *Smith* v. *Osborne*, 6 H. L. C. 375; *Askew* v. *Askew*, 57 L. J. N. S. Ch. 629; *Lucena* v. *Lucena*, 7 Ch. D. 255; *Wake* v. *Varah*, 2 Ch. D. at p. 357; *Hudson* v. *Hudson*, 20 Ch. D. 406, 416-7; *Badger* v. *Gregory*, L. R. 3 Eq. 78, 84; Jarman on Wills, ch. 42.

E. M. Lake, for the children of the defendant Amy Lambert, who died *pendente lite.*

Shepley, in reply.

May 16, 1892. BOYD, C.:—

The turning point of the conflicting claims is whether the sons Jonathan and Jesse take a conditional fee or an estate tail. The gift in the earlier part of the clause, though without words of limitation, is sufficient to carry

Judgment.

Boyd, C.

the fee to these two sons under, if not apart from, the Act then in force, Con. Stat. U. C. ch. 8, sec. 12, unless a lesser estate appears to be intended upon the face of the will. Nothing to indicate this cutting down appears except the critical clause now under analysis, "And in case either of my sons should die without lawful issue of their bodies, then his share to go to the remaining survivor." To the ordinary layman this would mean "if one son dies without children, then his share goes to the other—the survivor." Here one son has died leaving children, and so his share has absolutely vested. The other has died without children, and this is claimed by the children of the son who first died. If the effect of the words is to give an estate tail, it is difficult to resist the reasoning of the law lords in *Smith* v. *Osborne*, 6 H. L. C. at pp. 393 and 399. But I think the law agrees with the result derived from the words used in their ordinary sense—reading "survivor" as meaning "longest liver" and not as "other." The decided trend of modern law is to give effect to the natural and obvious meaning of ordinary words. With regard to this particular word "survivor," no more incisive utterance can be found than that of Lord Macnaghten in *King* v. *Frost*, 15 App. Cas. at p. 553.

Upon the cases, then, the words "dying without issue" do not here mean an indefinite failure of issue, which would give rise to an estate tail, as held in *Travers* v. *Gustin*, 20 Gr. 106. For the context limits to a particular period, whether that be at the death of the one who first dies or during the life of the survivor. But the restricted construction necessitates the devolution taking the character of a defeazible fee, followed by an executory devise in case the event happens: *Pells* v. *Brown*, Cro. Jac. 590; *Hughes* v. *Sayer*, 1 P. W. 534. This result is strengthened by the reference to the "remaining survivor," which literally means a personal benefit to the "longest liver." Had words of limitation been added to the word "survivor," the scale might have turned the other way, and this ex-

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plains the case of *Taylor* v. *Walker*, 11 Jur. N. S. 723. See *Massey* v. *Hudson*, 2 Mer. 130.

Now, to apply the facts in evidence to the will as thus construed. The son who first died left issue, and his estate became a fee simple absolute; the second died without issue but left no survivor, and so was not within the words of the will. Therefore, nothing has happened to divest him of the estate in fee given by the earlier part of the will. I declare therefore that Jonathan, who last died, was seized in fee simple of one-half of the land. Costs out of the estate.

[QUEEN'S BENCH DIVISION.]

McGEACHIE V. NORTH AMERICAN LIFE ASSURANCE CO.

Insurance—Life—Premium note—Non-payment of—Forfeiture—Election—Conditions of policy—Conduct of defendants—Evidence.

The defendants insured the life of the plaintiff's husband and issued a policy to him, taking his promissory note for the amount of the first year's premium. The note was several times renewed, and at the death of the insured, which took place within the first year, the last of the renewals was overdue and unpaid. During the currency of one of the renewal notes the insured wrote to the defendants asking them for their terms for the cancellation of the policy, to which they replied that his request that they should cancel the policy was unreasonable. On the day before the death of the insured the defendants wrote to him that they had expected to hear from him with a remittance, and asked him to give the matter his immediate attention. After his death the amount of the note and interest was tendered to the defendants, who refused to accept it. In the application for the insurance, which was made part of the contract, it was provided that if a note should be given for a premium and should not be paid at maturity, the insurance or policy should thereupon become null and void, but the note must nevertheless be paid; and indorsed on the policy was a provision that if any premium note should not be paid when due the policy should be void and all payments made upon it forfeited to the defendants:—

Held, that the policy was voidable upon default being made in the payment of the premium note, but only at the election of the defendants; that, upon the evidence, the defendants had elected not to forfeit it but to continue it, and had treated it as subsisting up to the time of the death; that the policy being in force at the time of the death, no subsequent act of the defendants could affect the plaintiff's claim:—

Held, also, upon the evidence, that it could not be said that the defendants were at any time electing to forfeit the policy and nevertheless insisting upon the payment of the note, as they might have done under the provision therefor in the application.

THE plaintiff was the widow of one Robert McGeachie, and brought this action to recover the sum of $1,000 from the defendants. Statement.

The statement of claim alleged that the defendants on the 6th December, 1889, issued their policy 7,710, upon the semi-tontine dividend plan, upon the life of Robert McGeachie, and, among other things, promised to pay the plaintiff in case of the death of Robert McGeachie within the tontine period, 1909, the sum of $1,000; that Robert McGeachie died on or about the 6th of November, 1890, during the continuance of the policy; that the defendants had received proper proofs of death, etc., but had not paid and refused to pay the $1,000.

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The defendants, by their statement of defence alleged: (1) That the policy referred to and the covenants therein made on the part of the defendants were on the face of the policy expressed to be in consideration of the payment of the annual premium of $31.10, to be paid in advance; (2) That the premium had never been paid; (3) That in the application for the policy, signed by Robert McGeachie, it was provided that if a note, cheque, draft, or other obligation should be given for the first or a subsequent premium or any part thereof, and if the same should not be paid at maturity, it was agreed that any insurance or policy made on that application should thereupon become null and void, but the note, cheque, draft, or other obligation must nevertheless be paid; (4) That the application was by the terms of the policy made a part thereof; (5) That the policy contained a provision that it was issued and accepted upon certain special provisions therein printed and written, and also upon the conditions on the back thereof, all of which latter conditions were, by the policy, incorporated therein and made part thereof; (6) That one of the conditions on the back of the policy was: "If any premium note, cheque, or other obligation given on account of a premium, be not paid when due the policy shall be void and all payments made upon it shall be forfeited to the company"; (7) That Robert McGeachie being unable to pay the premium, the defendants agreed to accept a promissory note for the amount of the same; (8) That such note was not paid at maturity and had never yet been paid; that it was renewed, but the renewal thereof had not been paid, and remained in the hands of the defendants overdue and unpaid.

The plaintiff joined issue upon the statement of defence and for a reply said: (2) That the one month of grace allowed for the payment of premiums upon the policy had not expired at the death of Robert McGeachie, and before the expiration thereof the plaintiff offered to pay the note, but the defendants refused and still refused to accept the same; (3) That if the defendants had any right to cancel the policy when the renewal note became due, before the **Statement.** expiration of the one month, which the plaintiff did not admit, but denied, the defendants expressly waived their rights under the policy, and only sought to exercise such rights, if any, when they learned of the death of Robert McGeachie, and with the object of preventing the plaintiff, if possible, from recovering upon the policy; (4) And that, in any event, the conditions upon the policy to which the defendants referred in their statement of defence were unreasonable and unjust, and should not be enforced against the plaintiff.

The action was tried by STREET, J., at the Spring Sittings, 1891, of this Court at St. Catharines.

The application for the policy sued on, signed by Robert McGeachie, was put in evidence, which contained the following provisions: "It is hereby declared and agreed that all hereinbefore contained, with the accompanying reports and agreement and this declaration and agreement, constitute an application to the North American Life Assurance Company for the insurance proposed; that a policy, if issued in the company's usual form and delivered, shall be the only acceptance of this application; that any person having or claiming any interest under such policy adopts as his or her own each and all of the statements in said application, all of which statements are hereby declared to be material to the contract, whether written by his or her own bond or not, and declares the same to be full, complete, and true as facts, and that such statements are the only statements upon which the policy, if issued, will be founded; that such policy will be accepted when presented subject to the terms in and upon the said policy set forth."

"That the entire contract shall consist only of said application and policy and shall be construed and interpreted as a whole and in such of its parts and obligations according only to the terms thereof; that no part of the application or policy will be varied by any usage or custom whatever; that the place of contract for all purposes

Statement.

shall be the head office of the company in Toronto; and all rights, claims, and remedies not based on such contract are hereby waived."

"That no agent of the company (whether called general or otherwise) has power to bind the company in any way, nor is any agent authorized to receive any payment due to the company except when furnished with a receipt therefor signed by the president or managing director, in accordance with the terms of such receipt, every such payment being then not overdue."

"That no information or statement not contained in said application, no notice of any facts touching said application or said policy, however made, given, received, or acquired, shall affect the company unless forthwith communicated in writing by the insured to its president or managing director at its head office, and assented to by him in writing for the company; that no agent of the company or any other person except the president or vice-president or the managing director under the direction of the board of directors, has power to make, alter, revive, or renew any contract of insurance, grant permits, or waive forfeiture or any condition of such policy."

"It is hereby further agreed that, should the company upon any occasion consent to renew or revive a policy after the same has become null and void, every such renewal or revival shall always be understood as in nowise creating any precedent for waiving or as a waiver of any condition or agreement in the policy or application."

"That under no circumstances shall the policy be held to be in force until the actual payment to and acceptance of the first premium due thereon by an authorized agent of the company, and the delivery to the insured of the necessary receipt signed by the managing director, the life of the person proposed for insurance being at the time of such payment in the same condition of health as stated in this application; and that if any fraudulent or materially incorrect averment has been made, or any material information has been withheld by the insured, all sums which shall have been paid to the company upon account of the insurance made in consequence hereof shall be forfeited and the insurance be absolutely null and void. That no presumption of death shall arise from disappearance." Statement.

"That if a note, cheque, draft, or other obligation be given for the first or a subsequent premium or any part thereof, and if the same be not paid at maturity, it is agreed that any insurance or policy made on this application shall thereupon become null and void, but the note, cheque, draft, or other obligation must nevertheless be paid."

"That I have read or heard read and understood said application and this agreement, part thereof, and assent to all therein contained, and I agree to accept the policy when issued on the terms mentioned herein and pay the company the premium thereon, in consideration of their acceptance of this application."

The following receipt was put in:

"NORTH AMERICAN LIFE INSURANCE COMPANY.

Head Office, Toronto, Ontario.

First Premium $31.10 ....Sum insured, $1,000.

Received this 6th day of December, 1889, note for thirty-one dollars and ten cents for the first premium of policy No. 7710 on the life of R. McGeachie, Esq., subject to all the provisions of the said policy, and those on the back hereof hereby incorporated herein.

WM. MCCABE, Managing Director.

The policy is not valid or operative unless this receipt is countersigned by the agent of the company on the actual date of payment within thirty days of the issue of the policy, the life insured being then as stated in the application for the policy.

WM. H. HENSON, Agent at St. Catharines.

Especial attention is called to the back of this receipt."

And on the back of this receipt was indorsed the following:—

"Provisions for payment of premiums:—

"All premiums are due at the head office of the company, in the city of Toronto, Province of Ontario, at the

Statement. date named in the policy, but at the pleasure of the company suitable persons may be authorized to receive at other places such payments, but only on the production of the company's receipt therefor signed by the president or managing director. No payment of a premium, however made, except in exchange for such receipt, will be recognized by the company or be deemed by either party as valid payment. The revival of a policy must be understood not to constitute, in any case whatever, any obligation on the part of the company to waive the payment of a future premium when due."

"Commencement of insurance year and balance of year's premium:—

"All premiums are payable annually in advance. When the premium is made payable in semi-annual or quarterly instalments, that part of the year's premium, if any, which remains unpaid at the maturity of this contract, shall be regarded as an indebtedness to the company on account of the policy, and shall be deducted from the amount of the claim, and if any premium or obligation for a premium be not paid on or before the day it is due, the company shall from that day be released from all liability under the policy, except [illegible] modified by the non-forfeiting terms thereof, if the policy is then entitled to the benefits thereof, and no credit for surplus accumulated upon the policy shall be deemed applicable to the payment of any premium unless the previous consent of the company be obtained in writing."

"N. B.—Agents are not authorized to make any change whatever in receipts for premium or to waive forfeiture or any condition of a policy or premium receipt: that can be done only by a writing signed by the president or managing director under the direction of the directors."

The policy under the seal of the defendants was put in, which provided that the defendant company, "in consideration of the application for this policy and of the statements and agreements therein contained, hereby made a part of this contract, and of the annual premium of $31.10 to be paid

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in advance to the company at its head office, in the city of Toronto, on the delivery of this policy and thereafter on the 5th day of December in every year during the term of nineteen years, insures the life of Robert McGeachie, of St. Catharines, in the county of Lincoln, and Province of Ontario, and promises to pay to his wife Emma Jane McGeachie, should his death occur within the tontine period hereof, otherwise to himself, his executors, administrators, or assigns, the sum of one thousand dollars, first deducting therefrom the balance of the current year's premium, if any; and all loans on account of this policy upon satisfactory proof at its head office of the death of the insured during the continuance of this policy and its surrender with the last renewal receipt thereof:" and that "This policy is issued and accepted under the company's semi-tontine dividend plan, upon the following special provisions printed and written, and also those on the back hereof, all of which are hereby incorporated herein and made part hereof":

"Provision G.—A grace of one month will be allowed in payment of premiums on policies in this class, at the expiration of which time, if said premium remain unpaid, this policy shall thereupon become void. But a reinstatement will be permitted if application therefor be made in writing to the company at its head office within two months after the expiration of the month of grace, accompanied with a certificate of good health from a medical examiner of this company on the company's form No. 24, subject to its approval; provided always that whenever advantage is taken of this grace or of the privilege of reinstatement, interest shall be paid to the company at the rate of seven per cent. per annum for the time deferred." And that "no provision of this contract can be changed, waived, or modified, or permit granted, except by a written agreement signed by the president, vice-president, or the managing director of the company."

And on the back of the said policy there was indorsed the following: "This policy is issued and also accepted

Statement. by the insured and assured upon the following additional provisions and agreements therein made a part thereof." Among which provisions so indorsed were the following: "If any premium note, cheque, or other obligation given on account of a premium, be not paid when due, this policy shall be void, and all payments made upon it shall be forfeited to the company." "That under no circumstances shall this policy be held to be in force until the actual payment to and acceptance of the first premium due thereon by an authorized agent of the company and the delivery to the insured of the necessary receipt signed by the managing director; the life of the person proposed for insurance being at the time of such payment and delivery in the same condition of health as stated in the application for this policy." "Should the company upon any occasion consent to renew or revive a policy after the same has become null and void, every such renewal or revival shall always be understood as in nowise creating any precedent for waiving, and not as a waiver of, any condition or agreement in the policy or application."

The note mentioned in the said receipt was not produced, but it appeared to have been dated December 4, 1889, at six months, and to have borne interest at the rate of seven per cent. per annum.

On the 27th of May, 1890, the defendants by their managing director wrote to Robert McGeachie as follows:—

"We beg to remind you that your note, amount $31.10, and interest $1.10, becomes due here at the head office on the 7th day of June, 1890. Your prompt attention will oblige." This note was not paid when due, and a new note was taken for $32.20, covering the amount of it and interest, dated the 7th day of June, 1890, payable in thirty days with interest at seven per cent. per annum. A similar notice to that given by the defendants to McGeachie on the 27th May, 1890, was given by them to him in respect of the last mentioned note. On July 2nd, 1890, McGeachie wrote to the defendants as follows: "That note of mine, held by you, $32.20, I am unable to pay. I

Statement.

am sorry that I undertook it under my present circumstances. About a year ago I had to make an assignment, and settled by giving notes, and I find it all I can do to get along. The note will be due on July 10th. That will be seven months' insurance, or suppose it was changed from endowment to ordinary life without profits, how much would it be for me to pay? Please answer soon and oblige."

On the 4th July, 1890, the defendants by their managing director replied as follows: "Re Policy 7710. We have yours of the 2nd inst. Evidently you knew just as well when you accepted the note whether you would be able to meet the same at maturity as you do now, and therefore your request that we cancel the policy is unreasonable. Had you died during the currency of the note, your wife would certainly have expected this company to pay the full amount of the policy and very properly so too. We therefore shall expect you to pay your note. If you remit us for one-half the amount we shall have no objection to extend the time for the balance for two months, and will send you a note for your signature for the same. No change in the present policy could be considered by our committee until the note has been paid."

The secondly above mentioned note was not paid when it fell due, and a new note was taken dated July 10th, 1890, at two months for $22.40, with interest at the rate of seven per cent. per annum, McGeachie having paid $10 on account in cash. A similar notice to that given by the defendants to McGeachie on the 27th May, 1890, was given by them to him on the 2nd September, 1890, in respect of the last mentioned note. The last mentioned note was not paid when it fell due, and the defendants took from McGeachie a new note dated September 13th, 1890, at one month, for $22.80.

On the 15th September, 1890, the defendants by their managing director wrote to McGeachie as follows: "We have your favour enclosing renewal note in place of that due on the 13th inst. We now return to you herewith your old note duly cancelled, and note that you will remit

Statement. for the one which we received to-day before its maturity." A similar notice to that given by the defendants to McGeachie on the 27th May, 1890, was given by the defendants to McGeachie on the 3rd October, 1890. The last mentioned note was not paid when it fell due, and on the 5th day of November, 1890, the defendants by their managing director wrote to McGeachie as follows: "7710. We fully expected to have heard from you ere this with a remittance for your note which matured on the 16th ult. Kindly give the matter your immediate attention." This letter was mailed at Toronto on the 5th November, 1890, and bore the St. Catharines post mark of the 6th of November, 1890, on the morning of which latter day McGeachie died. The amount of the note and interest was tendered to the defendants and they refused to accept it. Proofs of death were duly given on the 30th December, 1890.

The learned Judge gave judgment as follows:—

The defendants rely upon a condition in the application which is incorporated into the policy by the terms both of the policy and application, and which is as follows:—"That if a note, cheque, draft, or other obligation be given for the first or a subsequent premium or any part thereof, and if the same be not paid at maturity, it is agreed that any insurance or policy made on this application shall thereupon become null and void, but the note, cheque, draft, or other obligation must nevertheless be paid."

In the present case a note was given on 13th September, 1890, for a part of the first premium; it was not paid at maturity; and thereupon, by the express terms of this condition, the policy became void. The plaintiff says that the forfeiture was waived because the company asked the assured by their letter of 5th November to pay the overdue note; but they had the right to do so without waiving the forfeiture also, by the terms of the condition above set forth; so that there was no waiver on their part.

The plaintiff relies upon a condition in the policy which provides that a grace of one month will be allowed in pay-

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ment of the premiums: but a grace of six months had already been allowed by the original agreement, and then several additional periods of grace, all of which had expired without payment having been made. This condition can therefore not avail her.

The action must be dismissed with costs

At the Michaelmas Sittings of the Divisional Court, 1891, the plaintiff moved to set aside the said judgment, and to enter judgment for her for the full amount claimed, with interest and costs, or for a new trial, or for such other order as might seem meet, on the following grounds:—

(1) That the said judgment was against the evidence and the weight of evidence. (2) That the said judgment was bad in law. (3) That the learned Judge should have found that the said company by accepting the premium note and renewing the same from time to time were estopped from setting up the defence that the said policy was avoided by non-payment of the last renewed note. (4) That the learned Judge should have found that "Provision G." of the said policy, which provided that a grace of one month would he allowed on payment of premium, was applicable to the note given for said premium and the renewals thereof, and that the amount of the last renewal note having been tendered to the said company within thirty days from its due date, the said company had no right to cancel or avoid said policy for non-payment of said note, and the plaintiff was therefore entitled to recover upon said policy. (5) That the learned Judge, in any event, should have found as a fact that the company, by requesting payment of the last note in their letter of the 5th November, consented to waive any rights, if any they had, as to avoiding and cancelling the said policy for non-payment of said note. (6) That the learned Judge should have found upon the evidence that the company were willing to accept the money in accordance with the terms of the letter of the 5th November, and that if the same had been paid, no cancellation or avoidance of the policy would

Statement. have been claimed or urged by the defendants. (7) That the evidence of the manager of the company shewed that no steps were taken by the said company to forfeit or cancel the policy.

On the 17th November, 1891, the motion was argued before ARMOUR, C. J., and FALCONBRIDGE, J.

Aylesworth, Q. C., for the plaintiff. The policy shews on its face the contemplation of the parties that payment of the premium might be made by promissory note. The company chose to accept a note for the first year's premium, and I contend that was payment and the risk attached. The defendants do not say that the risk never attached; and if it did attach, it attached only by virtue of this payment by promissory note. They received this note as cash, and the premium was thereby paid. But the application has a provision that if a note be given and not paid at maturity, the policy becomes rescinded. As to that I say, that the risk having attached, it needed something formal on the part of both parties to constitute a rescission, and that something was never done. On the contrary, the defendants always acted as if the risk was current. By the letter they wrote to the insured twelve hours before his death, they treated the policy as valid and subsisting. The risk having attached, the policy was not void on default of payment, but voidable only, and there was a waiver of the conditions within the authorities. I refer to *McIntyre* v. *East Williams*, 18 O. R. 79; *Campbell* v. *National Ins. Co.*, 24 C. P. 133; *Moffatt* v. *Reliance Ins. Co.*, 45 U. C. R. 561; *Neill* v. *Union Ins. Co.*, ib. 593; *Shay* v. *National Benefit Society*, 54 Hun. (61 N. Y. Supreme Court) 109; *Horton* v. *Provincial Provident Institution*, 16 O. R. 382; 17 O. R. 361; Porter on Insurance, 2nd ed., p. 74 *et seq.* The policy contains a provision allowing a grace of one month. The former indulgence to the insured was paid for in interest, and the days of grace should be allowed from the maturity of the last note.

Argument.

William Macdonald, for the defendants. The risk attached, but subject to conditions. It cannot be said the note was taken as cash; it was taken subject to an express arrangement that if not paid at maturity the risk would be gone. Nothing was required to be done to avoid the policy. It was a condition, not a covenant, that was broken, and so it was not necessary to do any act to disavow or disaffirm the policy: Crawley on Life Insurance, p. 21; Platt on Covenants, p. 70. To constitute a waiver, the acts done must have been referable to an intention to keep the policy on foot. The waiver, if any, only gave rights to the insured and not to his representatives. After the death, the contract was incapable of being carried into effect. See Porter, p. 79. The days of grace are applicable only to the payment of premiums subsequent to the first.

Aylesworth, in reply, referred to Porter, p. 74.

February 27, 1892. The judgment of the Court was delivered by

ARMOUR, C. J.:—

This case appears to me to be a very clear one, and to depend entirely upon the question whether the policy was in force at the time of the death of the insured; for if it was, no subsequent action of the defendants could affect the plaintiff's claim: *Olmstead* v. *The Farmers' Mutual*, 50 Mich. 200.

Upon the giving of the note for the premium and the issuing of the policy, the risk attached, subject to the avoidance of the policy for the non-performance by the insured of the condition subsequent—the payment of the note when it fell due.

The law applicable to the forfeiture of leases for non-performance of conditions is equally applicable to the forfeiture of a policy such as the one in question for the non-performance of conditions subsequent therein contained.

This policy was voidable upon default being made in the payment of the note taken for the premium, but only at

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Armour, C.J.

the election of the insurers: *Wing* v. *Harvey*, 5 DeG. M. & G. 265; *Armstrong* v. *Turquand*, 9 Ir. C. L. 325; *Mackie* v. *European Assurance Society*, 21 L. T. N. S. 102.

Upon default being made in the payment of the note the insurers might have elected to forfeit the policy, or they might have elected not to forfeit it, but to continue it; and upon the evidence before us I think it clear that they elected not to forfeit but to continue it.

There is not from first to last in the correspondence or in the conduct of the insurers any intimation or suggestion that they had elected to forfeit the policy, but the contrary; nor is there therein any intimation or suggestion that, while electing to forfeit the policy, they were nevertheless insisting on the payment of the notes, but the contrary.

The correspondence and conduct of the insurers when default was made in the payment of the first note shew clearly that they were not electing to forfeit the policy, but to continue it, and were not while electing to forfeit the policy nevertheless insisting upon the payment of the note, and afford evidence of a like election on their part down to the death of the insured.

They took for the amount of the first note and interest a new note with interest at seven per cent. per annum at thirty days, and when during the currency of this note the insured wrote to them asking them what they would let him off with by cancelling the policy on July 10th, they answered him on July 4th that his request that they should cancel the policy was unreasonable. They were then, notwithstanding the default that had been made in the payment of the first note, not only shewing that they had not elected to forfeit the policy, and that they were not, while electing to forfeit the policy, insisting on payment of the note, but were also shewing that they had elected to continue the policy, and were treating it as then subsisting.

There is nothing to shew that their course of conduct in respect of this policy as thus made manifest was in any way altered up to the time of the death of the insured.

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They took for the amount of the last mentioned note a cash payment of $10 and a new note for $22.40 with interest at seven per cent. per annum, at two months from the 10th July, 1890, and at its due date they took for the amount of it and interest a new note for $22.80 at one month, and after default was made in its payment they wrote to the insured on the 5th day of November, 1890: "7710. We fully expected to have heard from you ere this with a remittance for your note which matured on the 16th ult. Kindly give the matter your immediate attention." And before this letter reached the insured on the following day, the insured was dead. Surely this letter must be taken, in the light of the previous correspondence and conduct of the insurers, as treating the policy as still subsisting, and repelling the idea of any election to forfeit.

It was argued that, because the insurers had the right while electing to forfeit to nevertheless insist upon payment of the note referred to therein, the letter must be taken to mean that they were by it merely insisting on the payment of the note, having exercised their election of forfeiting the policy; but the refusal of the insurers to receive the amount of the note and interest when tendered shews clearly that no such meaning can be extracted from the letter. The letter was written treating, and intending to treat, the policy as still subsisting and asking the kind and immediate attention of the insured to the payment of the note.

Supposing the insured had paid the note on the 6th of November and had died on the 7th of November, would there have been any defence to this claim? I think clearly not; and neither, in my opinion, is there any defence to it under the circumstances which occurred.

The plaintiff is, in my opinion, entitled to recover the sum insured with interest from the 1st January, 1891, less the amount of the promissory note of the insured with interest thereon at the rate of seven per cent. per annum, and her costs of suit.

[This case has been carried to the Court of Appeal.]

[QUEEN'S BENCH DIVISION.]

DENISON V. MAITLAND ET AL.

Landlord and tenant—Action for arrears of rent and recovery of demised premises—Election to forfeit lease—Retraction of—Payment of rent and costs—Implied request to be relieved from forfeiture—R. S. O. ch. 143, secs. 17-22—Vacant land—Evidence.

Rent under a lease made pursuant to the "Short Forms Act" becoming in arrear, the landlord served the statutory notice of forfeiture, and brought an action against the tenants both for the recovery of the demised premises and of the arrears of rent. Before the action came to trial the defendants paid the arrears and costs :—

Held, that the bringing of the action was an election on the part of the landlord to forfeit the lease which could not be retracted by him ; to enable him to get rid of the forfeiture there must have been a request on the part of the tenants, either express or implied, to be relieved from the forfeiture ; and the mere payment, after the forfeiture, of rent which accrued due before would not amount to such a request.

The effect of such a payment depends upon the intention of the party paying ; and the payment of the rent and costs in this case could not operate, by force of R. S. O. ch. 143, secs. 17-22, to permit the landlord to retract his forfeiture, without regard to the intention of the tenants, and without any request on their part to be relieved from the forfeiture.

These sections are applicable simply to an action for the recovery of the demised premises ; had the action been brought for that alone, an implication might have arisen from the payment of rent and costs that the tenants intended to seek to be relieved from the forfeiture ; but not so where the action was also brought for the rent in arrear, more especially as the demised premises were vacant land, the tenants not being in actual possession :—

Held, also, on the evidence, that there was no intention on the part of the tenants to seek to be relieved from the forfeiture :—

Held, further, that the landlord could not get rid of the forfeiture unless both tenants concurred in seeking relief from it.

Decision of BOYD, C., reversed.

Statement. THE plaintiff by his statement alleged : (2) That on the 14th May, 1887, the plaintiff, as lessor, did by a certain indenture of lease demise and lease to one George Lawrence, as lessee, lots 56 and 57 according to plan 665 registered in the registry office for the city of Toronto, said lease being registered in the said registry office on the 27th June, 1887, as No. 1,079 E., said lands being leased therein for and during the term of fifteen years from the 1st January, 1887, at a yearly rental of $52.50, payable half-yearly in advance in equal sums of $26.25, on the first days of January and July in each year ;

Statement

(3) That on the 15th August, 1888, George Lawrence duly assigned the said lease and lands to the defendants, Robert R. Maitland and Henry E. Robinson; (4) That the defendants, Robert R. Maitland and Henry E. Robinson, were in arrears of payment of rental due and payable in advance on the last first days of January, 1891, and July, 1891, respectively; (5) That the plaintiff's claim was to have the lease declared forfeited and void, and for an order for the immediate delivery of possession to the plaintiff of the lands, and for the immediate payment of $52.50 arrears of rental due, $26.25 of which was due on the first day of January, 1891, and $26.25 of which was due on the last first day of July, 1891, and for interest on the arrears from the respective dates at which they became due, till judgment, at six per cent. per annum, and for the sum of $50 costs.

The defendant Robert R. Maitland by his statement of defence denied all the allegations contained in the plaintiff's statement of claim, and denied that he was indebted to the plaintiff in any sum whatever, and alleged that the lease was surrendered and cancelled, and his obligations and liability thereunder, if any, determined, as the result of certain proceedings had in an action in the Queen's Bench Division of the High Court of Justice, in which Charles L. Denison, the present plaintiff, was plaintiff, and Robert R. Maitland and Henry E. Robinson were defendants, begun on the 17th day of December, A.D. 1890.

The defendant Henry E. Robinson by his statement of defence admitted the allegations in the second and third paragraphs of the statement of claim, and alleged that the lease was surrendered and cancelled, and his obligations and liabilities therein, if any, were determined, etc., by the action above referred to; and he further alleged that if it should be found that the lease was not so surrendered and cancelled, he claimed the benefit of sub-section 1 of section 11 of chapter number 143 of the Revised Statutes of Ontario, 1887, and that under the provisions of that section the plaintiff was not entitled to enforce any forfeiture of the

Statement. lease, and he claimed to have the action dismissed with costs as against him.

Issue.

The action was tried at the Autumn Sittings, 1891, of the Chancery Division for the city of Toronto, by BOYD, C.

The lease and assignment mentioned in the pleadings were produced and their execution admitted. The lease purported to be made in pursuance of the "Act respecting Short Forms of Leases," and was for fifteen years from the 1st January, 1887, at a rental of $52.50 a year, payable by half-yearly payments, in advance, of $26.25 each, the first payment to be made on the 1st of January, 1887, and contained a covenant to pay rent and a proviso for re-entry by the said lessor on non-payment of rent or non-performance of covenants.

On the 13th of October, 1890, the plaintiff's solicitor, Mr. Drake, wrote to the defendant Maitland the following letter: "The rental on the lots owned by you and Mr. Robinson, and leased from Mr. Charles L. Denison, is in arrears, the particulars of which arrears you are well acquainted with. I have already had several attendances and letters in connection with this particular rental now in arrears, and as reasonable costs for the doing of these things must be paid by you, I formally notify you now that unless this past rental is paid I shall issue a writ to have your lease declared void and for delivery over to the lessor of the premises, and will only wait for sufficient time to hear from you by return mail before taking action." To which the defendant Maitland on the 23rd October, 1890, replied as follows: "Your note received. I shall write you again in a few days; I am pressed for funds just now." On the 29th November, 1890, Drake wrote to Maitland as follows: "Re rental on lots 56 and 57, plan 665. I herewith enclose you statutory notice herein and hope to hear from you at once;" and to Robinson as follows: "Re rental on lots 56 and 57, plan 665. I herewith enclose you statutory notice in this matter. Please let me hear from you at once as to what you propose to do, before any further costs, beyond the costs of this statutory notice, are incurred." To which Maitland on the 6th December, 1890, replied as follows: "Your letter (date November 29th) received today. I have written Rev. R. R. M. (the defendant Maitland), Vancouver, B. C. So soon as I get his reply will communicate with you, in the meantime crave your indulgence."

Statement.

On the 17th December, 1890, the plaintiff issued a writ of summons against the defendants indorsed as follows: "The plaintiff's claim is to have declared forfeited and void a certain lease made between the plaintiff, as lessor, and George Lawrence, as lessee, on the 14th day of May, 1887, of lots numbers 56 and 57, according to plan 665 registered in the registry office for the said city of Toronto, said lease being registered in the said registry office on the 27th day of June, 1887, as number 1,079 E., which lease has been assigned by the said George Lawrence to the defendants R. R. Maitland and H. E. Robinson by an indenture of assignment dated the 15th day of August, 1888, and registered in the said registry office on the 23rd day of November, 1888, as number 3,507 D.; and for an order for the immediate delivery and possession to the plaintiff of said lots; and for immediate payment of $26.25 arrears of rental due on the last first day of July, 1890, as a half yearly rental on said lots as reserved under the terms of the said lease; and interest on said arrears from said date due and payable till judgment at six per cent. per annum; and the sum of $50 for costs."

A statement of claim was produced purporting to have been delivered in that action on the 17th day of January, 1891, making the same claim as was indorsed on the writ of summons.

The writ of summons was not served upon Maitland till the 10th day of March, 1891.

A correspondence between the solicitor for the plaintiff and the defendants, and also between the solicitors for the defendants and the solicitor for the plaintiff, and between

Statement. the defendants and their solicitors, was put in, which correspondence resulted in the payment by the defendant Maitland of the amount of the rent sued for in the action of the 17th December, 1890, and costs as settled, the plaintiff's solicitor offering to enter a discontinuance.

In making the payment the defendant Maitland was under the impression, as was also his co-defendant, that the lease was by the action taken forfeited, and all claim for future rent at an end.

No notice of discontinuance was ever signed or proposed or submitted for signature. Mr. Standish, one of the solicitors for the defendants, gave evidence that prior to a letter of the 16th of May, 1891, written by Cassels & Standish to Maitland, he had called on Mr. Drake and had settled the amount of costs with him at $40, and had told Mr. Drake that Robinson would forfeit the lease, but that he could not say as to Maitland; but it was agreed that he should have time to write to Mr. Maitland, which he did by that letter.

Mr. Drake, on the other hand, alleged that at the interview deposed to by Mr. Standish he told Mr. Standish that upon payment of the $40 costs and the rental claimed for in the writ he would sign a notice of discontinuance; that no agreement was ever made for forfeiture.

This action was commenced on the 8th July, 1891.

November 23, 1891. BOYD, C.:—

This lease is said to be under the statute as to short forms, and, if so, failure to pay rent for fifteen days after it ought to be paid *per se* works a forfeiture without any previous demand for payment. This right of forfeiture being at the landlord's option, he must do something to shew that he means to exercise that option: per Brett J., in *Phillips* v. *Bridge*, L. R. 9 C. P. at p. 55.

It is well settled that the bringing of an action of ejectment is equivalent to the ancient entry and is a decisive act showing an unequivocal election to treat the tenant

Judgment.

Boyd, C.

as a trespasser. It asserts the right of possession upon every ground that may turn out to be available to the party claiming to re-enter: *Grimwood* v. *Moss*, L. R. 7 C. P. at p. 364; *Evans* v. *Davis*, 10 Ch. D. at p. 763. This last decision upholds the authority of *Jones* v. *Carter*, 15 M. & W. 718, wherein it was said "the bringing of an ejectment for a forfeiture, and serving it on the lessee in possession, must be considered as the exercise of the lessor's option to determine the lease; and the option must be exercised once for all."

Now, payment of past due rent *per se*, after action brought to enforce a forfeiture for another cause, is not evidence of the waiver of the forfeiture, for the reason given by Martin, B., in *Price* v. *Worwood*, 4 H. & N. at p. 516:—"The mere receipt of the money, the rent having become due previously, is of no consequence, and for the very plain reason that the entry for a condition broken does not at all affect the right to receive payment of a pre-existing debt."

But if the payment is made pending action to enforce a forfeiture arising from the non-payment of that rent, then the special provisions of the "Landlord and Tenant's Act" have to be considered. These were not brought to my notice during the argument, but to me they appear to solve the contest in the plaintiff's favour. I refer to those grouped under the heading "Recovery of Premises by Landlords," R. S. O. ch. 143, secs. 17-22. This last section, 22, meets the circumstances of this case. A former action having been brought for rent and recovery of possession, the now defendants, after statement of claim, paid all the rent claimed and costs. The plaintiff's solicitor had written defendant that on payment of these claims he would discontinue the action. In sending the money the defendant stated in his letter that he did not anticipate the forfeit of the lease, but he supposed it could not then be helped. After receiving payment, the plaintiff's solicitor repeated his willingness to sign a notice of discontinuance of the action. And so the matter rested. By the effect of

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Boyd, C.

the section I have referred to, section 22, this payment caused all further proceedings in the action to cease, and in effect worked a discontinuance by statute. The closing part of the section originally referred to the effect of the tenant obtaining relief in equity against forfeiture for non-payment of rent. By section 19 it appears that the right to such relief was held in suspense for six months after execution executed, and if no application made within that period then the landlord held his land freed and discharged from the lease; but if equitable relief was obtained in that interval then (*vide* section 22) the tenant was to continue to hold and enjoy the lands demised according to the lease thereof made, without any new lease.

As the provisions are now collocated, the meaning of the legislature seems to be to extend to the payment during action the same effect as to the relief obtained in equity after execution executed by actual re-entry on the land and the enjoyment thereof by the landlord.

But whether this be so or not, it is not to be considered that the defendant is in worse case if he intercepts the action by payment than if he slumbers till actually ejected.

In brief, I take it that the Act changes the irrevocable character of election once made to forfeit for non-payment of rent, and in the circumstances provided for by the statute it enables the election to be revoked or withdrawn. So that the settlement of the action by payment in this case absolved the defendant from the consequences of the forfeiture and worked a rehabilitation of the lease.

Judgment will now be for forfeiture as claimed and possession, and for payment of the rent claimed, with costs.

At the Hilary Sittings of the Divisional Court, 1892, the defendants moved to set aside the judgment of Boyd, C., and to enter judgment for the defendants on the following grounds: (1) That the judgment of the learned Chancellor was contrary to the evidence and the weight of evidence. (2) That it was shewn by the evidence that

Argument.

the plaintiff had on the 29th November, 1890, terminated by statutory notice of forfeiture the lease sued on herein. (3) That it was further shewn that the plaintiff acted on the said notice, and also on the 17th day of December, 1890, began an action to have a declaration of forfeiture of the lease and to recover possession of the lands. (4) That it was shewn that the defendant Robinson had authority to act for the defendant Maitland as well as for himself in said action, and that, by arrangement made by the said Robinson through his solicitor with the solicitor of the plaintiff, all the obligations and liabilities of the defendants in respect of the said lease were terminated, and the lease sued on herein was cancelled and possession given to the plaintiff; and that a certain sum of money was paid in pursuance of the said arrangement on behalf of the defendants to the plaintiff's solicitor as a final settlement of all claims of the plaintiff under said lease. (5) That the learned Chancellor based his judgment upon an erroneous view of section 22 of chapter 143 of the Revised Statutes of Ontario, and the said section has no application to this case, where the assignees of the original lessee were not seeking any equitable relief by action.

The motion was argued before ARMOUR, C. J., and FALCONBRIDGE, J., on the 1st and 5th of February, 1892.

Allan Cassels, for the defendants, referred to *Hartshorne* v. *Watson*, 4 Bing. N. C. 178; *Price* v. *Worwood*, 4 H. & N. 512; *Bradfield* v. *Hopkins*, 16 C. P. 298; *Jones* v. *Carter*, 15 M. & W. 718; *Morrison* v. *Universal Marine Ins. Co.*, L. R. 8 Ex. 197; *Scarf* v. *Jardine*, 7 App. Cas. 345; *James* v. *Young*, 27 Ch. D. 652; *Croft* v. *Lumley*, 5 E. & B. 648; 6 H. L. C. at pp. 697, 706; *Evans* v. *Wyatt*, 43 L. T. 176; *Doe Morecraft* v. *Meux*, 4 B. & C. 606; *Thompson* v. *Baskerville*, 40 U. C. R. 614.

W. H. Blake, for the plaintiff, cited *Green's Case*, Cro. Eliz. 3; *Birch* v. *Wright*, 1 T. R. 378; *Roscoe's* N. P., 16th ed, pp. 323, 332, 1023, 1024, 1027; R. S. O. ch. 143, sec. 22.

Judgment.

Armour, C.J.

February 27, 1892. The judgment of the court was delivered by

Armour, C. J.:—

There can be no doubt that the bringing of the action brought by the landlord against the tenants on the 17th day of December, 1890, was an election on his part to forfeit the lease which could not be retracted by him: *Dumpor's Case*, 1 Sm. L. C., 9th ed., 43; *Jones* v. *Carter*, 15 M. & W. 718; *Scarf* v. *Jardine*, 7 App. Cas. 345 at p. 360.

And to enable the landlord to get rid of this forfeiture, there must have been a request on the part of the tenants, either express or implied, to be relieved from the forfeiture.

And as the mere receipt, after the forfeiture, of rent which accrued due before the forfeiture, would not operate as a waiver by the landlord of the forfeiture: *Price* v. *Worwood*, 4 H. & N. 512; so the mere payment of rent, after the forfeiture, which accrued due before the forfeiture, would not amount to a request on the tenant's part to be relieved from the forfeiture.

In each such case the effect of such receipt or payment must depend upon the intention of the party receiving or paying: *Doe Cheny* v. *Batten*, Cowp. 243; *Laxton* v. *Rosenberg*, 11 O. R. 199.

It seems to me, with great deference, that the learned Chancellor erred in assuming that the payment of the rent and costs after action brought, and before trial, operated by force of the provisions of the statute R. S. O. ch. 143, secs. 17-22, to permit the landlord to retract his forfeiture, no matter what the intention of the tenants was in paying such rent and costs, and without any request on their part, either express or implied, to be relieved from such forfeiture.

Before the statute 4 Geo. II. ch. 28, Courts of law were in the habit of staying proceedings in actions of ejectment brought on clauses of re-entry for non-payment of rent at any time before execution executed, on the tenant's bringing into Court all the rent in arrear and costs; and Courts

Judgment.

Armour, C.J.

of equity were in the habit of granting relief against such clauses at any time. Then was passed the Act 4 Geo. II, ch. 28, the second section of which contained the recital: "And whereas, great inconveniences do frequently happen to landlords and lessors in cases of re-entry for non-payment of rent, by reason of the many niceties that attend re-entries at common law, and for as much as, where a legal re-entry is made, the landlord or lessor must be at the expense, charge, and delay of recovering in ejectment before he can obtain the actual possession of the demised premises; and it often happens that after such a re-entry made the lessee or his assignee upon one or more bills filed in a Court of equity, not only holds out the lessor or landlord by an injunction from recovering the possession, but likewise pending the said suit do run much more in arrear without giving any security for the rents due when the said re-entry was made, or which shall or do afterwards incur;" and for remedy thereof that section and sections 3 and 4 were enacted, which sections were brought into force in this province by the Act 32 Geo. III. ch. 1, were afterwards substantially re-enacted in 19 Vic. ch. 43, secs. 263-265, and now appear in R. S. O. (1887) ch. 143, as sections 17-22.

It will be seen that these sections are applicable simply to an action for the recovery of the demised premises, and I am free to admit that if in such an action the tenant or his assignee, at any time before the trial in the action, paid or tendered to the lessor or landlord, or to his solicitor in the cause, or paid into Court, all the rent in arrear together with the costs, the implication might arise from that only, and in the absence of anything to the contrary, that his intention in so doing was to seek to be relieved from the forfeiture. But the action brought by the landlord against the tenants on the 17th December, 1890, was not an action simply for the recovery of the demised premises, but the landlord joined with the action for the recovery of the demised premises, as he was entitled to do under the Con. Rules 340 and 341, an action for the recovery of the arrears

Judgment.

Armour, C. J.

of rent. How then could any implication arise from the mere fact of their paying, in an action so brought, to the landlord's solicitor in the action, the arrears of rent which they were sued for in the action, and which they were bound by their covenant to pay, and the costs of the action, which they were also bound to pay, that they intended by so doing to seek to be relieved from the forfeiture? It seems to me that no such implication could arise from such payment under such circumstances, especially when, as admitted on the argument, the demised premises were vacant land, the tenants not being in the actual possession of them.

When we turn to the evidence, however, I think it abundantly clear that there was no intention on the part of the tenants to seek to be relieved from the forfeiture. Mr. Robinson had no such intention, and this was communicated by Mr. Standish to Mr. Drake, and Mr. Robinson certainly did nothing from which such an intention could be implied, and all that Mr. Maitland said was contained in his letter enclosing the cheque for the arrears of rent and costs—"I did not anticipate the forfeit of the lease, but I suppose it cannot now be helped;" and there is nothing in this from which an intention to seek relief from the forfeiture could be implied, but, on the contrary, an acquiescence in it.

It is difficult, moreover, to see how the landlord could get rid of the forfeiture, unless both the tenants concurred in seeking relief from it, which they certainly did not: *Finch* v. *Underwood*, 2 Ch. D. 310.

In my opinion, the action should be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

GREEN ET UX. V. MINNES ET AL.

Defamation—Libel—Poster advertising account for sale—Justification.

Two of the defendants, merchants, placed in the hands of the other defendant, a collector of debts, an account against the female plaintiff, wife of the other plaintiff, for collection, well knowing the method of collection adopted by the collector, who, after a threatening letter to the female plaintiff, which did not evoke payment, caused to be posted up conspicuously in several parts of the city where the plaintiffs lived, a yellow poster advertising a number of accounts for sale, among them being one against "Mrs. J. Green (the female plaintiff), Princess Street, dry goods bill, $59.35." The evidence shewed that she owed $24.33 only :—

Held, that the publication was libellous and could only be justified by shewing its truth, and, as the defendants had failed to shew that she was indebted in the sum mentioned in the poster, they were liable in damages.

Statement. THE plaintiffs by their statement of claim alleged :

(1) That they had sustained damage by the defendants, in or about the month of May, 1890, falsely and fraudulently printing and publishing, and causing to be printed and published, and to be posted up and exhibited in conspicuous public places, on buildings, fences, and elsewhere in different parts of the city of Kingston, in which the plaintiffs resided, of and concerning the plaintiffs, certain libellous placards or bills of advertisements, which were read by the public and divers persons, and which placards or bills were in the words, names, etc., following, that is to say: "Accounts for sale by the Canadian Collecting Company :—Fred. Scobell, clerk, grocery bill, $14.60 (and so on giving a number of names, and then) Mrs. J. Green, Princess street, dry goods bill, $59.35 * * * $10 reward for information that will lead to the conviction of any person destroying this poster. C. C. C.

(2) In the said printed bills the defendants by the name of "Mrs. J. Green" meant and intended to designate the plaintiff Sarah Green as being the wife of the plaintiff John Green, and by the words "Princess street" meant to describe the plaintiffs' present place of residence, and by the

Statement. words, "dry goods bill" and the figures "$59.35" (meaning fifty-nine dollars and thirty-five cents as being the value or price of such dry goods) the defendants meant and intended to allege and to state to the public that the plaintiff Sarah Green was indebted in respect of a quantity of dry goods sold and delivered to her in the sum of fifty-nine dollars and thirty-five cents; and that she wrongfully and dishonestly neglected and refused to pay for the same, and by describing the plaintiff Sarah Green in the said placard or advertisement as "Mrs. J. Green" the defendants meant and intended to convey to the public the impression of the plaintiff John Green that he abetted and approved such dishonesty, and himself acted in a mean and discreditable manner in neglecting and refusing to pay for goods and merchandize supplied to his wife.

(3) That the said bills of advertisement, and the posting up said placards or publication thereof as aforesaid, and the publication of the plaintiffs' name therein in manner and style aforesaid, was intended by the defendants to force and compel payment by the plaintiffs of a claim for which they were not and for which neither of them was liable, and which never was incurred by or charged to any one of the name of Green, and the necessary and intended consequence of such posting up and publication was to injure and defame the reputation of the plaintiffs, and to degrade them and subject them to annoyance, ridicule, and disgrace, and to make them seem guilty of fraud and dishonesty, and appear unworthy of trust or credit, and which implied that they were cheats and swindlers.

(4) That by reason of said defamatory publications the plaintiffs have suffered much loss of reputation and of business, and suffered in their credit and good name, and incurred public odium and contempt, and been generally damnified.

The defendants Minnes & Burns by their statement of defence: (1) Denied the allegations contained in the plaintiffs' statement of claim, and said; (2) That long before the month of May, 1890, mentioned in the first paragraph of said

Statement.

claim, and before the 1st of April, 1887, the above named plaintiff Sarah Green, then the widow of one Samuel Thornton, of said city, was indebted to the defendants Thomas Minnes and William Burns, who were dry goods merchants in said city, in the sum of $59.35 for dry goods furnished to her by said defendants, trading under the name of Minnes & Burns, in said city; (3) That after the death of said Samuel Thornton, and after the said 1st April, 1887, the said plaintiff Sarah Green, then Sarah Thornton, widow, married the said plaintiff John Green, and from being well known formerly as Mrs. S. Thornton, she then became well known as Mrs. J. Green; (4) That they repeatedly requested the said plaintiff Sarah Green to pay them the said sum of $59.35, so owing to them as aforesaid, and the said plaintiff Sarah Green repeatedly acknowledged the sum as due, and promised to pay the same to them; (5) That notwithstanding that the said plaintiff frequently promised to pay the said sum so due to the defendants Minnes & Burns, yet the said plaintiff Sarah Green did not pay the same; (6) That the defendants Minnes & Burns thereupon, prior to the month of May, 1890, employed the Canadian Collecting Company, a company whose business it was to collect accounts through their manager and agent in Kingston, the above named defendant Edwin S. Andrews, to collect the said amount so due; (7) That the defendants Minnes & Burns, in employing the said company to collect the said debt, gave the name of Mrs. J. Green as the person who owed the same, she having become, as aforesaid, Mrs. J. Green since the incurring of the said debt; (8) That they merely instructed the said company to collect the said sum so due; (9) That in all they did, or intended to do, they were acting in good faith for the purpose of collecting their said debt, or so much of the same as could be collected, and that they were not acting maliciously, or with the intent to injure or defraud the said plaintiffs, or either of them; (10) That they denied that they meant or intended to allege against or in respect of the said plaintiffs, or either of them, as

Statement.

set forth in the said claim; (11) That as to the plaintiff John Green, in anything they did they did not mean or intend to convey to the public the impression alleged in the said claim; and, further, that said impression could not be created by anything which they did; (12) They denied that the plaintiffs, or either of them, had suffered loss or damage; (13) And wholly denied that the said printed placards were printed with the meanings severally and respectively alleged in said claim, or with any defamatory meaning.

And the defendant Edwin S. Andrews by his statement of defence alleged: (1) That he was the manager at the city of Kingston of the Canadian Collecting Company, which was a company that did business in said city and elsewhere in the province of Ontario, in collecting the accounts due merchants and others; (2) That in the due and regular course of business the above named defendants Minnes & Burns employed the said defendant to collect an account of $59.35 against said plaintiff Sarah Green, for dry goods supplied to the said plaintiff by the defendants Minnes & Burns, the account being handed to the said defendant Andrews by the other defendants as due by one Mrs. J. Green, who since this action the defendant Andrews had ascertained to be identical with the said plaintiff Sarah Green; (3) That he, in his regular course of business and employment, and in perfect good faith and without malice or any other improper motive, and understanding that said sum was so due as aforesaid, proceeded to request payment of the same from the plaintiff Sarah Green, but was unable to collect the same, and being so unable to collect the same, duly advertized the said account for sale, with many other accounts, as mentioned in the alleged placards, believing that the said account was due as aforesaid; (4) The defendant Andrews denied the allegations in the claim that he falsely or maliciously acted in anything that he did, or that he intended to defame the said plaintiffs or either of them, or that he meant or intended to convey the impression that the plaintiff

Statement.

John Green was guilty as alleged in said claim, or that said John Green was indebted in any amount, or that he intended to injure said plaintiffs or either of them; (5) That except as to said publication he denied the allegations in said claim; (6) That he denied that the plaintiffs or either of them had suffered any loss or damage; (7) That he wholly denied that the said placards were printed or published with the meanings severally and respectively alleged in said claim, or with any defamatory meaning.

The cause was tried at the Spring Sittings, 1891, of this Court at Kingston, by consent, by ROSE, J., without a jury.

It appeared that the plaintiff Sarah Green was formerly the wife of Samuel Thornton, and that Samuel Thornton in his life time was in the habit of dealing with the defendants Minnes & Burns, who were merchants. That Samuel Thornton died on the 12th day of August, 1886, and at that time was indebted to the defendants Minnes & Burns in the sum of $45.02. That on October 18th, 1886, $10 was paid on account. That subsequently the plaintiff Sarah, then the widow of Samuel Thornton, purchased from the defendants Minnes & Burns two bills of goods amounting to $7.87 and $24.33 respectively, the former of which she afterwards paid. That in July, 1888, she married the plaintiff John Green, and was now his wife. The defendant Andrews had in Kingston and in Ottawa, in conjunction with a partner, a business which they styled the Canadian Collecting Company, under which name they undertook the collection of accounts; and their method was to send notices to the debtors demanding payment, and threatening that in default of payment they would post advertisements throughout these cities of the sale of the accounts against such debtors. The defendants Minnes & Burns had applied to the plaintiff Sarah Green for the payment of their account against her, claiming it to be $59.35, and not having received payment of it, they placed it in the hands of the Canadian Collecting Company for collection, well knowing the methods adopted by that

Statement. company for the collection of accounts. The Canadian Collecting Company, thereupon, addressed the following letter to the plaintiff Sarah Green:

4/23/1890.

Office of the Canadian Collecting Company.
Office Hours, 2 to 5.

To MRS. J. GREEN:

We must realize immediately on all accounts now in our hands, and unless yours with Minnes & Burns, amounting to $59.35, is paid or secured at our office before 26th inst., it will be dealt with as accompanying poster shews, and shall grace the wall of every bill board in this city.

Respectfully yours,
THE CANADIAN COLLECTING COMPANY,
Local Office, No. 4 Ambor Building,
Over Express Office, Market Square.

P.S.—Make satisfactory arrangements for payment at our office before Sunday next, and your account will be withdrawn from the list.

C. C. C.

And the "accompanying poster" referred to in the said letter was a printed yellow-coloured poster, the same in words and figures as that set out in the statement of claim. That no attention having been paid to this letter by the plaintiff Sarah Green, the said printed poster was posted up conspicuously in several parts of the city of Kingston, where the plaintiff resided. The defendants Minnes & Burns had never taken any legal proceedings to collect their claim from the plaintiff Sarah Green.

The learned Judge gave the following judgment:

September 21, 1891. ROSE, J.:—

This was an action of libel tried before me at the last sittings of this Court in Kingston, the parties consenting that the jury should be dispensed with, and that I should dispose of the facts as well as the law.

Judgment.

Rose, J.

The plaintiffs, John Green and Sarah Green, his wife, complain that the defendants published a certain advertisement headed "Accounts for sale by the Canadian Collecting Company," in which advertisement appeared the names of several persons, among others that of the plaintiff Sarah Green as follows: "Mrs. J. Green, Princess street, dry goods bill, $59.35."

The plaintiffs say that the defendants, being the alleged creditors and the manager of the collecting company, have falsely and maliciously printed and published, and caused to be posted up and exhibited in conspicuous public places and on buildings, fences, and elsewhere, in different parts of the city of Kingston, of and concerning the plaintiffs, certain libellous printed placards or bills of advertisement, which bills were in the words set out in the pleadings. The husband is joined because he complains that the publication respecting his wife is one tending to degrade and disgrace him.

The plaintiff Sarah Green, prior to her marriage with the plaintiff John Green, was the widow of one Samuel Thornton, who became indebted to the defendants Minnes & Burns in a certain sum of money. After Thornton's death Mrs. Thornton purchased a carpet from the defendants Minnes & Burns, but did not pay for it. The defendants Minnes & Burns endeavoured to collect the whole account from the estate of Samuel Thornton, and failing that made an attempt to collect the sum from Mrs. Thornton or Mrs. Green, and failing to collect from her, placed the account in the hands of the collecting company, of which the defendant Andrews was manager. Application for payment was made to her by circular letter, threatening that if the account was not paid or secured it would be "dealt with as accompanying poster shews, and shall grace the wall of every bill board in this city." The account not having been paid, the advertisement the heading of which I have given, was prepared, in which Mrs. Green's name appeared with those of some eighteen other persons whose accounts were thus advertised for sale.

Judgment

Rose, J.

I think that I should find as a fact that Mrs. Green was indebted to Minnes & Burns for the carpet, at least, the price of which was $24.33. I do not think it necessary to consider whether she was indebted to them in the further sum of $35, about which there may be considerable doubt, because I do not think that for the purpose of this action the amount of the indebtedness is material. No greater injury or annoyance was suffered by her by the publication of the statement that she was indebted in $59 than would have been by the publication of the statement that she was indebted in $24.

I think, therefore, that the defendants have shewn that the statement in the advertisement of her indebtedness was substantially true. It is urged that the publication of these statements contained in the advertisement was libellous. If the object of Minnes & Burns was really and truly to advertise for sale this chose in action for the purpose of obtaining a purchaser therefor, and thus realizing as much for such claim as they possibly could obtain, it is beyond question, I take it, that they would have had a perfect right to advertise it for sale in the same way as they would have had the right to advertise any collateral security which might have been placed in their hands by Mrs. Green to secure payment of the account. But it is said the object was not to make a sale of the account, but was to coerce Mrs. Green or her husband into the payment of it by means of a threat, so as to relieve themselves from the shame or disgrace from which they would suffer by the publication of the statement that Mrs. Green was indebted for this amount; that such publication affected her credit and was a statement made which would prevent her obtaining financial credit. In other words, the claim is that the defendants Minnes & Burns, being unable to collect their account in the usual way, threatened the publication and carried that threat into execution for the purpose of coercion.

I have no doubt that the publication of the advertisement was calculated to bring Mrs. Green into financial

Judgment.

Rose, J.

discredit, and that it was in fact a representation that she was indebted to the defendants, and that she was either unwilling or unable to pay; because I think no one seeing the advertisement would doubt that the creditor had exhausted all ordinary means of recovering payment before seeking to advertise the account for sale. But if as a fact, and I have found the fact to be so, Mrs. Green was indebted to the defendants Minnes & Burns, and would not or could not pay the amount, why could not her creditors state the fact in an advertisement in an endeavour to make a sale of the account, which to them was otherwise unrealizable? Can the fact, if it be the fact, that they did not expect to make a sale of the account, but that they were using the means employed for the purpose of coercion, convert that into a wrongful act which would be perfectly legal and justifiable if their motives had been what, on the face at any rate, they appeared to be? It is, of course, clear that if the document was libellous, the fact that the creditors did not intend it to be so would not relieve them; and if the document was not libellous, the fact that the creditors were making what in one sense may be called an improper use of their legal rights would not make them amenable to the proceedings which have been taken.

In *Regina* v. *Coghlan*, 4 F. & F. 316, Baron Bramwell told the grand jury that the mere offer, on the face of it, to sell an alleged debt, which did not necessarily imply inability to pay it, and which did not appear to be false, was not libellous, because it was not libellous to publish of another that he owed money.

In *The Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741, the test as to whether such a document as this would be libellous appears to be, not whether one might infer something to the detriment of the person named in it, which inference did not appear upon the face of the document, but what does the document fairly set forth according to a reasonable understanding of any one who was put in a position by the publication of the document to apprehend its meaning. In other words, if looking at the document alone

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Rose, J.

it did not necessarily or fairly imply anything derogatory to the party named, the mere fact that some one of a suspicious turn of mind might infer something derogatory, would not make the document libellous.

Finding the facts in this case as a jury, and bringing to bear such knowledge as I may deem to be common knowledge, I think that seeing such an advertisement would convey to my mind the meaning that the person named in it was indebted; that the creditor had been unable to obtain payment of the debt; and that he was willing to sell the claim to any one who might, as a matter of speculation, be willing to try his chances of making the collection. I think it rather implies that the debtor is able to pay, but is unwilling; because, if the implication of the document was that the debtor was unable to pay, there would be little use in making an offer to sell the account. I think that the plaintiff Mrs. Green cannot complain if any one reading the document should have taken the meaning I have suggested, because such meaning is supported by the facts.

If the advertisement of this account for sale is libellous, then the advertisement by a mortgagee, [illegible] an equity of redemption which he knew to be valueless, would be libellous, because there it might be proved that he knew that he could not make a sale, and although the mortgagor owed him the debt, and although the equity was a security in his hands, it was valueless, and therefore he would be prevented from saying to another, or from advertising to the world, that the mortgagor was indebted to him, and that he offered the security for sale, because the debtor would say, "you are not taking such steps with an honest intention of making a sale of the property, but you are holding me up to disgrace and ridicule as a means of coercing me into the payment of the debt."

Imagine another case, that of a person sensitively proud who had been compelled to borrow money and had pledged as security therefor some article of little value intrinsically, but of great value to the pledger

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Rose, J.

because of some incident connected with the ownership of it, as, for instance, the pledging of a wedding ring by a widow, or the deposit of a keepsake given by some deceased friend, and the debtor being unable to pay, the creditor first threatens to advertize the pledge for sale, and then in fact does advertize. I assume that the threat was made and the advertisement issued not with any hope whatever of realizing the amount of the indebtedness, but for the simple purpose of coercing the debtor into raising the amount in some manner in order to relieve from the shame and disgrace which to his or her mind attached to the publication of the facts. There would be the exercise of the legal right in a cruel and oppressive manner.

Any unfortunate debtor who, through poverty, is unable to pay claims the honesty of which is admitted, and the desire to pay which is great, who is brought into Court by the pressing creditor, can complain that he is held up to reproach and shame, and that his credit is affected, and that statements are made which affect his credit. It is manifest, I think, that the exercise of the legal right in a harsh or unkind or uncharitable manner does not in anywise expose the person so acting to any legal proceedings.

If motives were to be inquired into, one would have to inquire into the motives of the debtors. If a debtor able to pay, but dishonestly unwilling, was coerced into payment by the threat that his name would be exposed to the public, he would not command much sympathy. I think neither the motive of the creditor nor that of the debtor may be inquired into in such an action as the present; that the only inquiry I have to make is whether the indebtedness existed, and whether the creditor was exercising a legal right in advertising the claim for sale.

I am of the opinion that an indebtedness in fact existed, although possibly not to the amount claimed, and that the creditors had a perfect right in law to advertize that claim for sale, although their motive in doing

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Rose, J.

so was to coerce the debtor into paying a claim which otherwise the creditors were unable to realize. I am at a loss to understand how the advertising of the claim could be to this particular debtor a means of coercion; the threat to advertize might be, but when the advertisement was once issued and posted up, then the injury was done, and the motive to pay was removed.

The plaintiffs cited *Muetze* v. *Tuteur*, 46 N. W. Reporter 123, as supporting their argument. The facts of that case are different from the case before me, as a very hasty perusal will make evident, and, in as far as the reasoning or conclusions reached in that case differ from what I have endeavoured to above express, I am unable to accept them as valid arguments to assist the plaintiffs.

Finding as I do that the plaintiff Mrs. Green has no cause of action, I do not have to consider the somewhat novel claim on the part of the husband that he is damnified because the account was advertised as being due by Mrs. J. Green instead of by Mrs. S. Thornton. The account was certainly due by Mrs. S. Thornton when she married the plaintiff John Green, but thereafter it was due by Mrs. J. Green.

The action must be dismissed with costs.

At the Michaelmas Sittings of the Divisional Court, 1891, the plaintiffs moved to set aside the judgment of ROSE, J., and to enter judgment for themselves, or in favour of the plaintiff John Green, on the ground that the judgment was contrary to law and evidence, and that upon the facts established in evidence at the trial the plaintiffs were, or the plaintiff John Green was, entitled to recover damages in this action.

The motion was argued before ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ., on the 26th November, 1891.

Aylesworth, Q.C., for the plaintiffs. The libel arose out of a wanton attempt to collect an account by blackmail. Even though the female plaintiff personally owed $24, the poster

Argument.

was libellous; it was not a *bonâ fide* effort to sell the debt; everything shews that the real effort was to collect the account, not to sell it. The defendants Minnes & Burns gave no instructions to sell it. The imputation is that the plaintiff Sarah Green owes a debt which the plaintiff John Green will not pay, though able; and so this proceeding is taken to shame him into doing what he is under no legal obligation to do. The defendants have not pleaded privilege. *Wells* v. *Lindop*, 13 O. R. 434, shews that it is necessary to do so. The defence is narrowed down to justification, and that being so the truth of the whole libel must be proved. There is no pretence of justification for more than $24. I refer to *Muetze* v. *Tuteur*, 77 Wis. 236; *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741, 747; *Lemay* v. *Chamberlain*, 10 O. R. 638; *Todd* v. *Dun*, 15 A. R. 85; *Regina* v. *Coghlan*, 4 F. & F. 316.

John McIntyre, Q. C., for the defendants, referred to *Capital and Counties Bank* v. *Henty*, 7 App. Cas. at p. 744; *Alexander* v. *North-Eastern R. W. Co.*, 6 B. & S. 340.

Aylesworth, in reply, referred to Odgers, 2nd ed., p. 170; *Huber* v. *Crookall*, 10 O.R. 475.

February 27, 1892. The judgment of ARMOUR, C. J., and FALCONBRIDGE, J., was delivered by

ARMOUR, C.J.:—

About two months after the defendant Andrews had started the business of the Canadian Collecting Company at Kingston, as appeared from the evidence of the defendant Minnes, a meeting of merchants, including the defendant Minnes, to the number of twenty-five or thirty, was held in the council chamber regarding this Collecting Company, at which the defendant Andrews was present and explained to the meeting the method of collecting accounts adopted by the company.

This method of collecting accounts was by no means a novel one, but had been frequently made use of by others, and was a method with which the public at large were well acquainted.

Judgment.

Armour, C.J.

The first question to be determined in this case is whether, under the circumstances under which this poster was published, reasonable men would be likely to understand it in a libellous sense: see *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741.

The poster was striking in its colour and unusual in its character; it advertized accounts for sale by the Canadian Collecting Company, a sale unlikely to be made by a collecting company until the means of collection had proved abortive; it did not shew to whom the accounts were due, nor on whose account they were to be sold, nor when nor where the sale was to be effected; it shewed the quality of the debtors, and the quality of the goods supplied to them, and offered a reward for information that would lead to the conviction of any person destroying it.

We think that reasonable men reading this poster would understand from it that the debtors referred to therein were persons from whom the accounts which they were therein alleged to owe could not be collected by process of law, and were insolvent or dishonest debtors.

Being so understood by reasonable men, this poster would have the effect of bringing discredit upon the debtors mentioned therein, and of lowering them in the estimation of their neighbours, and would be consequently libellous.

If this had been a criminal prosecution, there would have been nothing to justify the publication of this poster, even if it had been shewn that the debtors therein mentioned were indebted as therein set forth, for it could not have been shewn that its publication was for the public benefit.

But, in a civil action, in order to justify the publication of this poster, it would be necessary to shew only its truth, and that the debtors therein named were indebted as therein set forth.

In this case it was quite clear from the evidence that the plaintiff Sarah Green was indebted to the defendants Minnes & Burns in the sum of $24.33, and in no other

Judgment.

Armour, C.J.

or greater sum, and that she was not indebted to them in the sum of $59.35, as in the poster set forth.

We think that the defendants, having failed to shew that the plaintiff Sarah Green was indebted to the defendants Minnes & Burns in the sum mentioned in the poster, have failed to justify its publication. It is also quite clear from the evidence that the collecting company never had any authority to sell this account, nor was it the intention of any of the defendants to sell it; but it was given by the defendants Minnes & Burns to the defendant Andrews for the sole purpose of its being attempted to be collected by threatening to expose and by exposing the debtor to public shame.

When persons resort to this very reprehensible method of collecting accounts, and publish posters such as that published in this case, we think that they cannot complain if they are held to strict proof of the truth of the matters published therein, and failing in such proof, if they are held liable to suffer the consequences of such publication.

We think and find that the poster published and complained of in this case was libellous, and that the justification of it was not made out, and that the plaintiffs are entitled to recover damages in respect of it.

And we assess such damages at the sum of $50; and we direct that judgment be entered for the plaintiffs against the defendants for this amount with full costs of suit.

See *Goodburne* v. *Bowman*, 9 Bing. 532; *Alexander* v. *North-Eastern R. W. Co.*, 6 B. & S. 340.

STREET, J.:—

I entirely concur in the remarks of the Chief Justice as to the reprehensible nature of the means employed by the defendants for the collection of the debt due to Minnes & Burns from the female plaintiff. It is a matter of surprise to find in the evidence a statement that a number of traders and business men had deliberately resolved to descend to such a device.

The publication complained of by the plaintiffs is clearly of a character which a jury might properly hold to be

Judgment.

Street, J.

libellous; it is clearly not a matter of public interest or concern, and, whether true or false, it is therefore a matter for which the defendants might have been indicted. It is, I think, a matter in which a plea of justification should not be taken to be proved unless the proof go to the full extent of the libel. The statement complained of in the libel is that the debtor owed $59.35, when as a matter of fact she owed but $24.33. Under these circumstances, the plea of justification should not in my opinion be held to have been proved.

In *Alexander* v. *North-Eastern R. W. Co.*, 6 B. & S. 340, the defendants were sued for publishing an alleged libel consisting of a hand bill stating that the plaintiff had been convicted of refusing to pay his proper fare and that a penalty had been imposed of "£9 1s. 10d., including costs, or three weeks' imprisonment." As a matter of fact, the order was that the plaintiff should pay a fine of £1 and £8 1s. 10d. costs, or in the alternative be imprisoned for fourteen days. The Court held that it was a question for the jury whether the statement so published was substantially true.

In *Goodburne* v. *Bowman*, 9 Bing. 532, the libel consisted in the statement that the plaintiff had twice been mayor of the borough of Richmond, viz., in the years 1814 and 1823, had during each of these tenures of office charged to the borough a greater sum per ton for the coal purchased for the poor than he had paid for it, and had pocketed the difference. A plea that the plaintiff had done this during his first mayoralty, though not during his second, was held bad by the Court.

These two cases leave the question open, whether the Court or the jury should pass upon the sufficiency of a plea of justification. In the present case we combine the functions of Court and jury, and should, I think, hold that the plea has not been proved.

I agree in the verdict found by the Chief Justice and my brother **Falconbridge.**

[See the case of *Searles* v. *Scarlett*, 8 Times L. R. 562, upon a cognate subject.]

[QUEEN'S BENCH DIVISION.]

VILLAGE OF NEW HAMBURG V. COUNTY OF WATERLOO.

Municipal corporations—Bridges—R. S. O. ch. 184, secs. 532, 534—Counties and villages—Rivers and streams—Width of, how ascertained.

Upon the proper construction of sections 532 and 534 of the Municipal Act, R. S. O. ch. 184, the county council is by the former provision given exclusive jurisdiction over all bridges, by whomsoever built, 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 is by the latter provision compellable to build such bridges only where necessary to connect any main public highway leading through the county.

The place at which the width of a stream or river is to be ascertained is the place at which the bridge crosses; and the width is to be determined by the width of the natural channel of such stream or river, taking it in its highest ordinary state.

Decision of FERGUSON, J., at the trial, reversed.

Statement.

THE plaintiffs by their statement alleged: (1) That the plaintiffs were a village corporation formed and existing under the provisions of the Municipal Act; (2) That the defendants were a county corporation formed and existing under the provisions of the said Act; (3) That the river Nith was a river over one hundred feet in width running through the village of New Hamburg; (4) That there was a main public highway leading through the county of Waterloo and which passed through the said village; (5) That there was and had been for many years past erected across the said river on the said highway a bridge called the Huron street bridge; (6) That the said bridge was erected at a point on the said river where the same was upwards of one hundred feet in width; (7) That the said bridge was and for some time past had been out of repair and it was necessary to lengthen the same in order to avoid the danger of its being carried away in the time of freshets; (8) That the said bridge was a bridge which under the provisions of the Municipal Act it was the duty of the defendants to build and maintain; (9) That the defendants denied that the said bridge was one which they were under the provisions of the said Act bound to build

Statement. and maintain, and they alleged that the duty of maintaining it rested upon the plaintiffs and the defendants refused to repair or lengthen the said bridge; (10) The plaintiffs submitted that it ought to be declared by the judgment of this honourable Court that the defendants were bound to build and maintain the said bridge and that they should by the like judgment be ordered to put the said bridge in repair.

The defendants by their statement of defence: (1) Admitted the allegations contained in the 1st, 2nd, and 9th paragraphs of the statement of claim, but denied all the other allegations contained therein; (2) And said that the said river Nith was not more than one hundred feet in width at the point on the said river where the said Huron street bridge was erected and the said bridge was not one which the defendants under the provisions of the Municipal Act were bound to build and maintain; (3) That at a session of the municipal council of the county of Waterloo held in the month of June, 1884, a petition was presented by the plaintiffs praying for a money grant by the defendants to assist the plaintiffs in building the said bridge, and a grant of $1,000 was thereupon made by the defendants to the plaintiffs for that purpose, and the defendants said that said grant was made by the defendants and accepted by the plaintiffs in full satisfaction and discharge of all past and future claims by the plaintiffs upon the defendants for the building and maintenance of the said bridge and that the plaintiffs were legally debarred and estopped from setting up and maintaining their claim in this action. Issue.

The cause was tried at the Spring Sittings of the Chancery Division of this Court held in May, 1891, at Stratford, by **Ferguson, J.**

It appeared that the bridge in question was built by the plaintiffs in the year 1884 and that in the month of June, 1884, they petitioned the defendants for a grant of $2,500 to assist them in building it, and that in part compliance with such petition the defendants granted to the plaintiffs the sum of $1,000 to aid them in its erection. Statement.

Evidence was given for the purpose of shewing that this was a bridge connecting a main highway leading through the defendants' county and evidence was given on both sides of measurements made for the purpose of proving and disproving that the river over which the bridge in question was built was over one hundred feet in width.

The learned Judge gave judgment for the plaintiffs, delivering the following judgment:

May 15, 1891. FERGUSON, J.:—

I have had heretofore a good deal to do with streams, although this identical matter, the width of the stream, has not been a part of any case that I have considered. I do not think it would be of any advantage to any of the parties, unless I should find a case precisely in point, that I should withhold judgment for consideration. The statute that is relied on by the plaintiffs for the liability of the defendants is contained in the Municipal Act in Harrison's book at section 534, the latter part of the section, "~~and~~ further, the county council shall cause to be built and maintained in like manner, all bridges on any river or stream over 100 feet in width, within the limits of any incorporated village in the county, necessary to connect any main public highway leading through the county." That this is a main public highway leading through the county has been placed, I think, beyond all dispute. I think there is no ground for saying and asserting that it is not such a highway. Then it is admitted that the bridge in question requires repairs, or alterations, or changes. Counsel agree upon that. It is also admitted that the village, the plaintiffs, have made all demands that are necessary for the purpose of founding the action for the mandamus. That the bridge in question is necessary to connect this highway I have been speaking of is also beyond all dispute.

The main difficulty is in regard to the width of the river,

Judgment

Ferguson, J.

because, even although all these conditions of which I have been speaking are existing and in favour of the plaintiffs' contention, if the river or stream is not 100 feet wide there is no liability on the defendants. Now, it is admitted that the width of the river or stream is not to be taken at the water's surface when there is low water. It is said that when there is a freshet that is not a time to take the width of the river. The defence have sought to make out that the river is not at the surface of the water 100 feet wide at the time of high water, and I dare say, if that were the question, they might possibly succeed. But that is a question so difficult to determine that one cannot say what the effect of the evidence is upon it. No mark has been proved that one can say is high water mark. It appears that no mark can be proved, because many witnesses who would know, if any one would know, a high water mark, have been called, and no one of them, I think, establishes or professes to swear to a high water mark in the river at that place. It would be a very uncertain thing if one had to get at the width of the river in that way. I make these remarks only because it was conceded that the measure should not be taken at low water mark, and to refer to the uncertainty of finding where the measurement should be taken according to the defendants' contention, which, however, I do not think the proper contention.

The river is not the water that flows in the river. The river, I apprehend, is composed of the water and the banks of the stream. I think the proper way of ascertaining the width of the river or stream is by ascertaining the width of the watercourse, taking the brow of the bank on one side and measuring to the brow of the bank on the other side, if the land on each side of the river is of the same height. The cut through the land with the water running in it is the river.

This river is shewn to be one at this place having well defined banks. There is no trouble in regard to what might be called the bank of the river, with the beach, that might also be called the bank. The banks are well defined; the parties do not disagree at all about what are the banks of the river.

The mode adopted by the plaintiffs of getting the width is to take a point a little below the brow of the lower bank and to measure on a perfectly horizontal line from that point, at right angles to the current as nearly as may be, to the opposite bank. That, I think, is the proper mode, and at all events the proper mode in this case, of ascertaining the true width of that river. If the one bank were only a little higher than the other, or if the two banks were of the same height, the measurement would be from the brow of one bank to the brow of the other. There may be cases where there are beaches, where there might be difficulty in ascertaining whether or not the beach was the bank of the river, but there is no such difficulty in this case, and I think the plaintiffs' method of ascertaining the width is the proper mode, and if that is so, it is clear on the evidence that the width is over 100 feet.

Then we have such a river as is mentioned in the statute, connecting such a road as is mentioned in the statute; we have the necessity for some repairs; and we have all things shewn to enable the plaintiffs to call upon the defendants to repair or keep in proper repair this bridge.

It was argued that the place at which the measurement should be made, is at the particular point where the bridge is. That may be so. I do not feel called upon to say whether it is so or not, because I am of the opinion that the evidence of the plaintiffs has established that the river is more than 100 feet in width at that place. Then, on the former law, there would be some trouble as to the proper mode of proceeding to get redress in a case of this kind. There have been various opinions expressed by very learned Judges. The late statute, however, as read by counsel for the plaintiffs, gives the party the right to bring an action and claim a mandamus in the action. This action has been so brought, and, in my opinion, the plaintiffs shew they are entitled to have the relief asked against the defendants.

Judgment.

Ferguson, J.

The relief asked is, I understand, a declaration of the right, a mandamus commanding the defendants to do the necessary repairs or make the necessary alterations in this bridge, and to maintain the bridge as a bridge over a stream or river more than 100 feet wide, connecting such a road through the county as I have described. The form or scope of the mandamus, I suppose, can be agreed upon, or can be drafted and settled. I do not wish to say anything with particularity about the form of it just now, nor is it necessary that I should.

[*W. R. Meredith*, Q. C. (for the plaintiffs).—I think the declaration of right should be that the duty is on the defendants to maintain the bridge.]

FERGUSON, J.—I think the plaintiffs are entitled to that declaration, and to the mandamus.

Now, about the costs. The common rule is that the party who succeeds is entitled to his costs, though they are said to be in the discretion of the Judge or Court. In this case I do not see any reason why the successful parties should not have their costs against the other parties.

I may add, that I do not think the contention in regard to the estoppel can succeed upon the evidence that is here. I do not see any possibility of the right, if it otherwise exists, having been foregone. There was a freshet years ago which took away the old bridge; the village was in trouble; it was an expensive matter, no doubt, to construct a new one, and they asked the county for a thousand dollars to aid in the construction of the bridge. The council gave that. Now, I cannot see that that affords any reason why the village should not now set up any rights that it has according to law. A condition was spoken of. I do not see how such a condition could be imposed in any verbal way. The papers that exist do not shew any condition. The cheque by which the money was paid over was read by the counsel; there is nothing of the kind in it. There is nothing of the sort in the report in regard to the resolution whereby the thousand dollars was granted. Even if the condition were there, it would raise a grave

Judgment.

Ferguson, J.

question as to whether there was an estoppel, but that question need not be considered. I do not think there is any estoppel.

There will be judgment for the plaintiffs, declaring the right, as I have said, granting the mandamus, and giving them their costs.

At the Michaelmas Sittings of the Divisional Court, 1891, the defendants moved to set aside the said judgment and to enter judgment for them, on the ground that the said judgment was contrary to law and evidence and the weight of evidence, and for the improper admission and rejection of evidence.

On the 23rd November, 1891, the motion was argued before **Armour**, C. J., and **Falconbridge** and **Street**, JJ.

King, Q. C., for the defendants, referred to Gould on Waters, sections 41-45; Angell on Watercourses, section 4; Coulson and Forbes on Waters, pp. 51-54; Woolrych on Waters, p. 31; *Stanton* v. *Windeat*, 1 U. C. R. 30; *City of New York* v. *Hart*, 95 N. Y. 443; *Plumb* v. *McGannon*, 32 U. C. R. 8, 14; *Parker* v. *Elliott*, 1 C. P. 470 Sm. L. C., 9th Am. ed., 1418; *Kains* v. *Turville*, 32 U. C. R. 17; *Regina* v. *Wellington*, 39 U. C. R. 194; *Re Kinnear and Haldimand*, 30 U. C. R. 398.

W. R. Meredith, Q. C., for the plaintiffs, cited *Howard* v. *Ingersoll*, 17 Ala. 780; 13 How. U. S. 381, 417; Bouvier's Law Dic., tit. "Banks;" *Clark* v. *Bonnycastle*, 3 O. S. 528; *McHardy* v. *Ellice*, 1 A. R. 628; *Traversy* v. *Gloucester*, 15 O. R. 214.

King, in reply, referred to Wilberforce's Statute Law, pp. 102-5, 11-12; Phear on Rights of Water, pp. 13-31; *Attorney-General* v. *Chambers*, 4 DeG. M. & G. 206; Anderson's Dict. of Law, tit. "Water-Mark," p. 1108; *Houghton* v. *C., D., & M. R. Co.*, 47 Iowa 370.

Judgment.
Armour, C.J.

February 27, 1892. The judgment of the Court was delivered by

Armour, C. J.:—

The origin of the legislation which gives rise to this litigation is to be found in 34 Vic. (1870-71) ch. 30, secs. 6 and 7, the former of which provided that section 341 of the Act 29 & 30 Vic. ch. 51 should be amended by adding after the words "separating two townships in the county" the following "and over all bridges crossing rivers over five hundred feet in width, within the limits of any incorporated village in the county, and connecting any highway leading through the county;" and the latter that section 342 of the Act 29 & 30 Vic. ch. 51 should be amended by adding thereto the following words, "And further, the county council shall cause to be built and maintained in like manner all bridges on any river over five hundred feet in width, within the limits of any incorporated village in the county, necessary to connect any public highway leading through the county, and may pass a by-law for the purpose of raising any money by toll on such bridge to defray the expense of making and repairing the same."

In 36 Vic. (1873) ch. 48, secs. 410 and 412, these provisions appear as follows: Sec. 410—"And over all bridges crossing rivers over two hundred feet in width, within the limits of any incorporated village in the county, and connecting any highway which is in the continuation of a county road leading through the county." Sec. 412—"And further, the county council shall cause to be built and maintained in like manner all bridges on any river over two hundred feet in width, within the limits of any incorporated village in the county, necessary to connect any public highway leading through the county and which is in continuation of a county road." By 37 Vic. (1874) ch. 16, secs. 17 and 18, these provisions were amended to read as follows: Sec. 410—"And over all bridges crossing streams or rivers over one hundred feet in width, within

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the limits of any incorporated village in the county, and connecting any highway leading through the county." Sec. 412—"And further, the county council shall cause to be built and maintained in like manner all bridges on any river or stream over one hundred feet in width, within the limits of any incorporated village in the county, necessary to connect any public highway leading through the county."

These provisions appear in the same words in R. S. O. (1877) ch. 174, secs. 492 and 495, and in 46 Vic. (1882-3) ch. 18, secs. 532 and 534; but by 50 Vic. (1887) ch. 29, secs. 34 and 35, the word "main" was inserted before the word "highway" in the first provision, and before the word "public" in the second provision, and these provisions so amended are now the law and appear in R. S. O. (1887) ch. 184, secs. 532 and 534, as follows: Sec. 532—"The county council shall have exclusive jurisdiction * * 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." Sec. 534—"And further, the county council shall cause to be built and maintained in like manner, all bridges on any river or stream over 100 feet in width, within the limits of any incorporated village in the county, necessary to connect any main public highway leading through the county."

Some difficulty has arisen in the construction of these provisions from the use of the word "necessary" in the second provision, but we think that the intention of the legislature is reasonably plain, and that by the first provision they intended to give the county council exclusive jurisdiction over all bridges, by whomsoever built, 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 by the second provision, to compel the county council to build such bridges only where necessary to connect any main public highway leading through the county.

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This, however, was not the view taken by this Court in *Regina* v. *Wellington*, 39 U. C. R. 194.

Difficulty may also arise as to the meaning of the words "any main highway leading through the county" contained in the first provision, and as to the meaning of the words "any main public highway leading through the county" contained in the second provision, but this difficulty need not concern us at present, for the evidence in this case abundantly shews that the bridge in question is a bridge connecting a main highway leading through the defendants' county.

But the difficulty which does concern us at present is whether this is a bridge crossing a stream or river over 100 feet in width, and the solution of the difficulty depends upon the manner in which this width is to be ascertained.

There can, we think, be no doubt that the place at which the width is to be ascertained must be the place at which the bridge crosses. And we think that the width of a stream or river, according to the proper construction of these provisions, must be determined by the width of the natural channel of such stream or river.

"A stream of water, in law, is water which runs in a defined course:" per Jessel, M. R., in *Taylor* v. *St. Helens*, 6 Ch. D. 264 at p. 273. And in *Rex* v. *Oxfordshire*, 1 B. & Ad. 289, Lord Tenterden, C. J., defined a river or water course to be "water flowing in a channel between banks more or less defined."

The width of the water in a stream or river does not accurately denote the width of such stream or river, for the water in a stream or river varies in volume, but the width of the natural channel of a stream or river shews the width of the stream or river, for it shews the limits of the volume of its water in its ordinary state of high or low water.

No doubt, in freshets and unusually high water, these limits would be exceeded, but such conditions of the stream or river should not be taken into account in deter-

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mining the width of the stream or river, but only the condition of the stream or river in its highest *ordinary* state.

In *Plumb* v. *McGannon*, 32 U. C. R. 8, Wilson, J., in delivering the judgment of the Court, and discussing the meaning of high water mark as applied to the river St. Lawrence, said (p. 14): "The evidence does not shew what the limit of the highest *ordinary* state of the river is, or was, as that would seem to be the proper limit of high water mark, and not the highest limit that the water reaches in the course of the year, for the great flow caused by the melting of the snow and ice, and by the spring rains, or by other unusual floods or causes, is to be excluded in determining the limit of high water mark. The true limit would appear to be, by analogy to tidal waters, the average height of the river after the great flow of the spring has abated, and the river is in its ordinary state;" and he referred to *Blundell* v. *Catterall*, 5 B. & Ald. 268, and to *Attorney-General* v. *Chambers*, 4 DeG. M. & G. 206. See also *Lowe* v. *Govett*, 3 B. & Ad. 863, and *Gerrish* v. *Proprietors of Union Wharf*, 26 Maine 384.

The natural channel of every stream or river is generally apparent and easily ascertainable, and furnishes, in our opinion, the only proper measure of the width of such stream or river within the meaning of these provisions.

The opinions of Judges Nelson and Curtis of the Supreme Court of the United States in *Howard* v. *Ingersoll*, 13 How. 381, are in strong support of the view we have taken.

The burden of shewing that the stream or river crossed by the bridge in question was over 100 feet in width, rested upon the plaintiffs, and we do not think that the evidence established that the stream or river crossed by the bridge in question was, according to the method we think ought to have been adopted in ascertaining its width, over 100 feet in width.

The fact that the plaintiffs erected this bridge, themselves, at a time when, according to the state of the law, if

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their present contention be correct, the defendants ought to have erected it, is not without its significance.

If the plaintiffs think that they can establish that the width of the stream or river crossed by the bridge in question, ascertained as we think it ought to be ascertained, is over 100 feet, they may have a new trial on payment of costs, electing to take it within ten days; otherwise their action will be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

TOLTON v. CANADIAN PACIFIC R. W. CO. ET AL.

Waters and Watercourses—Diversion of, by railway company—Equitable easement—Bonâ fide purchaser for value—Registered deed—Actual notice—Prescriptive right—Damages—51 Vic. ch. 29, sec. 90 sub-sec. h, (D.)—Compensation.

Where the defendants in 1871, without authority, diverted a watercourse on certain land and afterwards made compensation therefor to the then owner of the land, the plaintiff's predecessor in title:—

Held, that the equitable easement thereby created in favour of the defendants was not valid against the registered deed of the plaintiff, a *bonâ fide* purchaser for value without actual notice; the defendants having shewn no prescriptive right to divert the watercourse; and the diversion being wrongful as against the plaintiff.

Knapp v. *Great Western R. W. Co.*, 6 C. P. 187; *L'Esperance* v. *Great Western R. W. Co.*, 14 U. C. R. 173; *Wallace* v. *Grand Trunk R. W. Co.*, 16 U. C. R. 551; and *Partridge* v. *Great Western R. W. Co.*, 8 C. P. 97, distinguished.

The plaintiff, having failed to prove actual damage, was allowed nominal damages for the wrong; and instead of granting a mandatory injunction to compel the restoration of the watercourse, the Court directed a reference to ascertain the compensation to which the plaintiff would be entitled as upon an authorized diversion of the watercourse under 51 Vic. ch. 29, sec. 90, sub-sec. h, (D.).

Statement. ACTION by a land-owner claiming damages for damage caused to his land, owing to the diversion of a watercourse by the line of railway constructed by the Toronto, Grey, & Bruce Railway Company, and now worked by the defendants the Canadian Pacific Railway Company, and for a mandamus to compel the defendants the Canadian Pacific Railway Company to re-open the original channel of the watercourse.

The action was tried before STREET, J., at Orangeville, on 12th and 13th May, 1891, without a jury. Statement.

The lot in question, being the west half of lot 3 in the 9th concession of the township of Amaranth, was owned by Mr. Charles Robertson, of Toronto, until the spring of 1876, when he conveyed it to the plaintiff by deed dated 18th May, 1876, containing no exception of any land whatever. The plaintiff then entered into and had ever since been in possession. The deed was duly registered in the proper registry office on the 2nd June 1876.

The line of the Toronto, Grey, & Bruce Railway was constructed through the lot in question in 1871, and in the course of their work the company built their embankment across the bed of a large watercourse which ran through the land in question, and diverted the water into a new channel, which ran along the side of their line until it found its way into the Grand river. Their embankment and the new channel were both upon the land in question.

About the time the works in question were being constructed, namely, on 17th April, 1871, Mr. Robertson conveyed to them the right of way, but not the bed of the new channel of the watercourse, which lay outside the parcel conveyed.

In January, 1873, Mr. Robertson wrote to the company claiming $50 damages for the diversion of the stream and the taking of some wood, and $50 for land taken at Waldemar station. In April, 1873, he began an action against them to recover damages for penning back the waters of the stream. The defendants demurred to the declaration, because the venue, being local, had been laid in the County Court of York; and the action was not prosecuted. On 7th April, 1874, Mr. Robertson wrote to the company claiming:

1st. Payment for two acres of land taken by them at Waldemar station.

2nd. Timber cut on his land.

3rd. Damages for turning a creek on his property, being

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the watercourse in question; and offering to accept $125 in settlement, provided the company would secure him a roadway across their track for free ingress and egress to his land lying on both sides of the railway.

On 21st May, 1874, he wrote, in reply to an offer from the company, agreeing to accept $50 an acre for the station grounds at Waldemar, and stipulating for a plank crossing to be made *at the station* for the use of his tenant, Henry Stephens.

On 30th May, 1874, he conveyed the 1.72 acres at Waldemar station to the company, in consideration of $86, being at the rate of $50 an acre, by a deed which contained the following proviso:—"Provided the said company do provide for me a level crossing at such point as Henry Stephens, as agent for the said Charles Robertson, and the engineer or other duly authorized agent of the company, may agree upon, and if they cannot agree, then at the point marked on the said hereunto annexed plan."

Mr. Chadwick, who was solicitor at the time for the Toronto, Grey, & Bruce Railway Company, stated that he had to do with the settlement with Mr. Robertson under the instructions of Mr. Wragge, who was then the manager of the company. He produced a memorandum of instructions received by him from Mr. Wragge for the settlement, which he says he carried out. It was in these words:—"Wragge says no timber was taken by the company, and says C. R. not to have the $50 which he claims for timber; $50 for rest of his claim, including deviation of creek, Wragge says correct."

Mr. Chadwick said that all Mr. Robertson's claims were settled by the payment of the $86 for the land at the Waldemar station; and it appeared that Mr. Robertson only claimed $50 for the whole of that land when he made his claim in January, 1873; but in his letter of 21st May, 1874, he spoke of the $50 an acre as being his compensation for the land taken at Waldemar, and said nothing about the diversion of the creek.

Mr. Charles Robertson had died before the present action

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was brought, but his son, Mr. James E. Robertson, a practising solicitor, who had acted for his father in bringing the action in 1873 against the company, was examined as a witness, deposed to his personal knowledge of the matter, and stated that his father's claim against the company was completely settled in 1874.

Evidence was given on the plaintiff's behalf that in the fall and spring and during freshets, the stream or watercourse in the diverted channel overflowed its banks through his land and submerged part of it, and that the diverted channel was not of sufficient capacity to carry off the water at such times.

Evidence was given on behalf of the defendants that the plaintiff's land so submerged was submerged to as great an extent at such times before the railway was built and the diversion made, as it had been since.

The trial Judge refused to allow the plaintiff to call witnesses to rebut this evidence on the part of the defendants, on the ground that he ought to have given such evidence as part of his case.

The plaintiff swore that, at the time he purchased from Charles Robertson, he was not aware that this stream or watercourse had been diverted.

Argument was heard at the conclusion of the evidence.

Elgin Meyers, Q. C., for the plaintiff.

Angus MacMurchy, for the defendants.

May 26, 1891. STREET, J.—(after setting out the facts) :—

We have, therefore, the fact that Mr. Charles Robertson, then being the owner of the land in question, made a claim against the Toronto, Grey, & Bruce Railway Company in 1873, for compensation for the diversion of this stream by the works of the company; that he pressed his claim and brought an action to recover it, with other demands; that he continued to press it down to May, 1874; that the company acknowledged a

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liability to pay him for this particular injury; that a settlement of some sort took place between him and the company at that time; that both the solicitor for the company and the solicitor for Mr. Robertson say that this particular injury was included in the settlement; and that no further claim was made by Mr. Robertson in respect of it, although down to that time he had vigorously urged it. Upon these facts I think I can do nothing else but find that the company at that time made to Mr. Robertson full compensation for the injury for which this action is brought, and that the plaintiff is therefore not entitled to recover.

In *Knapp* v. *Great Western R. W. Co.*, 6 C. P. 187, and *L'Esperance* v. *Great Western R. W. Co.*, 14 U. C. R. 173, it was held that the right to damages such as those here claimed must, in the absence of evidence to the contrary, be assumed to have been included in the price agreed on by contract of sale of the land taken by the company, or to be covered by the award upon the reference provided by the Act when the parties disagreed. Here we are not left to conjecture or presumption, for a claim was in fact made by the landowner and submitted to by the company, and compensation was, as I have found, made accordingly. It is true that there is no exception or reservation of the company's rights in the conveyance from Mr. Robertson to the plaintiff in May 1876; but the watercourse had then for several years been flowing in its new channel; the railway was then running across the lot and had obviously caused the diversion; the conveyance from Robertson to the company was registered, and was notice, under the cases above referred to and the Railway Act, that the company had settled with the grantor for the damage caused by the construction of the railway. The plaintiff must be taken to have contracted to buy damaged land and cannot be heard to complain that he got it: see 31 Vic. ch. 40, (O.) being the Act incorporating the Toronto, Grey, & Bruce Railway Company.

Apart, however, from these questions, I should have

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very great difficulty in finding that the damage of which the plaintiff complains is caused to any appreciable extent by the diversion of the creek. The land which, in his opinion, is damaged, is about an acre and a quarter of low land, lying almost at the intersection of the east and west branches of the Grand river, which are enlarged into a mill pond immediately below their junction by the operation of a dam still lower down; the diverted watercourse and the railway embankment, along which it runs, are the southern boundary of the land in question, and the east branch of the Grand river its northern boundary, while the west branch of the river lies a little to the west. The land is naturally low, being from two to three feet above the ordinary high water mark, and the evidence shews, as I think only what must naturally have happened, that it has always been subject to submersion in times of high water before there was any railway, and that since the dam was built this has been more especially the case. The serious damage of which the plaintiff complains is that this acre of land, which is part of the road by which he has access to a travelled road, though even then he has to trespass upon other land, is rendered impassable by water at certain seasons of the year. He and his witnesses shew that the value of his property is very greatly lessened by this circumstance, and he places his damages at $50 a year, and claims that sum for each of the six years before action. If it were established that the inconvenience which he sustains is caused entirely by the diversion of the creek, and if I could satisfy myself that the defendants are liable, I do not think he has overestimated the damage, but I am of opinion that the same trouble would have happened had the creek not been diverted, because the other causes would have brought it about.

For the reasons first given, however, I think that the plaintiff cannot succeed, and that he is not entitled either to the damages or the mandamus which he claims; and I dismiss the action with costs.

Statement.

At the Michaelmas Sittings, 1891, the plaintiff moved to set aside this judgment, and to enter judgment for himself, on the grounds that the judgment was contrary to law, evidence, and the weight of evidence; that if the defendants purchased the right of diverting the water which caused the damage complained of, the plaintiff had no notice thereof; that such right, if any obtained by the defendants, was to divert the water in a proper channel constructed for that purpose, and not to divert it, as the evidence shewed they did, in irregular courses; that the defendants were guilty of negligence in not maintaining the channel in a manner so as to confine the water therein, but permitted it to injure the land of the plaintiff; that the leave, if any obtained by the defendants, to divert the water as complained of, was simply a revocable license, which was revoked by the plaintiff; that such license, if any, was simply a personal right given by the plaintiff's predecessor in title, without notice to the plaintiff, to the Toronto, Grey, & Bruce Railway Company, and was not assignable, and was not binding on the plaintiff; or for a new trial on the ground that the plaintiff was taken by surprise by the evidence of the defendants' witnesses; and the plaintiff filed affidavits in support of this part of the motion.

The defendants filed affidavits in answer.

The motion was argued before a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE, J., on the 24th November, 1891.

Elgin Meyers, Q. C., for the plaintiff, referred to R. S. O. ch. 114, sec. 83; *Lawrence* v. *Great Northern R. W. Co.*, 16 Q. B. 643; *Vanhorn* v. *Grand Trunk R. W. Co.*, 9 C. P. 265; *Utter* v. *Great Western R. W. Co.*, 17 U. C. R. 392; *Davis* v. *Lewis*, 8 O. R. 1; *Carron* v. *Great Western R. W. Co.*, 14 U. C. R. 192; *Clouse* v. *Canada Southern R. W. Co.*, 11 A. R. 287; *Wallace* v. *Great Western R. W. Co.*, 25 Gr. 86; *Alton* v. *Hamilton & Toronto R. W. Co.*, 13 U. C. R. 595; *Crysler* v. *Creighton*, E. T. 2 Vic., Robinson and

Joseph's Dig., p. 1156; Jones on Prescription, p. 162; *Regina* v. *Brewster*, 8 C. P. 208; Pollock on Torts, Bl. ed., p. 259; *Sturges* v. *Bridgman*, 11 Ch. D. 852; *McKay* v. *Bruce*, 20 O. R. 709. Argument.

G. T. Blackstock, Q. C. (with him *Angus MacMurchy*), for the defendants, cited *Partridge* v. *Great Western R. W. Co.*, 8 C. P. 97; *Wallace* v. *Grand Trunk R. W. Co.*, 16 U. C. R. 551; and relied also upon the judgment of the trial Judge and the cases therein cited.

February 27, 1892. ARMOUR, C. J.:—

The Act of incorporation of the Toronto, Grey, & Bruce Railway Company authorized them to construct, maintain, and work their railway across, along, or upon any stream of water or watercourse which it intersected or touched, but the stream or watercourse so intersected or touched was to be restored by the company to its former state, or to such state as not to impair its usefulness.

We think that this authority did not extend to and include the making of the diversion of the stream or watercourse complained of in this case, even if they had shewn such diversion upon the plans and surveys filed by them of their contemplated work.

But there was nothing to prevent their making this diversion by the consent of the owners of the land through which this stream or watercourse ran, whether shewn on their plans and surveys or not. It would seem from the evidence that this diversion was made without the consent of Robertson, and that he was claiming compensation for it, and continued to claim compensation for it until the deed lastly above mentioned (that of 30th May, 1874) was made by him to the company, and it is argued that it is to be inferred from all that took place that compensation was made to him at that time for this diversion, and the learned Judge has so inferred.

This diversion was made after the deed firstly above mentioned (that of 17th April, 1871), which conveyed the

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right of way through the west half of lot three to the company, was made to the company, and that deed gave the company no authority to make this diversion, and it cannot be assumed from it that the consideration therein mentioned as having been paid included compensation for this diversion, or for the exercise of the power to make this diversion, which was a power they did not possess under their Act of incorporation.

Besides, it was after the making of this deed that Robertson was claiming compensation for this diversion that was made after the giving of the deed, and the company, through their engineer, were admitting that his claim for compensation for this diversion was correct.

Nor can it be assumed from the giving of the deed lastly above mentioned, (that of 30th May, 1874), which merely conveyed to the company additional land for station grounds, at a point on the west half of lot 3, at a considerable distance from this diversion, that the consideration money therein mentioned included compensation for this diversion, or for the exercise of the power which they had assumed, although they had it not, to make this diversion.

We think, therefore, that the cases of *Knapp* v. *Great Western R. W. Co.*, 6 C. P. 187, and *L'Esperance* v. *Great Western R. W. Co.*, 14 U. C. R. 173, have no application to the circumstances of this case. It seems reasonably clear that no money compensation was paid to Robertson for this diversion; for the consideration money mentioned in the deed lastly above mentioned is plainly the price which was agreed upon for the land thereby conveyed, and no other payment to him was shewn.

And it is singular that, if compensation was made to Robertson for this diversion at the time the deed lastly above mentioned was given, this deed was not made to grant to the company the right to make and maintain this diversion; but it contains no allusion to it whatever, and this is the more singular having regard to the fact that both the company and their solicitor were well aware that Robertson had been for a long time and was then claiming compensation for this diversion.

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Assuming that the company were bound by law to give Robertson a farm crossing at the south-west corner of the west half of lot 3 to the corner which they had cut off, they were not bound to give him a farm crossing at the south-east corner thereof, for they had taken the whole of the corner there cut off, and it may be that he accepted the stipulation as to the crossing contained in the deed lastly above mentioned to the company as compensation for his claim for this diversion, and, taking all the circumstances into consideration, we think that it may be inferred that he did so, and we are therefore not prepared to overrule the finding of the learned Judge that compensation was made to Robertson for this diversion.

This stipulation was, however, never fulfilled by the company.

Assuming then that the company made compensation to Robertson for the privilege of diverting the stream or watercourse through his land, an equitable easement was thereby created: see *Duke of Devonshire* v. *Eglin*, 14 Beav. 530; *Duke of Beaufort* v. *Patrick*, 17 Beav. 60; *Hervey* v. *Smith*, 22 Beav. 299.

The plaintiff, however, shews that he is a *bonâ fide* purchaser for value without notice, and he insists upon the provision of the Registry Act, R. S. O. ch. 114, sec. 83, that "No lien, charge, or interest affecting land shall be deemed valid in any Court in this Province, as against a registered instrument executed by the same party, his heirs or assigns."

Actual notice to the plaintiff of such equitable easement was essential to its validity as against his registered deed, and there was no such notice, and it cannot therefore be deemed valid as against such deed: *Forrester* v. *Campbell*, 17 Gr. 379; *Ross* v. *Hunter*, 7 S. C. R. 289; *Peterkin* v. *McFarlane*, 9 A. R. 429; *Rose* v. *Peterkin*, 13 S. C. R. 677.

The defendants proved no prescriptive right to divert this stream or watercourse, and we think that such diversion is wrongful as against the plaintiff.

The case of *Wallace* v. *The Grand Trunk R. W. Co.*, 16 U. C. R. 551, was relied on by the defendants, but in that case the defendants had only exercised the powers which the law allowed them to exercise, and had paid the owner of the land for the exercise of such powers, and had obtained a deed from him of the land, and the decision followed the decisions in *Knapp* v. *The Great Western R. W. Co.* and *L'Esperance* v. *The Great Western R. W. Co.*, already adverted to.

The head-note of the case of *Partridge* v. *The Great Western R. W. Co.*, 8 C. P. 97, is misleading; the Court refused the rule for a mandamus on the ground that "Partridge was not the owner nor in any way interested in the lands respecting which he makes his claim. He has purchased long since Whether the right to the land on which the railway is constructed passed to him or not, I think no right to mere damages passed—nothing which is in the nature merely of a chose in action. If the land is his, he has other remedies, and I do not think that a case such as he presents is one for the Court to decide upon an application for the writ of mandamus."

The circumstances of that case and what was decided therein are not, in our opinion, applicable to this case, nor does that case stand at all in the way of the plaintiff in this case.

There have been many cases since that case in which the assignee of the owner of land through which a railway has been constructed has obtained compensation from the railway company for the land taken and the exercise of their powers: see *Stretton* v. *Great Western & B. R. W. Co.*, L. R. 5 Ch. 751; *Dumble* v. *Cobourg, Peterborough, & Marmora R. W. Co.*, 29 Gr. 121; *Thompson* v. *The Canada Central R. W. Co.*, 3 O. R. 136.

We do not think that we can interfere with the finding of the learned Judge as to the damages claimed by the plaintiff for the submergence of his land by reason of the diversion, nor can we interfere with the finding on the ground of surprise.

The plaintiff was bound to shew beyond reasonable doubt that the submergence of his land was caused by this diversion, and for that purpose should have come pre-

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pared with evidence to shew what the condition of his land was as to submergence before and after the diversion complained of, so as to enable a proper judgment to be formed as to whether the whole or any part of the submergence was caused by this diversion.

The plaintiff is, however, entitled to legal damages in respect to the wrong done him by the diversion itself, which we assess at a nominal sum.

The defendants have now the power to divert a stream or watercourse by the 51 Vic. ch. 29, sec. 90, sub-sec. *h* (D.), and we think that we should not, after the time that has elapsed since this diversion was made, direct a mandatory injunction to issue compelling the restoration of the stream or watercourse so diverted, when the plaintiff can be compensated in damages for the injury caused to him by the diversion itself.

We therefore direct a reference to the Master at Orangeville to ascertain the compensation that ought to be made to the plaintiff by the defendants for this diversion; or, if the defendants prefer it, we will stay the proceedings for two months in order to enable them to proceed by arbitration under the Railway Act to ascertain such compensation.

The defendants must pay the costs of this cause and of the reference, if it goes to a reference; but if it goes to arbitration, the costs of the arbitration will be as directed by the Railway Act.

FALCONBRIDGE, J.:—

I agree with the learned trial Judge that compensation was made to Mr. Charles Robertson for the diversion.

But the registered deed contains no mention of the right or easement claimed by defendants, and plaintiff has not had actual notice thereof.

As I understand *actual* notice, the plaintiff was not put upon inquiry by the facts that, when he purchased, the watercourse was flowing in its new channel, and that the railway had apparently caused the diversion.

[QUEEN'S BENCH DIVISION.]

ELLIS V. CLEMENS.

Waters and watercourses—Riparian proprietors—User of stream—Reasonable user—Injury to plaintiff's land—Prescriptive right—Malice—Damages—Concurrent cause of injury.

The use by riparian proprietors of the waters of streams through whose lands they flow must be a reasonable use, and the proprietors so using the waters must restore them to their natural channel before they reach the lands of the proprietors below them.

The defendant, in restoring the water of a stream used by him to its natural channel, did so at such times and in such a manner that the water froze as it was being restored, and formed a solid mass of ice, completely filling the natural channel, so that the water coming down flowed away from the channel and over the plaintiff's land, and injured it. The evidence shewed that the cause of the water freezing as it did was the times at which and the manner in which the defendant so restored it, and was the natural result thereof; and it appeared that the defendant had been remonstrated with by the plaintiff and the consequences of his action pointed out to him:—

Held, that the defendant's use of the water was unreasonable; and, as there was no proof to sanction a prescriptive right to restore the water at the times and in the manner indicated, he was liable to the plaintiff for the injury so caused: his conduct being wrongful, his persistence in it was malicious; and the injury to the plaintiff was an invasion of his rights, and imported damage, whether there was any actual damage or not:—

Held, also, that even if there was a cause, for which the defendant was not responsible, concurrent with the wrongful acts complained of, and contributing to the injury sustained by the plaintiff, the defendant would still be answerable for the injury sustained by such wrongful acts for such damages, or such portion thereof, as were caused by the wrongful acts complained of.

Judgment of STREET, J., 21 O. R. 227, affirmed.

Statement. THE defendant appealed to the Divisional Court from the judgment of STREET, J., reported 21 O. R. 227, in favour of the plaintiff, finding him entitled to damages against the defendant, by reason of the latter's misuse of a small natural stream of water upon which he maintained a dam above the plaintiff's land bordering on the stream.

The motion was argued before ARMOUR, C. J., and FALCONBRIDGE, J., on the 12th February, 1892.

Moss, Q. C., for the defendant. Where the plaintiff alleges negligence against the defendant, he is bound to shew that the cause of the damage, the preponderating cause, is the negligence of the defendant, and this he has

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not done. The defendant is entitled to use the water in a reasonable way for the purposes of his business. After the defendant has for forty years worked this mill in the way he has without any alteration in the mode of working it, the mere fact that on one or two occasions there has been some overflow should not oblige him to depart from his usual mode of conducting his business. It is making only a reasonable use of the water to detain and retard it for a time, and thus to work the mill, which involves letting it down afterwards. If the defendant stored more water than was necessary to work the mill, the plaintiff might complain. There is the right in this country to so use the water without any prescriptive right at all: *Dickson* v. *Carnegie*, 1 O. R. 110; *Keith* v. *Corey*, 17 New Brunswick (1 P. & B.) 400. What is complained of here is not the usual and necessary result of what the defendant does, but the uncommon and exceptional result, and is only what might happen without any mill or dam at all. The negligence, if any, was not the sole cause of the damage. Upon the findings of fact, there is no repeated or sensible injury to the plaintiff's land. I refer to R. S. O. ch. 111, sec. 35; *Hoy* v. *Sterrett*, 2 Watts (Pa.) 327, 332; *Hartzall* v. *Sill*, 12 Pa. St. 248; *Pitts* v. *Lancaster*, 13 Metc. (Mass.) 156; *Hetrich* v. *Deachler*, 6 Pa. St. 32; *Rucker* v. *Athens*, 54 Ga. 84; *Brown* v. *Atlanta*, 66 Ga. 71; *Danard* v. *Chatham*, 24 C. P. 590; Sedgewick on Damages, 8th ed., sec. 142; *Sharp* v. *Powell*, L. R. 7 C. P. 253; *Blyth* v. *Birmingham*, 11 Ex. 781; *Sutton* v. *Card*, W. N. (1886), p. 120.

W. R. Meredith, Q. C., (with him *E. P. Clement*), for the plaintiff. *Dickson* v. *Carnegie* and *Keith* v. *Corey* deal only with the user of water *quâ* water. The use of a stream is not wrongful until it becomes unreasonable. Here there was no unreasonable use until within ten or twelve years; the plaintiff does not complain of anything prior to 1883. The plaintiff exercises a proprietary right. It makes no difference whether the injury is to a proprietor above or below; both are founded on proprietary

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right: Angell on Watercourses, 7th ed., secs. 330, 335. The case of *Knoll* v. *Light*, 76 Pa. St. 268, is just the converse of this. I refer also to *Cowles* v. *Kidder*, 24 New Hampshire 364; *Embery* v. *Owen*, 6 Ex. at p. 370, per Parke, B.; *Orr Ewing* v. *Colquhoun*, 2 App. Cas. 839, 855-6; Higgins on Watercourses, pp. 96, 97, citing *Goldsmid* v. *Tunbridge Wells*, L. R. 1 Ch. 349. If the damage done here was only in exceptional cases, it does not come within the prescription contended for. As to whether the negligence must be the sole cause of the injury, I refer to Wood's Law of Nuisances, 2nd ed., p. 502, referring to *Woodyear* v. *Schaefer*, 57 Maryland 1.

Moss, in reply.

February 27, 1892. The judgment of the Court was delivered by

ARMOUR, C. J.:—

The principles governing the use by riparian proprietors of the waters of streams through or along whose lands they flow are established by numerous cases, the principal of which in the English Courts are *Mason* v. *Hill*, 5 B. & Ad. 1; *Embery* v. *Owen*, 6 Ex. 367; *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; *Miner* v. *Gilmour*, 12 Moo. P. C. 131; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*, L. R. 7 H. L. 697; and *Orr Ewing* v. *Colquhoun*, 2 App. Cas. 839, 856; and in the American Courts are *Tyler* v. *Wilkinson*, 4 Mason 397; *Webb* v. *The Portland Manufacturing Co.*, 3 Sumn. 189; and *Elliot* v. *Fitchburg Railroad Co.*, 10 Cush. 191.

These principles shew that such use must be a reasonable one, and that the proprietors so using the waters must restore them to their natural channels before they reach the lands of the proprietors below them.

The wrongs complained of by the plaintiff were that the defendant, in restoring the water used by him to its natural channel, did so at such times and in such a manner

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that the water froze as it was being restored, and formed a solid mass of ice, completely filling the natural channel, so that the water thereafter coming down flowed away from the channel and upon and over the plaintiff's land, and injured his land and the crops growing and being thereon.

The evidence shewed that the cause of the water freezing as it was being restored to its natural channel was the times at which and the manner in which the defendant so restored it, and was the natural result thereof, and the learned Judge held that his doing so at such times and in such manner was not a reasonable use by him of such water; and, as there was no proof to sustain a prescriptive right to restore the water at such times and in such manner to the injury of the plaintiff, that he was liable to the plaintiff for the injury so caused. We do not understand that the learned Judge intended to hold that the defendant, in so restoring the water, was not acting maliciously, for he was remonstrated with by the plaintiff, and the effect of his so restoring the water was pointed out to him and the injury it caused, but he persisted in so restoring it, and expressed his intention to continue to so restore it, and if his conduct in so doing was wrongful, his persistence in it was malicious.

The injury to the plaintiff by such wrongful acts was an invasion of the plaintiff's rights and imported damage, whether there was any actual damage or not: *Ashby* v. *White*, 1 Sm. L. C., 8th ed., 264; *Barker* v. *Green*, 2 Bing. 317; *Fay* v. *Prentice*, 1 C. B. 828.

It was contended, moreover, that if there was a cause for which the plaintiff was not responsible, concurrent with the wrongful acts complained of and contributing to the injury sustained by the plaintiff, no actual damages could be recovered by him against the defendant for the injury sustained by him by the wrongful acts complained of, but this contention is not maintainable.

It does not appear from the evidence that there was any

Judgment. Armour, C.J. such cause from which the plaintiff sustained any injury; but if there were, the plaintiff would only be entitled to recover such damages (or such portion thereof) as were caused by the wrongful acts complained of: *Woodyear* v. *Schaefer*, 57 Maryland 1; *Wallace* v. *Drew*, 59 Barbour 413; *Francis* v. *Schoellkopf*, 53 N. Y. 152; *Chipman* v. *Palmer*, 16 N. Y. Supreme Court (9 Hun) 517; *Crossley* v. *Lightowler*, L. R. 3 Eq. 279.

We think that the judgment of the learned Judge was right, and should be affirmed, and that the motion should be dismissed with costs.

[COMMON PLEAS DIVISION.]

THE QUEEN V. CONNOLLY ET AL.

Criminal law—Evidence before committee of House of Commons—Hearing before magistrate—Refusal to admit evidence—Mandamus.

At the hearing of a criminal charge before a county judge sitting as police magistrate evidence given before a special committee of the House of Commons, and taken down by stenographers was tendered before the magistrate and refused by him:—

Held, that the Court had no power to grant a mandamus to the county Judge directing him to receive such evidence.

ROSE, J., while concurring in the decision that a mandamus should not issue was of opinion that Parliament having ordered the prosecution, the evidence should have been received by the magistrate.

Subsequent resolution of the House of Commons authorizing the evidence to be given.

Statement. THIS was an application for a mandamus to His Honour Judge Ross, sitting as police magistrate at the city of Ottawa, directing him to receive certain evidence taken before a committee of the House of Commons.

The charge against the defendants was that of conspiracy.

The evidence tendered was that of certain stenographers who had taken the evidence; and it was objected to on the ground that as the examination before the committee was "inquisitorial" meaning thereby that the witness was

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obliged to answer all questions whether they tended to criminate him or not, his answers could not be given in evidence against him.

The learned Judge gave effect to this objection and refused to receive the evidence. It was in consequence of this decision this application was made.

In Michaelmas Sittings, December 5th, 1891, *Robinson*, Q. C., *Osler*, Q. C., and *Hogg*, Q. C., supported the motion before the full Court.

The Crown desire the opinion of the Court, if the same can be given, as to the right to use the evidence taken before the committee of the House of Commons. Two questions are presented, namely: (1) Is there any privilege or power in Parliament to authorize or compel the reception of such evidence; and (2) Is there any privilege incident to the giving of such evidence as would render the same inadmissible? Under the B. N. A. Act, sec. 18, the powers and privileges of the Dominion Parliament are limited to the powers and privileges to be defined by the enactment of the Parliament of Canada, but so as not to exceed the powers and privileges of the Imperial Parliament at the time of the passing of the B. N. A. Act; and by virtue of the limited powers conferred, the Imperial Parliament then only having empowered select committees on private bills to examine on oath, a like power was conferred by the Dominion Act, 31 Vic. ch. 24. By the Imperial Act 38 & 39 Vic. ch. 38, sec. 18 of the British North America Act was amended so as to extend the power of enactment to the powers and privileges possessed by the Imperial Parliament at the time of the passage of the particular Dominion Act. The Imperial Parliament having in 1871, by the Parliamentary Witnesses Oath Act, 34 & 35 Vic. ch. 83, sec. 1, authorized the taking of evidence under oath before any committee, the like power was conferred by the Dominion Act 39 Vic. ch. 7; and the examination before the committee took place under this Act. Parliament has certainly power to

Argument. authorize the use of such evidence. In *Rex* v. *Merceron*, 2 Stark. 366, it was held that the evidence which a person had given before a committee of the House of Commons was afterwards admissible against him on a criminal charge. This case was decided in 1818, and is expressly in point, but it has not been followed in subsequent cases. In *Rex* v. *Gilham*, 1 Moo. C. C. 186, at p. 203, Lord Tenterden doubted the correctness of that case, but his objection proceeded on the ground that the evidence was not taken under oath, there being at that time no power in the committee to examine under oath. In consequence of the decision of *Rex* v. *Merceron*, 2 Stark. 366, it is urged, that certain resolutions were passed by the House of Commons, that all witnesses examined before the House or any committee were entitled to the protection of the House with respect to their evidence; and that no clerk, officer, or shorthand reporter was to give evidence elsewhere without the leave of the House. It will be argued that this prevents the evidence being given; but it must be borne in mind that this is only so where the leave of the House of Commons has not been obtained: Cushing's Law and Practice of Legislative Assemblies, 9th ed., sec. 1001; and it is said in Cushing, at the same page, that it is the constant practice on the application of the parties to grant such leave. Here such leave, or what is tantamount to such leave, has been granted, for Parliament directed such proceedings to be taken, and directed the production and use of the books, etc. The enquiry before the committee was to discover whether a crime had been committed, and it would be idle to say that on the prosecution of the crime the evidence procured on the enquiry should not be admitted. The next point is as to the privilege of the witnesses. Privilege of a witness is based on two grounds: (1) where the statements are not made voluntarily, *i.e.*, by compulsion, and (2) where the witness is under a criminal charge. Thus, in Taylor on Evidence, 8th ed., sec. 899, it is said, where a person on being examined as a witness has consented to answer questions to which he

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might have demurred, as tending to criminate him, and which therefore he was not bound to answer, his statement will be deemed voluntary, and as such may be subsequently used against him for all purposes, unless protected by the special language of some statute. See also *Regina* v. *Garbett*, 1 Den. C. C. 236; Russell on Crimes, 9th Amer. ed., 407, note *y*. The statements made before the committee were made voluntarily. At one time it was held that statements made under oath were deemed to be made compulsorily, but this doctrine is now overruled. The rule now is that a statement made by a person not at the time a prisoner under a criminal charge is admissible in evidence against him, though made under oath: Taylor on Evidence, 8th ed., sec. 900; *Regina* v. *Garbett*, 1 Den. C. C. 236; *Rex* v. *Chidley*, 8 Cox C. C. 365; *Regina* v. *Goldshede*, 1 C. & K. 657; *Regina* v. *Coote*, L. R. 4 P. C. 599, 607; *Regina* v. *Bateman*, 4 F. & F. 1068; Greenleaf on Evidence, 14th ed., secs. 210, 226; Joy on Confessions, 62. Compulsion means improper, *i.e.*, illegal compulsion. The compulsion here was legal. The parties here were not under arrest on any charge, but were merely giving evidence at an investigation. Thus in the Court of Bankruptcy where a bankrupt is compelled to give evidence, though of a criminating character, such evidence is admissible on a criminal charge: *Regina* v. *Scott*, 1 D. & B. 47; 7 Cox C. C. 164; *Regina* v. *Robinson*, L. R. 1 C. C. R. 80; *Regina* v. *Hillam*, 12 Cox C. C. 174; *Regina* v. *Widdop*, L. R. 2 C. C. R. 3; Taylor on Evidence, 8th ed., sec. 897. Where Parliament intends to protect a witness from the effect of his answers, they have expressly done so: "The Larceny Act," R. S. C. ch. 164; "The Corrupt Practices at Elections Act," R. S. C. ch. 10. The Courts have jurisdiction to grant a mandamus: *Rex* v. *Justices of Cambridgeshire*, 1 D. & R. 325; *Rex* v. *Justices of* ———, 1 Chitty 164; *Regina* v. *Townsend*, 4 F. & F. 1089; *Re Holland*, 37 U. C. R. 214; Folkard on Libel and Slander 5th ed., p. 780. The R. S. C. ch. 174, secs. 69-72, 140, shews the jurisdiction of the magistrate.

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Du Vernet, for his Honour Judge Ross, referred to Stone's Justices Manual, 26th ed., pp. 739-40; *Regina* v. *Fee*, 13 O. R. 590.

Lash, Q. C., *A. Ferguson*, Q. C., and *Fitzpatrick*, Q.C., of the Quebec Bar, the latter by permission of the Court, for the defendants, contra. Under the privilege of Parliament, there would be no power to compel the use of the evidence in question here; and as to the privilege of the witness, it would be a breach of such privilege to use such evidence. Under section 3 of the R. S. C. ch. 11, the privilege of the Senate and House of Commons is defined—namely, the Senate and House of Commons, and members thereof respectively, shall hold, enjoy, and exercise such, and the like privileges, immunities, and powers, as at the time of the passing of the B. N. A. Act, were held and enjoyed by the English House of Commons, and by the members thereof; and also such privileges as from time to time are defined by the Parliament of Canada, not exceeding those held so by the English House of Commons; and by section 4, such privileges shall be taken notice of judicially in all courts. In consequence of the decision of *Rex* v. *Merceron*, 2 Stark. 366, the Speaker brought the matter before the House of Commons, stating that there could not be a more important duty for the House than to protect witnesses giving evidence before its committees, and expressed the opinion that the House should pass some resolution on the question of its privileges: Hansard, (Imp.) 1st Series, p. 919. The matter subsequently came up before the House of Commons in pursuance of a notice of motion by a member to that effect, pointing out that the inquisitorial powers of the House of Commons were essential to it, as the great council of the nation, and all persons either examined in committee or at the bar, were bound to answer every question put to them. It was, therefore, not right, without leave of the House, that the information thus obtained, should be divulged elsewhere. Reference was made to the case of *Rex* v. *Merceron*, where a court of justice had compelled a shorthand writer, employed by the House, to give evi-

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dence. The power of any court to come at facts so disclosed without the consent of the House was denied; and it was stated that if such a practice were allowed, the investigations of the House must be very much contracted, or else very great danger must be apprehended from the disclosure before committees; and then the resolutions referred to by the other side, were proposed and carried. There is no necessity to claim the privilege before the House or a committee, as the witness is assumed to know that he is compelled to give evidence and cannot claim privilege, and that Parliament will protect him. The difference between proceedings in Parliament and ordinary courts of justice, has been established on grounds of public policy, and is considered to be fundamentally essential to the efficacy of a parliamentary enquiry; and while it compels disclosure, it at the same time affords the witness protection: May's Laws and Usages of Parliament, 9th ed., 164, 484; Cushing's Law and Practice of Legislative Assemblies, 9th ed., secs. 968-1001, 81 Hansard, (Imp.) 3rd Series, 1436; and *Meggott's Case,* (1696) cited therein, where Parliament interposed to prevent the use of evidence taken before a committee, as an infringement of the privileges of Parliament; and so also in *Baker's Case,* 82 Hansard, 3rd Series, pp. 292-4; Taylor on Evidence, 8th ed., sec. 774; 1 Chitty's Statutes, 290. That Parliament insisted on the right to compel the witness to give evidence is evident from the course pursued in the case of the Hon. Thomas McGreevy. Where Parliament has authorized courts to compel witnesses, having such privilege, to give evidence, they have expressly provided that the courts shall at the same time protect them against the effect of such evidence; and this is the effect of the provisions in the "Larceny Act" and the "Corrupt Practices at Elections Act." The general rule as to the admissibility of evidence tending to criminate the witness, is that where a witness might object, and does not do so, *i. e.,* does not claim the privilege, *i. e.,* if he voluntarily chooses to answer a question to which he might have demurred, his answer may be used against him for all pur-

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Robinson, Q. C., in reply, referred to Taylor on Evidence, 8th ed., p. 1095; *Smith* v. *Beadnell*, 1 Camp. 30; *Stockfleth* v. *De Tastet*, 4 Camp. 10; Roscoe's Criminal Evidence, 14th ed., 166. If the Court should be of opinion that there is no power to grant a mandamus, then the Crown would ask the Court to give an expression of their opinion for the guidance of His Honour the County Judge.

December 21st, 1891. GALT, C. J.:—

The question argued before us most fully was as to "privilege;" but I decline to express an opinion on that point, as I am satisfied the Court has no jurisdiction to entertain the motion.

The law on this subject is stated most emphatically by Cockburn, C. J., in *Regina* v. *Carden*, 5 Q. B. D. 1, at p. 5, as follows: "This is a case of some importance, but it is, in my opinion, so clear that we need not hesitate to give judgment at once discharging the rule. The application is of a somewhat startling nature. In cases where a magistrate has authority to hear and determine a matter, but refuses to do so to the frustration of justice, we have undeniably jurisdiction in the exercise of our mandatory authority to direct him to hear and determine. In the present case we are applied to, while the case is under consideration, to interfere and direct the magistrate as to the course he shall pursue. While we have authority to issue a mandamus to hear and determine we have no authority, it seems to me, to control

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the magistrate in the conduct of the case, or to prescribe to him the evidence which he shall receive or reject, as the case may be. We are not called upon here to exercise anything in the nature of appellate jurisdiction. That could only be done when the case was at an end, in such cases as may come within our appellate jurisdiction. We are called upon to issue a mandamus commanding the magistrate to take a certain course while the case is pending."

It is true this motion was made at the suggestion of the learned Judge himself, but this cannot confer jurisdiction upon this Court.

The case here is stronger than the one to which I have referred; the learned Judge has given his judgment refusing to receive the evidence. In *Regina* v. *Carden*, the magistrate had reserved his judgment until the opinion of the Court had been given. In my opinion this motion must be refused.

Rose, J.:—

I agree that the motion for a mandamus must be refused. I have looked carefully for any authority upon which such a motion could be supported and have found none. I found that the cases to which the learned Chief Justice has referred, and the cases to which my learned brother MacMahon will refer in a judgment which he has kindly allowed me to peruse, are cases that go to support the contrary proposition; and in a case cited at bar, *Re Holland*, 37 U. C. R. 214, I find that Wilson, J., seemed to take it for granted that the Court would not interfere with the determination of a justice of the peace as to the admissibility of evidence.

In Shortt on Mandamus and Prohibition, Black. ed., p. 276, sec. 256, it is said: "If the duty be of a judicial character a mandamus will he granted only where there is a refusal to perform it in any way; not where it is done in one way rather than another, erroneously instead of properly. In other words, the Court will only insist

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that the person who is judge shall act as such; but it will not dictate in any way what his judgment should be."

This Court considered in *Re Massey Manufacturing Co.*, 11 O. R. 444, the question of the power to issue a mandamus where the duty to perform was judicial or ministerial; and there it was taken for granted that if the duty was a judicial one the Court would not interfere. The judgment given in appeal 13 A. R. 446, supported the conclusion there arrived at.

I, therefore, agree that the motion for mandamus must be refused.

I have carefully examined the opinion of the learned Judge acting as a magistrate in this case, and, it seems to me that he is rather taking the position of suspending judgment until an expression of opinion might be obtained from a Divisional Court, than of refusing to hear, although he formally declined to receive the evidence tendered. Speaking entirely for myself, as the other members of the Court decline to express any opinion, I venture to make the following suggestions which have occurred to me, if, perchance, they may be of any assistance to the learned Judge.

It was the common case of both the Crown and the defendants that the powers of the committee were inquisitorial; that the witnesses had no power to refuse to answer; and, it seems to me, that there is no difference between the cases of those who claimed the privilege and of those who did not. If the witnesses are to be assumed to know the law, then they knew that it would be idle to claim a privilege which did not exist.

I do not see how any question can arise as to the abuse of the privileges of Parliament in endeavouring to make use of this evidence, if the proper holding is that by the resolution of the committee, adopted by the House, Parliament directed the institution of the present proceedings upon the evidence taken before the committee.

From a perusal of the discussions in the Imperial Parliament, as found in Hansard and the text in the 2nd edition of Mr. Cushing's work on The Law and Practice of

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Legislative Assemblies, 9th ed., secs. 983, 1001, 1004 and 1005, I should deem the question to be, whether the witness is to be protected from any liability which might arise from the use of this evidence before the committee, and the protection afforded the witness would appear to be by preventing the use of the evidence given before the committee except upon consent of Parliament. If the direction of Parliament was, that upon the evidence given these prosecutions should be instituted, and that for that purpose the books and papers should be retained for use in the prosecutions, then it follows that there is no protection in this case to the witnesses from the liability to which they have been exposed by the giving of such evidence, if, as I have suggested, the only protection to be afforded to the witness is the protection from the use of evidence without the consent of the House. If this is not the case, then the protection of the witness would seem to be an absolute one which cannot be taken away from him except by an express Act of Parliament. Whether a witness before a committee is protected by an unwritten law, co-existent with the inquisitorial power, absolute and binding except expressly taken away, or whether his protection is merely the right to claim protection, which Parliament may refuse by consenting to the evidence being used against him, is a matter upon which perhaps there may be some doubt, upon which certainly there was much argument before us.

In view of the fact that the evidence has already been laid before the public and recorded upon the proceedings of the committee, and that no injury, can be done to the reputation of the defendants by using it, and that the question of the admissibility may be raised at another time and place and in another manner and to no detriment to the defendants, save, perhaps, the incurring of some little expense, I should, if I were acting as magistrate, feel justified in admitting the evidence lest possibly the prosecution directed by Parliament should be hindered or rendered ineffectual; for it would seem that the House came to the conclusion that upon the evidence it had before it, some

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offence had been committed for which the parties concerned should be proceeded against in the Courts. In such proceedings the parties can of course raise such defence as the facts will warrant. If it turn out that without the evidence taken before the committee the prosecutions must fail, that will add force to the argument that the protection which the witnesses would otherwise have, has been taken away by the direction of Parliament to have legal proceedings instituted.

If the question should come before myself, sitting in a Court for the trial of the cases, I should, I think, feel justified in receiving the evidence, and submitting a case for the opinion of the Court, so that the matter might come up before a tribunal competent to deal with it and whose opinion would be binding upon the parties concerned.

MACMAHON, J.:—

The motion herein is by the prosecutor for a mandamus to His Honour William Aird Ross, Judge of the County Court of Carleton, as a magistrate in the hearing of the complaint herein, to hear certain evidence offered by the prosecution.

We have, therefore, first to consider whether there is ground upon which to grant the writ; and, if not, whether the Court should, as requested by counsel for the prosecution, express an opinion as to the course the magistrate should pursue as to receiving the evidence tendered and rejected by him.

In addition to the citation made by the learned Chief Justice of this Division from the judgment in *Regina* v. *Carden*, 5 Q. B. D., I would refer to the further remarks of Cockburn, C.J. at p. 5, where he says: "We are called upon to issue a mandamus commanding the magistrate to take a certain course while the case is pending. This is, in my opinion, an application of a very anomalous character. In the case of *Ex p. Ellissen* (not reported but noted in Folkard on Libel and Slander, 4th ed. 592), which has been referred to, it seems to me that this Court went to the utmost

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limits of its mandatory jurisdiction and I should be extremely unwilling to extend the doctrine of the case to any other set of circumstances."

At page 13 Mr. Justice Lush referred to the two cases cited on the argument, namely, *Regina* v. *Townsend*, 4 F. & F. 1089, and *Ex p. Ellissen*, and said: "Both of those cases appear to me to have been well decided. One was a case of simply publishing a libel. The other was a case of a charge under the 4th section of publishing a libel knowing it to be false. It was competent to the defendant before the magistrates to endeavour to get rid of the major charge by proving the libel to be true. The cases are quite distinct."

In *Ex. p. Ellissen*, the statute required that the libel should appear to have been false and malicious *i. e.* wilfully false; so that it was of the e[illegible]nce of the charge that the prosecutors should prove this; and hence the evidence offered to disprove it by showing that the libel was in fact true was clearly admissible and an order for a mandamus was made absolute by the Court of Queen's Bench, directing the magistrate to hear the evidence of the witnesses for the defence, yet Cockburn, C. J., in *Regina* v. *Carden*, thought that the Court in *Ex p. Ellissen*, went to the utmost limits of its mandatory jurisdiction.

Where the defendant had been convicted of forcibly passing a turnpike gate without paying toll, the sessions on appeal rejected evidence to show that the gate had been unlawfully erected; and the Court of King's Bench refused a mandamus to receive such evidence the admissibility of it was, as said, exclusively for the justices: *Rex* v. *Justices of Cambridgeshire*, 1 D. & R. 325.

In *Rex* v. *Justices of Carnarvon*, 4 B. & Al. 86, where the sessions having heard the witnesses on one side, had refused to hear those on the other side, in an appeal, on the ground that their testimony had been prefaced by observations on the part of the advocate contrary to their usual practice, the Court refused to grant a mandamus, holding that it had no jurisdiction to review the judgment of the

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quarter sessions except on a case sent up for their consideration.

Mr. Justice Bayley, in his judgment, said, at p. 87: "In this case they," (the Quarter Sessions) "entered into the consideration of this appeal; and, after having heard it, they have decided that the respondents ought not to be allowed to call witnesses in reply. It is possible that in that decision they may be wrong; but it seems to me that we are not at liberty to enter into that question, as no case has been sent up for our consideration. If we were to do so, we should constitute this court a court of appeal from the Quarter Sessions, and we should have applications continually made to us to overturn their determinations, on the ground of the improper reception or rejection of evidence, and be called upon to review their judgment, although no case had been sent up to us for that purpose."

So also in *Rex* v. *Inhabitants of Frieston*, 5 B. & Ad. 597, where an objection had been made during the trial of an appeal at the Quarter Sessions to the reception of a particular piece of evidence, and the Sessions held that such objection was valid in consequence of which the appeal was dismissed, the Court of King's Bench refused to interfere by mandamus on that ground, Patteson, J., stating, at p. 599: "There is no instance in which the Court has granted a mandamus under such circumstances."

In *Regina* v. *Justices of Yorkshire, Ex p. Gill*, 53 L. T. N. S. 728, decided in 1885, the head-note is: "The Court will not direct a mandamus to issue to compel justices to hear and determine a case upon which, after hearing evidence, they have adjudicated, though at the hearing they had rejected certain evidence which was properly admissible," Mr. Justice Smith, saying: "I know of no case where a mandamus to justices to hear and determine a case has been granted on the ground that they have not heard all the evidence tendered before them."

His Honour Judge Ross acting as magistrate is the duly constituted tribunal to hear the charge or complaint against the defendants herein, and is the proper judge of what evidence should be received or rejected in respect of such charge, and the High Court of Justice will not in such a case interfere by mandamus: Shortt on Mandamus and Prohibition, Black. ed. sec. 257.

Should the magistrate refuse to commit the defendants on the charge laid against them, then the prosecutor, if he desires to prefer an indictment against them respecting the offence, may enter into a recognizance before the justice to prosecute such charge: R. S. C. ch. 174, sec. 80.

In case an indictment should be preferred and found against the defendants, I deem it inexpedient to express any opinion as to the admissibility or otherwise of the evidence tendered on behalf of the prosecution and objected to by the defendants, leaving to the judge who may preside at the trial of the defendants (if an indictment or indictments should be found against them) to deal with the question of its admissibility.

I agree that the motion must be dismissed.*

On the 12th of April, 1892, the House of Commons on motion of the Minister of Justice passed the following resolution:

"That in view of the prosecutions and suits, criminal and civil, which have been instituted under instructions from the Department of Justice arising out of the proceedings and enquiries before the Standing Committee on Privileges and Elections in the Session of Parliament of 1891, under the Order of Reference of 11th May, 1891, and also arising out of the proceedings and enquiries before the Public Accounts' Committee during the same session, this House deems it advisable and necessary, in aid of the said prosecutions and suits, to allow to be given in evidence before the respective courts before which the said prosecutions and suits are to be tried, the admissions, statements and evidence given before the said committees respectively by the parties accused, and by the defendants in the said

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*Note.—Subsequently His Honour Judge Ross on the resumption of the proceedings before him on having the opinion of Mr. Justice Rose before him admitted the evidence in question.

Resolution of House of Commons.

several suits when testifying before the said committees respectively. And this House also deems it advisable and necessary to order that all clerks and stenographers who were in the employment of the said House attending the said committees respectively do attend, if required, from time to time before the Courts before whom the said prosecutions and suits are being tried, and give evidence as to the statements upon oath made by the several parties accused and the defendants before the said committees respectively, and that the said clerks and other officers do produce before the said Courts respectively, all books, papers, exhibits and other documents received in evidence or produced and used before the said committees respectively, and which are necessary in connection with the following prosecutions and suits now pending:

"*The Queen* v. *Nicholas K. Connolly and Thomas McGreevy* for conspiracy (then setting out various other prosecutions and suits).

"That in case of further indictments and actions arising out of the Larkin, Connolly transactions, this House also deems it advisable to allow the use of the evidence in its possession in support of such indictments before both the Grand Jury and the Court and Jury, in case such indictments are found and go on for trial.

"That this House, while waiving its privileges in these particular cases, with the view of eliciting all the facts and obtaining substantial justice in the premises, does not in any sense give up its well established and undoubted rights, whenever it may deem it in the public interest hereafter at any time to protect all witnesses examined before this House or any committee thereof in respect of anything that may be said by them in their evidence, and to refuse permission to any clerk, or officer of the House, or shorthand writer employed to take minutes of evidence before the House or any committee thereof, to give evidence elsewhere in respect of any proceedings or examination had at the bar or before any committee of this House."

[CHANCERY DIVISION.]

HOLLIDAY V. HOGAN.

Principal and surety—Release of debtor—Consent of surety—Agreement of surety to remain liable.

Held, per BOYD, C., that the consent of the surety to the discharge of the principal debtor will have the effect of preventing such discharge operating to release the surety, and this sufficed for the determination of the law in this case.

Held, per MEREDITH, J., that the evidence showed that the sureties in this case intended and agreed to remain liable to the creditor, and therefore *cadit quæstio.*

Judgment of ROBERTSON, J., affirmed.

THIS was an action on a promissory note for $600, made **Statement.** on June 3rd, 1890, by the defendants, John Hogan and Margaret Hogan, his wife, payable to the order of the other defendants, Jackson and Hallett, twelve months after date with interest at five per cent. per annum, and by Jackson and Hallet endorsed to the plaintiff.

The action was tried at the Autumn Chancery Sittings at Guelph, 1891, before ROBERTSON, J., and the facts proved are mainly set out in his judgment. It also appeared, however, that the consideration for the note was an advance of $600 made by the plaintiff, which was paid to Jackson and Hallett, they desiring and pressing for money at the time, and all parties agreeing to the giving of the note and transfer of the chattel mortgage to secure the repayment of the amount to the plaintiff; and it also appeared that Singular, to whom Hogan's business was sold, and who had assumed this liability among others, was willing to take up the note if payment were pressed, but the plaintiff insisted upon payment by Jackson and Hallett, and they insisted upon his going to Singular for it.

Johnston, Q. C., and *O'Connor*, for the plaintiff.

Guthrie, Q. C., and *Coffee*, for the defendants John Hogan and Jackson and Hallett.

Mowat, for the defendant, Margaret Hogan.

December 18th, 1891. ROBERTSON, J.—[After stating the effect of the pleadings.]

Judgment.

Robertson, J.

I find the following facts: the defendant, John Hogan, was an innkeeper in Guelph, and became indebted to the plaintiff, who is a brewer there, for beer and ale supplied to Hogan in the course of his business, and to secure a part of which plaintiff held a second chattel mortgage on Hogan's goods. The plaintiff had also advanced to Hogan $600 in money, and took in security for the repayment thereof, the promissory note sued upon, endorsed by the defendants Jackson and Hallett, who endorsed the same for the accommodation of Hogan, and for which they were secured by a first chattel mortgage given by Hogan on certain household furniture, etc., in the hotel. This chattel mortgage Jackson and Hallett assigned to the plaintiff as collateral security for the payment of the note, so that plaintiff had both mortgages—amounting together to $1,200; and besides these he had a claim for an unsettled account. Hogan was also indebted to Jackson and Hallett in a large sum for liquors and groceries supplied by them, and was not making payments to either the plaintiff or Jackson and Hallett in such a way as to inspire confidence in them; and when the $600 was advanced by the plaintiff on the note in question, an understanding was come to between him and Jackson and Hallett, that they would respectively, for the future, insist upon Hogan paying cash for his purchases. This was in June, 1890. Afterwards in the month of February, 1891, plaintiff and Hallett casually met, and they each remarked that Hogan was not paying his way, and they went over to his hotel for the purpose of seeing him in relation to their respective claims. Hogan was not about, and the plaintiff and Hallett then came to the conclusion that it would be well for them if they could induce Hogan to sell out his hotel business to some good business man, and by this means pay off his creditors, etc.; and at the request of the plaintiff, Hallett promised to see Hogan on the subject, and look out for a

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Robertson, J.

purchaser, etc. I find in this connection that the plaintiff said to Hallett that if he Hallett could find a suitable purchaser for Hogan's business, he, the plaintiff, would take the new man for his debt against Hogan, and give him any reasonable time for the payment thereof. Shortly after this Hallett saw one Lot Singular, who had been and was at the time, a successful innkeeper in the county, and who was also a customer of the plaintiff and Jackson and Hallett, and he communicated to him what had taken place between the plaintiff and Hallett, and particularly that if he, Singular, could make terms with Hogan, the plaintiff would take him, Singular, for his debt against Hogan, and give him one or two years for payment thereof.

Singular thought favourably of the proposition, and afterwards on March 5th, the plaintiff and Hallett again met at the railway station at Guelph, and the latter communicated what had taken place between him and Singular, and the plaintiff expressed his satisfaction with Singular, as being a good man of business; and again said if he and Hogan can make a bargain, my claim against him may remain in the business, and I will give Singular all the time he wants for payment, if he will pay five per cent. interest.

The result was, that Singular and Hogan came to terms, and out of the purchase money agreed to be paid by him to Hogan, he, Singular, was to deduct $1,247.50, being the amount of the note in question, and interest thereon, and the said chattel mortgage for $600 which the plaintiff held, and the claim of Jackson and Hallett against Hogan, and become liable to the plaintiff and Jackson and Hallett for these respective claims. There was a balance of about $500 due to Hogan, for which Singular gave his promissory note payable in one month.

The plaintiff was not seen again in the transaction until it was completed between Singular and Hogan, and Singular had given to Jackson and Hallett his notes for the amount of Hogan's indebtedness to them.

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Robertson, J.

On the day after the sale was completed, the plaintiff was in Jackson and Hallett's place of business, and he and Hallett then talked over the matter, and the plaintiff was then told that Hogan had sold out to Singular, and that Singular had by agreement with Hogan retained $1,247.50 of the purchase money for him, the plaintiff—for the payment of which he wanted the plaintiff to give him one or two years' time. Singular was present at this interview, and said to the plaintiff, he would require to get this time for payment of the $1,247.50. The plaintiff in reply said, "you can have all the time you want if you will pay five per cent." Singular said he would do so, and both were apparently satisfied, the plaintiff stating at the same time to Singular, that he could have all the beer, etc., he wanted, etc.

On the following Monday, the plaintiff, Hogan and Hallett, met at the hotel, and the sale to Singular was talked over, and Hogan then told the plaintiff that he had sold out to Singular, and that he (Hogan) had left $1,247.50 in his (Singular's) hands to pay the note in question and the chattel mortgage, that he, Hogan, had given the plaintiff; (this was the second chattel mortgage before referred to); and that Singular had agreed with him, Hogan, to pay the plaintiff that amount. The plaintiff said to Hogan, "I have already seen Singular, and have accepted him for that indebtedness, and I will give him all the beer and ale he wants, etc. Singular is a good man, and is worth $5,000, and why should I not accept him?".

I also find that there was still a further claim held by the plaintiff against Hogan, on an unsettled account, for which the plaintiff had no security whatever, and for which he hoped to get from Hogan the $500 note which Singular had given him for the balance of the purchase money; in which, however, the plaintiff was disappointed, as Hogan afterwards absconded.

The conclusion I have come to is, that in regard to the liability of Hogan, the plaintiff agreed to accept and did accept Singular as his debtor in lieu of Hogan; and that Singular assumed the debts of Hogan to the plaintiff to

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Robertson, J.

the extent of $1,247.50, part of which was the promissory note now in question in this action; but I am not satisfied that in doing so, the plaintiff understood, or intended to release the endorsers, Jackson and Hallett. Nor am I satisfied from the evidence that Jackson and Hallett (who were cognizant of, and in fact, actively instrumental in bringing about the arrangement between Hogan and Singular), understood and intended that they were to be released from their liability as endorsers.

Their conduct in regard to the note, according to Mr. Hallett's own account of the matter, is inconsistent with what they now allege to be the fact. In regard to Hogan's indebtedness to them, and in regard to the note for $150 in the Canadian Bank of Commerce, on which they were endorsers, they were particular in taking from Singular his notes for payment to them, and a promise to pay the $150 note; but in regard to the note in question, they took nothing; they were satisfied, seemingly, that Singular would hold them harmless, and they did not ask the plaintiff to relieve them from their endorsation; in fact it was not until three months after, when the note fell due, and they had received notice of dishonour, that they took any steps whatever to protect themselves against their endorsation, by writing a letter to the plaintiff expressing their surprise, that he, the plaintiff, had not kept faith with Singular. They did not even then repudiate their legal liability, but said: "We do not know why you sent the Hogan note to protest, after the agreement made with Mr. Singular. Singular has not paid us, but will pay you, of course, if you insist on payment of this $600 and interest. We will have to ask Mr. Singular to find the money, but we are surprised at your not carrying out your promise to Singular in the matter."

That letter does not strike me as being such an one as good business men, such as Messrs. Jackson and Hallett evidently are, would have written, had they understood that the arrangement made between Hogan, Singular, and the plaintiff, entirely released them from liability.

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Robertson, J.

Then, again, look at the circumstances under which the plaintiff was induced to accept Singular, instead of Hogan. The fact is, the proposition to do so came from Mr. Hallett, it was he who first proposed the change to the plaintiff and that proposition did not include any suggestion that the plaintiff should give up Jackson and Hallett as sureties on the note in question, and take Singular in lieu, not only of Hogan, but of Jackson and Hallett also; on the contrary, the suggestion was made in their own interest, they believed that Hogan would not be able to pay, and they knew if he did not, they would be obliged to do so. It was therefore, in their interest as sureties to make such an arrangement as would place them, in regard to this note, in a safer position than that which they were in, should Hogan fail to meet the note; not that they should be discharged as sureties, but in fact that the principal debtor should be a man in whom they, as sureties, would have more confidence, so that the arrangement amounted to this: The plaintiff was to let Hogan go at the request of Jackson and Hallett, and take instead of him Singular, for whom they were willing to be sureties. This was not an arrangement between the principal debtor and his creditors behind the back of the surety, by which the creditors agreed to release the principal debtor and thereby release his surety. Quite the opposite of that. It was, in fact, an agreement between Singular and the sureties that he, Singular, by and with the consent and approbation of the creditor agreed to assume the liability of the principal debtor, and hold harmless the sureties; they, however, to remain sureties for the payment of the liability in case the new debtor failed to meet the liability at maturity. Nothing more, and nothing less.

Then again, there was another circumstance which came out in evidence on the part of these defendants, which makes against the defendants' contention, viz., that they designedly kept the plaintiff in the dark in regard to the details of the sale and purchase of the hotel business, until they and Hogan got matters arranged entirely to their own satisfac-

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Robertson, J.

tion; and the reason given for not calling in the plaintiff before the matter was finally closed between Hogan and Singular and Jackson and Hallett was, that if the plaintiff had been present, he would have upset the whole arrangement, had not a proper settlement been come to by Hogan in regard to the plaintiff's unadjusted claim. This shews that they understood that the plaintiff always meant that the whole of his claim against Hogan should be secured, and not that part which was already secured.

Although I have been obliged to find the facts against the plaintiff's own evidence, it is only right to say that he denies most emphatically that he ever agreed to take Singular for the note in question. There are circumstances which corroborate that view of the case. In the first place, there was not the slightest necessity for any anxiety on his part in regard to this note; he not only had a first-class endorsation, but as collateral security he held a first mortgage on Hogan's goods. Either made the note perfectly secure. Why then should he give up what was perfectly secure, for the mere verbal promise to pay, of Singular? I cannot make up my mind that he ever intended to do more than to say, as between Hogan and Singular, with the consent and on the recommendation of Hallett, "I will accept the liability of Singular for that of Hogan." It is true he said he would extend the time for the payment to one or two years on payment of interest at five per cent. but that even was never reduced to a certainty, and there was nothing definitely agreed upon so as to make it a binding contract between the parties.

On the whole, after much consideration, I have come to the conclusion that the plaintiff is entitled to recover against the defendants, Jackson and Hallett, for the amount of the note and interest. As to the costs, I confess to a feeling that if I can properly deprive the plaintiff of them, I might find justification in doing so. His conduct has been most reprehensible, I think. There really was no reason for bringing this action at all. As soon as the note was protested Singular went to the plaintiff and reminded

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Robertson, J.

him of his agreement to accept him for payment, and of his promise to give an extension of time, etc., but the plaintiff disputed the assertion that the arrangment covered the note, and insisted it only covered the $600 mortgage; and besides this he said Singular was interfering in a matter which did not concern him; and that he, the plaintiff, did not want to trouble him, Singular, but that he "would take the shirt off Hallett's back."

It appeared, however, that Mr. Hallett left the matter with Singular to arrange; in fact he sent him to the plaintiff to settle the claim, and Singular hoped to be able to get a satisfactory arrangement, but it was apparent, according to his own evidence, that the plaintiff "was very short" with him and would give him no satisfaction. Then a tender of the amount was afterwards made to the solicitors in the plaintiff's presence, but the costs were demanded, then. They were made up at about $30; this, Singular refused to pay, and the action went on.

According to my finding, the defendants, Jackson and Hallett, are liable. They should, therefore, have taken up the note on the day it fell due; they did not do so, and the plaintiff's cause of action was complete. I do not see, therefore, how I can, on principle, deprive the plaintiff of his costs against them. Then as regards the defendants Hogan, I think the action must be dismissed against them with costs, as regards Hogan, for the reason that there was a *novation*, and Singular was accepted as paymaster, instead of him, and the plaintiff should not have sued Hogan at all; as regards Margaret Hogan, she was a married woman at the time she made the note, and there is no evidence before me that she had any separate estate, nor is there anything to show she contracted in reference to any separate estate.

Judgment will, therefore, be entered for the plaintiff against the defendants, Jackson and Hallett, for $646.25, being the amount of the note and interest thereon at five per cent. from June 3rd, 1890, until December 18th, 1891, together with the costs of this action; and for the

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Robertson, J.

defendants John Hogan and Margaret Hogan, dismissing the action against them with costs.

The defendants, Jackson and Hallett, moved the Divisional Court by way of appeal from this judgment, upon February 26th, 1892, before BOYD, C., and MEREDITH, J.

Moss, Q. C., and *Coffee*, for the motion. Where the result of what is done is, that the original debtor is released, you cannot hold the surety, even if he assents; you must have a distinct agreement between the principal creditor and the surety. Where there is a discharge absolutely, it used to be doubtful whether you could reserve remedies against the sureties. But now it is held such remedies may be reserved. But there must be the express reservation: *Nicholson* v. *Revill*, 4 A. & E. 675; *Webb* v. *Hewitt*, 3 K. & J. 438; *Bateson* v. *Gosling*, L. R. 7 C. P. 9; *Green* v. *Wynn*, L. R. 4 Ch. 204. In *Overend, Gurney & Co.* v. *Oriental Financial Corporation*, L. R. 7 H. L. 348, the Court express the view that if there is to be a reservation of rights against the surety, there must be an express reservation.

[BOYD, C.—But have you any case where the dealing has been with privity and assent of the surety?]

That was so in several of the cases, for the sureties were parties to the deed. Most of these cases were cases where there was a deed. *Grundy* v. *Meighan*, 7 Ir. L. R. 519, shews that the reservation must be by formal provision in the deed itself. *Taylor* v. *Hilary*, 1 Cr. M. & R. 741, shews that the substitution of a new contract will be a discharge of the surety. In our case there was no attempt to reserve any right against Jackson and Hallett. The novation was between Hogan, Singular and the plaintiff. We were no parties to this. The proposition is, we are sureties for Singular, but how can this be: *Wilson* v. *Lloyd*, L. R. 16 Eq. 60.

Johnston, Q. C., and *O'Connor*, for the plaintiff. Hallett was as much a principal in the matter as Holliday was:

Argument. Brandt on Suretyship, p. 597. Even assuming Hogan was released by the plaintiff, the question does not turn on any question of an express reservation. The law seems to be that the intention of the parties must govern; and that, though the deed be absolute in form, if the parties intended the rights against the sureties to be reserved, they will be reserved: *Wyke* v. *Rogers*, 1 DeG. M. & G. 408; *Bank of Montreal* v. *McFaul*, 17 Gr. 234; *Bailey* v. *Griffith*, 40 U. C. R. 418; *Smith* v. *Winter*, 4 M. & W. 454. The acts of Jackson and Hallett are those of men who considered themselves still bound. The principle that a surety is released if the debtor is released, does not apply where the debt continues to exist. Here it is true Hogan is gone so far as our remedies are concerned, but it is not clear that Jackson and Hallett's remedies against him are gone. There was no definite agreement between Holliday and Singular as to extension of time: *Howell* v. *Jones*, 1 Cr. M. & R. 97; *Clark* v. *Devlin*, 3 B. & P. 363.

Moss, in reply. All we say as to time, is, that if time was given to Singular, it has not elapsed. We do not claim to be discharged on this ground. This was not a case of a surety taking a security from the principal debtor at the time of becoming surety. As to the argument that the intention of the parties is to be looked at in a matter of this kind, no doubt that is so. But here there is no evidence of any such intention to reserve the remedies. In *Wilson* v. *Lloyd*, L. R. 16 Eq. 60, it is said that *primâ facie* the discharge of the principal is a discharge of the surety.

March 29th, 1882. BOYD, C.:—

It is laid down in De Colyar that the consent of the surety to the discharge of the principal debtor will have the effect of preventing such discharge operating to release the surety: On Guarantees, 2nd ed., p. 365. *Ex p. Harvey*, 4 DeG. M. & G. 881, appears to substantiate that proposition, though not cited in the text quoted. Turner, L. J., said, at p. 899: "The general rule, that a surety who has concurred in or ratified an arrangement between the creditor and the principal debtor cannot claim to be discharged by the effect of that arrangement, was not disputed in argument." I apprehend that general rule cannot be disputed, and it suffices for the determination of this case upon the law. Upon the facts there is not the slightest indication that the plaintiff ever intended to relinquish his right upon the note against the appellants. The retention of that security is the strongest possible evidence of this. There is besides the fact that for the very amount of the note, the appellants held security upon the chattels (once of Hogan, now of Singular), which, though pledged as a collateral to the plaintiff for the debt now sued for, will be available for the appellants' security when they pay the amount for which it is held.

The action is, no doubt, a hard and unreasonable one, and I should have been satisfied had no costs been given below; but as it is we should now withhold costs while affirming the judgment.

MEREDITH, J.:—

I entirely agree in the conclusion of the trial judge that it was understood by and between the parties that the defendants Jackson and Hallett should not be released from their liability to the plaintiff upon the promissory note in question; indeed it seems plain to me that not only was that the understanding of the parties, but it was in fact the agreement which the defendant Hallett, acting for his firm and for the plaintiff, made with the original, and with the substituted, principal debtor.

In these circumstances it is difficult to understand how it could be reasonably contended that, contrary to their intention, and contrary to the agreement negotiated and made by themselves, these defendants can be, by any equitable doctrine, discharged from their liability.

The case is not an ordinary one of suretyship. The money in question was advanced by the plaintiff for the benefit of these defendants; it was paid directly to them

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Meredith, J.

for their needs; and security which they held from the common debtor was pledged to the plaintiff for the repayment of it, in addition to the giving of the promissory note in question, made by the debtor and endorsed by these defendants. So that the debtor's goods, mortgaged to these defendants, were made the primary fund to be looked to for the repayment of the amount of the promissory note if the maker dishonoured it. There was no gain to the plaintiff in the transaction; indeed, he was going out of his way to accommodate these defendants in advancing the money in the exigencies or requirements of their business.

It does not seem to me to be needful to determine whether or not, treating these defendants as simply sureties, the plaintiff's rights against them were reserved, so that their claim over against the debtor was unimpaired; or whether there was a complete substitution of the new debtor, so that in all respects he became primarily liable for the amount of the promissory note; for it seems to me to be quite enough that it was the intention and agreement of these defendants that they should remain liable to the plaintiff for the debt in question, as well might be, in view of all the circumstances of the case, as well as of the security of the chattel mortgages.

I would, therefore, dismiss this motion, but would make no order as to costs, for I cannot but think that needless litigation such as this, should be discountenanced and discouraged; it is not creditable to either party that the time of the Court should be taken up, as it has been in this case, solely because the one party was too obstinate, and too anxious to harass the other, to ask for, or receive, payment from the substituted debtor; and the other too perverse to obtain payment from him and hand it over to the plaintiff. These equally contentious and obstinate parties might, in my opinion, have been well and properly rewarded for this needless litigation by a refusal of any order regarding any of the costs of it.

A. H. F. L.

[CHANCERY DIVISION.]

IN RE CENTRAL BANK.

LYE'S CLAIM.

Company—Winding up proceedings—Liquidators' commission—Banks and banking—Allowance of commission on set-off.

In fixing the liquidators' commission or compensation in the winding-up proceedings of an insolvent bank, it is proper to take into consideration amounts adjusted or set-off, but not actually received by the liquidators; and in this case a commission of two and a-quarter per cent. having been allowed on the gross amount of moneys actually collected, a further commission of one and a-quarter per cent. on a sum of $231,000, consisting of amounts adjusted or set-off was allowed.

So far as possible, the amount allowed as compensation to liquidators in such winding-up proceedings should be evenly spread over the whole period of the liquidation, so as to ensure vigilance and expedition at all stages of the liquidation, as well as a proper distribution among the liquidators, when more than one.

THIS was an appeal from the certificate of the Master-in-Ordinary, dated November 16th, 1891, made on the application of Henry Lye, one of the liquidators of the Central Bank of Canada, in the winding-up proceedings, for further remuneration as liquidator beyond what had theretofore been allowed. Statement.

The bank suspended on November 15th, 1887, and a winding-up order was made on December 16th, 1887. On December 22nd, 1887, the liquidators, Campbell, Gooderham, and Howland, were appointed, pursuant to the 101st section of the Winding-up Act, R. S. C. 129, one of whom was removed on January 25th, 1888, after which, on March 22nd, 1888, the present appellant was appointed in his place.

On December 14th, 1888, the Master-in-Ordinary, before whom the winding-up proceedings were being conducted, application being made to him to fix the rate of remuneration which the liquidators were to have, adopted two percentage rates as the basis of the remuneration: First, "the lowest rate authorized by the Insolvent Act of 1875, viz., one and a quarter per cent., and the other, the lowest rate

Statement. sanctioned by the Court in *Thompson* v. *Freeman*, 15 Gr. 384, viz., three per cent. The higher rate," he directed, "will therefore be allowed on all moneys collected by them after pressure and where special efforts had to be made for the realization of the assets of the bank. The lower rate will be allowed on debts and interest paid at maturity or without much effort, and on debentures sold by the liquidators." The reasons of the learned Master in thus fixing the rate of remuneration, from which the above extracts have been made, are reported in 26 C. L. J. 24.

And on March 13th, 1889, the learned Master further ordered and directed that the liquidators might deduct from the assets of the bank which had come to their hands since December 31st, 1888, or which might thereafter come to their hands until further order, "a commission at the rate of one and a-quarter per cent. on the gross amount of all such moneys as have been or shall be realized without pressure, and at the rate of three per cent. on the gross amount of all such moneys as have been or shall be realized after pressure as and for their remuneration as such liquidators, without prejudice to the allowance of a higher rate of commission or a further or additional remuneration if it shall hereafter be made to appear that a higher rate or any additional remuneration ought to be allowed."

Pursuant to the leave reserved in the last mentioned order, on November 9th, 1891, Mr. Lye applied to the learned Master for further remuneration as liquidator, and on November 16th, 1891, the Master refused the application.

In his reasons for so doing the learned Master, after first pointing out that there was no evidence before him of greater exertions or difficulties in the work of liquidation than were anticipated when he made his former orders fixing the rate of remuneration, and that therefore he must hold himself judicially bound by the conclusions he had before arrived at, proceeded as follows:—

> Besides I am further constrained to adopt this conclusion by the opinion expressed by an English Judge in dealing with similar applications on the part of liquidators. In *Re Mysore Reefs Gold Mining Co.*, 34 Ch. D. 14, Chitty, J., observed, at p. 17, "I not unfrequently have applications by

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liquidators to alter the scale of their remuneration and, speaking for myself, I rarely accede to them; not the less so because they are generally cases in which the liquidator says, having regard to the work done, the scale of remuneration is not sufficient; whereas in the contrary case, where the scale has been ample he never comes and offers to reduce the amount. The answer is, as a general rule, 'You take those things for better, for worse.'"

But * * there is now a claim for some remuneration in respect of the services rendered by the liquidators in the adjustment of claims by way of set-off. And as this claim for services had not been put forward on the former application, it may reasonably come within the reservation in the order of March 13th, 1889, as "a further or additional remuneration if it shall hereafter be made to appear that any other additional remuneration ought to be allowed."

Set-off depends upon a right to receive or pay moneys, and in this winding-up proceeding, but for the ruling made by me in *Re Harrison & Standing*, 8 C. L. T. 254, in which I allowed some contributories to set-off the amount standing to their credit in the books of the bank, against the amount of their double liability under sec. 70 of the Bank Act, the liquidators would have been entitled, under the later decision of *The Liquidators of the Maritime Bank* v. *Troop*, 16 S. C. R. 456, to have compelled the contributories to pay the whole amount of the double liability in full and to have placed them as creditors on the dividend sheet in respect of their claims against the bank. As the effect of the judgment of the Supreme Court has been to reverse my ruling as to set off, I think the claim now made by the liquidators should be dealt with as if the rule laid down by the Supreme Court, and now the law of this Court, had been recognized in these proceedings, and that the liquidators should be held entitled to some commission for their services in cases where they had the trouble and responsibility of adjusting the details and allowance of the set-off. Where, however, they were relieved of that responsibility of ascertaining and adjusting the set-off by the act of the Court, I do not see that the liquidators can claim compensation in respect of the amounts of set-off so ascertained and adjusted. Were they so entitled they might equally claim compensation in respect of cases when the face value of the liability of the contributory shewed a larger number of shares or larger amount due in respect of that liability than was held to be established by evidence given in Court. The set-offs allowed by the Court must be dealt with as unadmitted or unascertained credits on the liability of debtors, or unadmitted or unascertained debits against the claims of creditors which had to be adjusted here before the liability or the claim could be held to be ascertained or evidenced by a judgment. All responsibility in regard to such set-offs or credits was assumed by the Court, and the liquidators had only the responsibility of collecting the balance ascertained here as the true debt to be collected, or of placing the creditor on the dividend sheet for the amount allowed as his claim against the estate.

But the claim for that commission or remuneration must be made by all the liquidators or their representatives. In *Re the Langham Hotel Co.*, Statement. 17 W. R. 463, on an application to divide the commission between three liquidators, Lord Romilly, M.R., said, "I cannot make the order asked. It is founded upon a misconception of what is the true position of the liquidators. When joint liquidators are appointed it is a species of partnership, and, in the absence of any agreement among themselves as to the division of the remuneration, the Court would leave it to be settled among themselves what proportion each would take. If the Court were to go into these questions between joint liquidators instead of assuming that they took equal shares of the gross sum awarded to them, it would lead to complicated and expensive litigation after the winding-up had ended, and a struggle as to who should be employed the greater number of hours in nearly every case where more than one liquidator was appointed." In deference therefore to the rule established by this case I am at present unable to fix any remuneration to the liquidators in respect of this adjustment of set-off until all claiming it join in the application.

A further claim is made by Mr. Lye for remuneration for the responsibility incurred by him in taking over, with Messrs. Gooderham and Howland, the money on hand at the time of his appointment, and in paying it out subsequently. The commission awarded to each set of liquidators was for the responsibility and trouble of (1) receiving and (2) of paying out the moneys which came into their hands. This is clear from the English Rules lately promulgated (1890) which state that the percentage remuneration of liquidators is apportionable as follows :—One part to be payable on the amount realized out of the proceeds of the securities, and the other part on the amount distributed in dividend. This therefore in more precise words prescribes the rule which has always prevailed, and must regulate the adjustment of the commission payable in respect of the moneys in hand at the time of Mr. Lye's appointment, and is the rule under which the proportion to which he may be entitled is adjustable between the liquidators themselves. Were a different rule applicable frequent changes of liquidators would largely increase the expenses of the liquidation.

Reference has been made to the scale of remuneration recommended by the Master of the Rolls and the Vice-Chancellors in 1868, but the practical working out of that scale has been illustrated in *In re Agra & Masterman's Bank, Cannan's Claim*, L. R. 7 Eq. 102, where a liquidator and his partners were allowed for services from June, 1866, to May, 1868 (two years), in collecting £3,700,000 (say $18,500,000), remuneration amounting to £7,085 (say $35,415) in addition to the salaries of clerks, although it appeared to the Judge who fixed the remuneration that the liquidation had (as this has) been conducted with care, attention, judgment and diligence, and that the liquidator's duties were onerous and the amounts he had to deal with exceptionally large. The percentage commission in that case, as well as the total amount paid to the liquidator and his partners, were less than in this case.

The claim for allowance for services in respect of the adjustments of the set-offs arranged between the liquidators and the debtors to the

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bank may be brought up on a joint application to be made on behalf of Mr. Howland and the executors of the late Mr. Gooderham, as well as of Mr. Lye, if so advised.

No further application was made before the Master-in-Ordinary, but after obtaining assignments of the rights and interests of his co-liquidators, Mr. Lye proceeded by way of appeal.

The appeal came on for argument on March 24th, 1892, before BOYD, C.

B. B. Osler, Q.C., and *A. C. Galt* for the appeal. The moneys received and applied in this liquidation have been as follows :—Cash collected by the liquidators, $2,173,473; paid out in dividends, $1,424,225; paid for redemption of circulation, $379,585; paid to creditors under special orders, $64,014; legal expenses, $50,330; remuneration to liquidators, including what was received by Campbell as auditor, under his appointment as such, of November 17th, 1887, $48,032; collected on double liability (out of a possible $500,000), $389,985; interim interest, $62,864; adjusted by way of set-off, $281,820. This last should be added to the total collections and the total dividends. No remuneration has been given in respect of this. Up to October, 1891, the total expenses of the liquidation were $121,870. Of the remuneration given, Campbell received $4,500 up to January 25th, 1888, when he was removed. Mr. Lye has received no remuneration for the distribution of some half million dollars received by the liquidators before he became a liquidator. Nothing has been allowed to any of the liquidators for the paying out or distribution. The Master has quite ignored the fact that the disbursing and paying out is as difficult as the getting in. I refer to *Thompson* v. *Freeman*, 15 Gr. 384. [BOYD, C.—That was in a matter of a private estate. These bank liquidations are quite a different thing.] The remuneration should be on at least as liberal a scale. The Master declined to grant remuneration on the basis of commercial services. He admits that if he had not eliminated the commercial element he must have given more. The Master took the lowest tariff

Argument. allowed in *Thompson* v. *Freeman*, and in the Insolvent Act. Why should this be? If liquidation were a business in this country as in England, a fair tariff fixed by the Court would be reasonable. But here liquidators were appointed *ad hoc*, not by the Court but by the creditors. The regulations as to remuneration of official liquidators in England will be found at L. R. 3 Ch. LXIV. clause 7. [*Kerr*, Q. C., refers to *Re Mysore Reefs Gold Mining Co.*, 34 Ch. D. 14.] Under that a liquidator would be paid £12 per day of eight hours. Now, taking the time in this case, viz., 910 days, and adding 300 days by the other liquidators, the amount payable would be over $60,000. If any difference should be made it should be in favour of liquidators here, because it is not a profession. At $50 per day we get a balance payable to Mr. Lye of $11,250. If we took him at $25 a day and add commission of one and a-quarter per cent., on set-off, there is a balance of $9,561 due him. As to allowing a commission on set-offs, see *Re Mysore Reefs Gold Mining Co.*, 34 Ch. D. 14. We submit we should have some remuneration as to the paying out: *In re Agra & Masterman's Bank, Cannan's Claim*, L. R. 7 Eq. 102.

A. C. Galt, on same side, referred to section 28 of the Winding-up Act. As to the liquidators being officers of the Court, they are rather agents of the company: *Knowles* v. *Scott*, (1891) 1 Ch. 717. As to *Thomson* v. *Freeman*, 15 Gr. 384, the Master does not follow the real decision, which was that on all sums and investments over $600 the executors were to have three per cent., but on those under that amount they were to have the whole five per cent.

J. K. Kerr, Q.C., for the creditors, contra. We admit Mr. Lye's services have been most valuable. But in determining to pay him by way of percentage, the Master has dealt as he would with a trustee, not as one working for a salary. Now if, as between himself and his co-liquidators, Lye has not received his due share, that is to be regretted; but we submit sufficient has been allowed for the three liquidators. [BOYD, C.—It was a very bad plan to fix the whole remuneration at the outset, as was done here. In some cases liquidators might then resign or neglect their duties.] When the further application was made, no new facts to warrant the application were shewn. The rules which apply to cases of trustees under the statute for pains, care, or trouble, do not apply here. The liquidator is an officer of the Court. He has none of the responsibility ordinarily attaching to a trustee. He can come to the Court at any time for advice, and is under the protection of the Court. This too distinguishes the case of a liquidator from that of the manager of a large banking institution, which is also a going concern. Moreover, by the sale of the assets remaining, the liquidators were relieved from the miserable fag end of the winding-up, which was referred to by anticipation in fixing the remuneration. As to set-off, there seems to be no case of an allowance made in respect of set-off. The moneys allowed by way of set-off never came into their hands. They did not receive it and, therefore, should not have a commission on it: *Re Prittie Trusts*, 13 P. R. 19. They have received between them an average of $40 a day, *i.e.*, between the three liquidators. And it must be remembered that they had the use of the clerks, for which we paid: *Thompson* v. *Fairbairn*, 11 Pr. 333; *Re Berkeley's Trusts*, 8 Pr. 193; *Re Fleming*, 11 Pr. 272, at p. 426; *In re Trueman's Estate, Hooke* v. *Piper*, L. R. 14 Eq. 279; *Langham Hotel Co. Case*, 20 L. T. N. S. 163.

Argument.

Osler, in reply. The English regulations to which I referred allow separately for clerks in the employment of the liquidators. Mr. Lye has received an average of only a fraction over $13 a day during his services.

March 28th, 1892. BOYD, C.:—

As I make out the figures the three liquidators have received in all as compensation what is equivalent to about two and one-quarter per cent. on the gross amount of moneys actually collected. That is excluding an amount of $231,000 consisting of amounts adjusted or set-off, as to

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which no moneys were received and as to which no compensation has been made. But there was some trouble and the need of some preparation in connection with these items as a class, in order to facilitate the closing of the cross-accounts and the settlement of the cross-claims under the direction of the Court. No doubt the responsibility is lessened when the liquidators act under the sanction of the Court, and that is a reason for reducing, not for denying compensation for the services thus rendered. I think the *Mysore Reefs Case*, 34 Ch. D. 14, is authority (if one were needed) to shew that the amount of money represented in the settlement of cross-claims may be regarded as if it had passed through the hands of the liquidators for the purpose of forming a convenient basis of computation when the percentage system of remuneration is adopted. Having regard to what has already been accepted on all hands as a suitable modus of allowance upon the adjudication of the Master (see 26 C. L. J. 24), I should fix one and a-quarter per cent. as applicable to the aggregate of $231,000; that is, Mr. Lye should get, in addition to the other sums, $2,887 in respect of his services upon these set-off and adjusted accounts.

I do not deem it advisable to disturb further what has been done, and I think the terms of Mr. Kerr's letter of March 19th, 1889, are satisfied by the fact that very shortly thereafter Mr. Gooderham's death had the effect of increasing the allowance to the remaining two liquidators, when coupled with the Master's finding that the duties had not become more onerous as was feared at the earlier period. Though the sum total of compensation is very considerable I think that the whole may be fairly justified when the comparison is made with what is paid in other countries for like services. I notice that even in Scotland, where the national reputation is not towards financial extravagance, the Judges do not regard with disfavour an allowance of two and a-half per cent. on the total of "ingatherings:" *Assets Co.* v. *Guild*, 23 Scotch L. R. 170 (1885), where the gross amount of the estate was £312,000.

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Even with the present extra allowance I keep well within this limit as the total cost of the liquidators' services.

I note that the large bulk of the compensation was paid out or deducted in this case at a comparatively early stage of the liquidation. I should deprecate that as a general precedent to be followed. As far as possible the amount should be evenly spread over the whole period, which will ensure vigilance and expedition at all stages of the liquidation, as well as a proper distribution among the liquidators, where more than one. These observations are not pertinent to the present case, because all here has been well and promptly done.

Adverting, by way of note, to what I said about the rate of compensation elsewhere, I may refer to *The matter of Bassford*, 13 Daly 22 (1884), which shews that the rate allowed to assignees for the benefit of creditors is a commission of five per cent. upon the whole sum which shall come into their hands, and this was extended to cases where the funds had been only constructively received as the adjusted matters in this liquidation. That rate is fixed by the New York statutes. Again, in Ohio the rate is six per cent. on the first $1,000, four per cent. up to $5,000, and all above that two per cent: Burrill on Assignments, 5th ed., p. 671, where further figures and information may be found. In Scotland the usual rate in bankruptcy is five per cent. but the Judges have said that is excessive in cases of large estates. In England the rate is at a *per diem* allowance, and is much higher than should be allowed here, especially where three liquidators are necessary by statute.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

GRAY ET AL. V. RICHMOND ET AL.

Will—Devise—Direction to devisee to pay legacies—Charge on land—Registration of will—Notice—Priority of legatees over mortgagees—R. S. O. ch. 110, secs. 8, 22.

A testator by his will devised land to his son James, subject to the payment of an annuity to his widow for her life, after the expiration of a lease given by the testator ; and directed his executors to apply the rent derived from the land so devised in payment of an incumbrance thereon, "so that my son may have the said property, at the expiration of the said lease, free from all incumbrance ;" and he then directed that his son James should pay one-half of the sums thereinafter bequeathed to each of his daughters, as soon as his son Daniel should attain the age of twenty-one ; and to the latter he devised other land, and directed him also to pay one-half of the bequests to the daughters. Then followed the bequests to his daughters, with names and amounts, to be paid to them in equal shares by his sons James and Daniel on the latter attaining the age of twenty-one. The will was entirely silent as to the debts of the testator.

James adopted the devise to him, took possession of the land, and dealt with it as his property for many years :—

Held, that the one-half of the legacies to the daughters was charged upon the land devised to James :—

Robson v. *Jardine*, 22 Gr. 424, followed.

The will was duly registered prior to the dates or registry of certain mortgages created by James upon the land devised to him :—

Held, that the mortgagees must be taken to have had, at the time of advancing these moneys, full notice of the will and its contents ; and were bound to see to the application of the moneys advanced by them ; and that, not having done so, the legatees were entitled to priority :—

Held, also, that that part of section 22 of R. S. O. ch. 110 which provides that the four preceding sections "shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies," is of general application, and applies to wills coming into operation as well after as before the 18th September, 1865 :—

Held, lastly, that section 8 of R. S. O. ch. 110, (sec. 15 of R. S. O. ch. 102), did not apply ; because the money was not money payable upon an express or implied trust, or for a limited purpose, within the meaning of the section :—

McMillan v. *McMillan*, 21 Gr. 594, and *Moore* v. *Mellish*, 3 O. R. 174, distinguished.

Statement. THIS action was tried before FERGUSON, J., at Chatham, on the 24th May, 1892.

Atkinson, Q. C., for the plaintiffs.

The defendant James Richmond had a defence upon the record, but was not represented by counsel.

Pegley, Q. C., and *Matthew Wilson*, Q. C., for the other defendants, mortgagees.

The facts are fully stated in the judgment.

May 28, 1892. FERGUSON, J. :—

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Ferguson, J.

The plaintiffs are legatees claiming that their legacies are charged on the lands. Their claim is that one-half of each of the legacies is charged upon the land devised to the defendant James Richmond. (One of the plaintiffs is administrator of the estate of one of the legatees).

The defendant James Richmond adopted the devise to him, took possession of the land, and has been dealing with it as his property for many years. He admits personal liability for the share of the legacies, which share seems in all to amount to about $500, but he denies that there is any charge of the legacies upon the land.

The other defendants are mortgagees of the land. They deny that there is any charge of legacies on the land; and (2) they say that even if the legacies are charged on the land, they hold their securities not subject to any such charge.

The plaintiffs ask that it be declared that the one-half of each of the five legacies is charged upon this land in priority of the claims of the defendants, or any of them; that they be paid the same with interest; that in default of such payment the lands be sold, etc.; and that the defendant James Richmond be ordered to pay any deficiency there may be. They also ask an order for costs.

The will is the will of the late Daniel Richmond, and bears date the 28th day of August, 1882. The testator died on or about the 3rd day of September, 1882. The will was duly registered on the 6th day of October, 1882, long prior to the dates or registry of any of the mortgages under which the defendants, other than the defendant James Richmond, claim; and the plaintiffs say and charge that these defendants, and the mortgagees through whom they or some of them claim (for some of them are the assignees of mortgages) had notice of these legacies, and of their being charged on the land at the times respectively of their taking their interests as mortgagees and advancing their money.

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Ferguson, J.

In order to understand the matters in contention, it appears necessary and convenient to set forth two clauses of the will. They are as follows: "I will, give, and devise to my son James Richmond, of the township of Dover East, aforesaid, lot number twelve on the west side of Baldoon street in the township of Dover East, in the county of Kent, subject to the payment to my wife Joanna Richmond of the sum of forty dollars, each and every year of her life after the expiration of the lease which has been given by me of the said lot. And I hereby direct my executors, hereinafter mentioned, to apply the rent derived from the said lot in payment of an incumbrance of two hundred dollars on the same, so that my son may have the said property at the expiration of the said lease free from all incumbrance; and I direct that my said son James Richmond do pay one-half of the sums hereinafter bequeathed to each of my said daughters as soon as my son Daniel Richmond attains the age of twenty-one years."

"I give and devise unto my said son James Richmond lot number eleven on the west side of Baldoon street, in the township of Dover East, in the county of Kent, to have and to hold until my son Daniel attains the age of twenty-one years, and then to my said son Daniel absolutely. And I direct that my said son James Richmond do support, maintain, and educate my said son Daniel, and do also support and maintain my said wife Joanna Richmond, until my said son Daniel reaches the age of twenty-one years. And I further direct that the said Daniel Richmond, after he has attained his majority, do maintain and support my said wife during the remainder of her life, and shall also on reaching twenty-one years pay to each of my daughters one-half of the bequests hereinafter made to them."

Then follow bequests to the testator's daughters: one of $40 to a daughter living in the United States, who is not a party to this action, and others of $200 to each of five daughters of the testator "*to be paid to them in equal*

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shares" by his sons James Richmond and Daniel Richmond, "*on the latter attaining the age of twenty-one*, as aforesaid," directing that the moneys be paid to each of his daughters as her separate estate.

There is no question here as to lot number eleven, or the position of Daniel Richmond, to whom the same was devised. The legacies to the daughters of the testator were made payable when he attained twenty-one years of age, and that period has arrived.

Lot number twelve was devised to the defendant James Richmond subject to the payment to the testator's widow of forty dollars a year during her life.

The testator provided in the way stated in the will for the payment of the mortgage for the sum of two hundred dollars which existed upon this lot twelve, and added: "so that my son may have the said property at the expiration of the said lease free from all incumbrance." It was contended that this shewed that it was not the intention of the testator that the lot (twelve) should be charged with the legacies to the testator's daughters. I do not think this contention well founded. I think the meaning was that the lot should be free from incumbrances theretofore existing upon it. I think the language used by the testator indicates this plainly enough, and that the incumbrances referred to were incumbrances apart from any that might be created by the will itself.

A question was raised as to the punctuation or separation of paragraphs in the original will, it not being in Court otherwise than by the probate. I have (as was intimated in Court that I should) seen the document in the office of the Surrogate, and, so far as I can perceive, there is no ground or room for this question or contention.

There is then the gift of this lot twelve (subject to the payment of the forty dollars a year to the widow) to the defendant James Richmond, followed immediately by a direction of the testator that he should pay the one-half of the legacies to the daughters of the testator, which legacies are mentioned and stated plainly and definitely

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on the face of the will, both as to amounts and time of payment.

The will seems to be entirely silent as to debts of the testator. There is no charge as to debts (scheduled or otherwise). An effort was made to shew that there were, in fact, some debts. So far as was made to appear, if there were in fact any debts, they must have been very trifling indeed, and the evidence was as to them very indefinite—I may say, shadowy. I think the matter of debts of the testator may be left out of the case, even if their existence, (they not being charged on the land) would make any difference in the consideration of the questions between the parties.

In the case *Robson* v. *Jardine*, 22 Gr. 420, the learned Judge, after having reviewed a very large number of cases and authorities, says (p. 424): "I think the cases warrant the conclusion that, where a testator gives real estate to one, whom he directs to pay a legatee named in the will a sum of money, and the devisee accepts the devise, he takes the premises on the condition that he pays the legatee; and the land is in his hands subject to this burden, and liable for the fulfilment of the obligation. In this manner the legatee obtains a charge on the realty claimed by the devisee, which the legatee can enforce in this Court."

In the present will the legatees are all named, and the legacies are mentioned in the plain and definite manner before mentioned.

There are differences of fact between *Robson* v. *Jardine* and the present case, but none that I think can affect this question. Besides, the learned Judge stated his proposition clearly, plainly, and in general terms. I cannot but think the case a clear authority for saying that the one-half of the legacies to the testator's daughters, given by the will, are charged upon this lot number twelve, the devisee having accepted the devise, taken possession of it under the will, and dealt with the land as before stated.

The devisee, the defendant James Richmond, admits his personal liability to pay his one-half of these legacies, so that I need not discuss the subject.

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Ferguson, J.

Assuming, then, that the one-half of these legacies are charged upon this lot number twelve, and that there is no charge of debts, there is nothing whatever charged on the land but the payment of specified sums, sums clearly specified, as I have already said, by the will, and the principle to be applied is, as I think, that stated by the Master of the Rolls in the case *Storry* v. *Walsh*, in 18 Beav. 568, referred to at some length in the case *Moore* v. *Mellish*, 3 O. R. at p. 179. To see to the application of the money was a thing that a purchaser or mortgagee might easily do. There was nothing in his way in the nature of an unlimited trust or duty to be performed by another person. Everything about the matter was plain and definite. In this respect the case is entirely different from *Moore* v. *Mellish*, and from *McMillan* v. *McMillan*, 21 Gr. 594, relied on by the defendants. The defendants, and those through whom some of them claim as assignees, must be taken to have had, at the time of advancing their money, full notice of the will and of its contents. In such circumstances the defendants were, as I think the authorities shew, bound to see to the application of the purchase money, or rather the mortgage moneys they advanced; and this they did not do.

No remedy against the mortgagees is sought beyond the enforcement by the legatees of their charge on the land. This charge being of the definite character I have before stated, and one that the mortgagees were bound to notice, the plaintiffs might well, I think, say to them that they, the plaintiffs, had a claim upon these lands, which was registered at the time the mortgages respectively, under which the defendants claim, were made and the moneys advanced; and that such claim should have priority over the mortgages, though the effect would or might be different if the claim were not of such a definite kind, and involving an undefined and unlimited duty or trust such as would exist if the charge were for the payment of debts generally—unscheduled.

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Ferguson, J.

Then as to the statutes relied on by the defendants, sections 18, 19, 20, 21, and 22 of ch. 110, and sec. 8 of the same chapter, R. S. O. These are, I think, the same as the sections in force at the time of the earliest of the transactions. A part of section 22, speaking of the preceding four sections, says: "And the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies." It was contended that this passage applies only to the cases of wills coming into operation before the date mentioned in the earlier part of the section, the 18th day of September, 1865. I am not of this opinion. I think the passage of general application, and that it applies to the present case, in which the estate is so devised. The remaining section is section 8, which is the same as section 15 of chapter 102; and I am of the opinion that this section does not apply to this case, because I cannot see that the money was money payable upon an express or implied trust, or for a limited purpose within the meaning of the section.

It is true that in *McMillan* v. *McMillan* the learned Judge referred to the section then in force. A reference is also, in a way, made to it in *Moore* v. *Mellish*. In neither case, however, was it necessary to the decision to make any such a reference; and, besides, in both those cases the devisees were also the executor and executrix, respectively.

On the whole case, I am of the opinion that the plaintiffs should succeed.

There will be a declaration that the plaintiffs' legacies—that is, the one-half thereof respectively—are charged upon the land, lot number twelve, and that the plaintiffs are entitled to be paid the same in priority to the defendant mortgagees upon the same land.

A reference to the Master to take an account of the respective sums due the respective legatees in respect of their respective legacies so charged upon these lands, and to tax the costs up to and inclusive of the trial and judgment.

Judgment.

Ferguson, J.

An order upon the defendant James Richmond to pay the amounts to be ascertained by the Master in respect of such legacies and costs, together with subsequent costs up to the report of the Master, within one month from the date of the report.

In default of such payment, order that the lands be sold and the proceeds applied, so far as may be necessary, in payment of the plaintiffs' claims and costs in priority of the claims of the defendant mortgagees. Reference to the Master at Chatham.

Further directions and subsequent costs are reserved.

The plaintiffs are also, I think, entitled to a personal order upon all the defendants for the payment of the plaintiffs' costs up to and inclusive of the trial and judgment.

Appoint Charles R. Atkinson, Esq., a solicitor of this Court, to receive the half share of the legacy given to the absent legatee, not a party, he undertaking to properly apply and pay over the same, the amount being small, only about twenty dollars.

I do not know that this embraces all, but from the foregoing a proper judgment in apt words can be framed.

[QUEEN'S BENCH DIVISION.]

LANE V. THE DUNGANNON AGRICULTURAL DRIVING PARK ASSOCIATION.

Equitable assignment—Order for payment of money—Evidence of intention.

The contractor for the erection of a building for the defendants during its progress gave to various persons orders upon the defendants for sums due them by him, in the following form :—" Dungannon, September 12, 1890. To the directors of the Dungannon Driving Park Association. Please pay to D. M. the sum of $——, and oblige (signed) T. F. H., contractor" :—

Held, per STREET, J., that these orders were not in themselves good equitable assignments of portions of the fund in the hands of the defendants.

Hall v. *Prittie*, 17 A. R. 306, followed.

The evidence, however, shewed that there was only one fund out of which the directors could be expected to pay the orders ; that the nature of that fund and its origin were well known to all the parties ; that when the contractor promised the persons with whom he dealt orders upon the directors, he meant to give, and these persons expected to get, orders which were to be paid out of the contract price ; and that the directors understood the orders as intended to deal with portions of the contract price, and to be payable only out of that particular fund.

Held, per STREET, J., that the Court should look to the real intention of all the parties to the transaction, and give effect to it by declaring that the contractor did make an equitable assignment to each of the orderholders of a portion of the fund.

ARMOUR, C. J., agreed in the result.

Statement. THIS was an appeal from an order of GALT, C. J., in Chambers, declaring certain persons entitled to share in a fund in Court as being equitable assignees of it.

The circumstances appearing in the affidavits and exhibits filed were as follows :

One Thomas F. Henderson contracted to erect a building for the defendants, and during its progress gave to various persons orders upon the defendants for sums due them by him. The order first in point of time was given to David McDonald, and was in the following words :—

" Dungannon, Sept. 12th, 1890. To the directors of the Dungannon Driving Park Association. Please pay to David McDonald $148 and oblige,

(Sgd.) T. F. HENDERSON,
Contractor."

Statement.

Upon the same day the directors of the defendants' company, having received the order, passed a resolution in the following words:

"Sept. 12th, 1890. Whereas Mr. T. F. Henderson, contractor, has sent an order to the company for $148, for material delivered by David McDonald. The board of directors of the Dungannon Agricultural Driving Park Association accept this order on condition that Mr. Henderson fulfil his contract in accordance with his original contract or agreement with this company."

On 30th September, 1890, Mr. F. Smith presented an order, in precisely the same terms, for $382.89, and on 3rd October, 1890, the board resolved "That the order of F. Smith for $382.89 be accepted on condition that the contractor T. F. Henderson complete his work according to the original agreement with the company."

On the same day a copy of this resolution was enclosed to Mr. Smith by the secretary.

Many other orders were presented to the company drawn in precisely the same form and signed by Henderson, and on 13th November, 1890, the directors resolved as follows:— "Whereas T. F. Henderson has given so many orders on the company: that the orders be accepted according to date by this board up to the amount of about $1,100, on the condition that T. F. Henderson complete his contract according to agreement."

On 20th November, 1890, the secretary of the defendants' company wrote to Mr. F. Smith as follows: "The Agricultural Hall here is nearly completed. The directors are ready now to pay, but of course did not agree to pay Mr. Henderson until the work is complete. I am in a position to state that your account is safe. Yours truly, W. Lane, Sec.-Treas."

On 1st January, 1891, the secretary wrote to Mr. F. Smith as follows: "Mr. Henderson did not complete the Agricultural Hall according to contract, but has done all he is going to do. We have therefore been obliged to take possession and have had the damages estimated by two men at $56.12.

Statement.

This will leave in our hands $956.88 to be divided. We have already notice of more claims than enough to absorb this and we cannot therefore pay in full. We are, however, willing to pay to those entitled every cent in our hands. We would advise the creditors claiming the money to meet here on Saturday the 10th January, 1891, at the hall, at 10 o'clock a.m., and try to adjust the matter without law expenses. We will hold the money meantime (Sgd.) W. Lane, Sec."

A meeting was thereupon held, and twelve of the persons holding orders upon the defendants agreed with one another in writing to a *pro ratâ* distribution amongst the holders of orders of the fund ($956.88) in the hands of the defendants. Amongst the persons who so agreed were D. McDonald and F. Smith. The order-holders who did not sign the paper were Tyler & Powell, D. C. Taylor, and John Lockhart.

On the 6th January, 1891, T. F. Henderson made an assignment for the general benefit of creditors to D. C. Taylor, and on the 15th January, 1891, Taylor as assignee began an action in this Division against the defendants, the Dungannon Agricultural, etc., Association, to recover the $956.88.

On the 24th January, 1891, at a meeting of the creditors of Henderson, Taylor was removed from his office of assignee, and William Lane was substituted for him.

On 16th February, 1891, an order was made by the local Judge of the High Court at Goderich that the action begun by Taylor should be carried on by Lane as assignee.

On 23rd February, 1891, Paul Powell, D. C. Taylor, and Wm. Taylor, creditors of Henderson, moved in the Chancery Division, upon notice to Lane, in a proceeding styled in that Division, in the matter of the Act respecting Assignments, etc., and in the matter of the assignment executed by Henderson, for an order allowing them to proceed against the Dungannon Agricultural, etc., Association, in the name of Lane, but for their own benefit, to recover the $956.88; and, through a mistake on the part of Lane, the motion was unopposed and the order was made.

Statement.

On 9th March, 1891, the defendants, the Dungannon Agricultural Association, obtained leave in the action of *Lane* v. *Dungannon* to pay into Court to the credit of the action the $956.88, less their costs taxed at $38.04, and that upon such payment the action as against them should be stayed; and they at once paid into Court the $918.84.

On 23rd March, 1891, an application was made in the Chancery Division, in the matter of the Act and of Henderson's assignment above mentioned, to set aside the order of 23rd February, 1891, and it was thereupon ordered that, upon giving notice to the two classes of creditors of Henderson's estate, those claiming to be secured by the orders above mentioned, and those not so secured, Lane should be at liberty to apply to a Judge in Chambers for an order for the payment out to him as assignee of the money in Court; and that the costs of the action, and of the application for the order of 23rd February, 1891, and for the present order, be disposed of upon the motion to be made.

Thereupon an application was made to GALT, C. J., sitting in Chambers, by Lane as assignee, for an order for the payment out of the money in Court to him, in order that the same might be distributed equally amongst all the creditors of Henderson.

The learned Chief Justice after stating the facts gave judgment as follows:—

May 8, 1891. GALT, C. J.:—

The question now before me is whether these orders are to be treated as bills of exchange, or whether they are equitable assignments of Henderson's claim against the association.

It appears to me that this case differs essentially from the case of *Hall* v. *Prittie*, 17 A. R. 306. In that case a similar order to these was given by the contractor addressed to the defendant, but the defendant never accepted the said order in writing, nor was there any clear evidence that there had ever been any oral acceptance or promise to pay.

In the present case there was an undoubted acceptance in writing, and also an undertaking to pay when Henderson's contract was completed.

It also differs materially from the case of *Brown* v. *Johnston*, 12 A. R. 190, for in that case, at the time when the order was given, the drawer had no money in the hands of the person to whom the order was directed, nor was the order ever accepted, but, on the contrary, after the transaction had been completed the defendants were forbidden by the drawer to accept or pay the order.

The case of *Lett* v. *Morris*, 4 Sim. 607, appears to me in point in favour of the holders of the orders; and in the present case the evidence is stronger in favour of the order-holders than it was in that case, because there the person to whom the order was given never in writing accepted the order, but he paid to the holder of the order certain moneys which from time to time were payable to him under the order.

In my opinion, therefore, these orders amount to an equitable assignment by Henderson, and the holders of these orders are entitled to priority of payment according to the dates of their respective orders.

Costs of the application will be paid out of the money.

From this judgment Messrs. D. C. Taylor, Taylor & Powell, and W. Laidlaw, creditors whose claims would be cut out by it, appealed to the Divisional Court, and their motion was argued at the Easter Sittings on 21st May, 1891, before Armour, C. J., and Street, J.

W. H. Blake, for the appellants. It is to be noted that the acceptance relied on is restricted and that there is no specification of a fund out of which the orders are payable. A bill of exchange cannot by acceptance become an equitable assignment. The drawer here never signified his assent to the change in the conditions of acceptance made by the drawees. These are in fact unaccepted bills of exchange and have no validity as such. The condition of acceptance has not been, and never can be, fulfilled. I refer to *Hall* v. *Prittie*, 17 A. R. 306; *Lamb* v. *Sutherland*, 37 U. C. R. 143; *Percival* v. *Dunn*, 29 Ch. D. 128; *In re Farrell*, 10 Ir. Ch. R. 304; *Lett* v. *Morris*, 4 Sim. 607; *Shand* v. *DuBuisson*, L. R. 18 Eq. 283; *Hopkinson* v. *Forster*, L. R. 19 Eq. 74; 53 Vic. ch. 33, secs. 3, 10 (*b*), 17, 23 (the Canadian Bills of Exchange Act). **Argument.**

Garrow, Q.C., for the order-holders taking under the decision appealed against. If there is not enough material before the Court to shew that these are equitable assignments, I ask that an issue may be directed in order to shew by parol evidence what the parties were dealing with, and if necessary to reform the orders. Five-sixths of these order-holders had liens which they gave up for these orders. These are not bills of exchange: see definition of bill of exchange in sec. 3 of 53 Vic. ch. 33 (D.). They are orders for payment of money out of a fund. I refer to *Mitchell* v. *Goodall*, 44 U. C. R. 398; 5 A. R. 164; *Gibson* v. *Minet*, R. & Moo. 68; *Noble* v. *National Discount Co.*, 5 H. & N. 225; *Walker* v. *Rostron*, 9 M. & W. 411; *Hodgson* v. *Anderson*, 3 B. & C. 842; *Crowfoot* v. *Gurney*, 9 Bing. 372; *Buck* v. *Robson*, 3 Q. B. D. 686; *Brice* v. *Bannister*, *ib.* 569. The form of order is of no consequence: *In re Pryce*, 4 Ch. D. 685. An equitable assignment must earmark the fund, but it may be by parol, and I undertake to make out that case if necessary: *Tibbits* v. *George*, 5 A. & E. 107; *Re Irving*, 7 Ch D. 419.

Hoyles, Q. C., for the plaintiff.

June 19, 1891. THE COURT directed that further evidence should be taken *vivâ voce* before FALCONBRIDGE, J. at the Goderich Autumn Sittings, 1891, and be brought before the Court, which would then dispose of the motion.

Evidence was accordingly taken before FALCONBRIDGE, J., at Goderich, the result of which is stated in the judgment of STREET, J

Judgment.

Galt, C.J.

Instead of having the appeal re-argued, it was agreed that counsel should submit memoranda of their contentions; and the following additional authorities were in that way referred to by counsel:—

Rodick v. *Gandell*, 1 DeG. M.& G. 765, at pp. 777-8; *Armstrong* v. *Farr*, 11 A. R. 186; *Robertson* v. *Grant*, 3 Ch. Chamb. R. 331; *Gurnell* v. *Gardner*, 9 Jur. N. S. 1220, at p. 1222; Wharton's Law Lexicon, 9th ed., p. 89.

February 27, 1892. STREET, J.:—

Besides the assignee, William Lane, three classes of persons are represented upon this motion:

1st. Creditors holding orders on the Agricultural Association whose claims would be paid under the judgment appealed against.

These creditors appear upon this motion to support the judgment.

2nd. Creditors holding orders whose claims would not be paid, because the fund would be exhausted before they were reached.

3rd. Creditors holding no orders and being simple creditors of Henderson, without any special claim to the fund.

These last two classes are the appellants upon the present motion.

There is nothing whatever out of which the debts of Henderson can be paid excepting the fund that is in Court, that being the only asset.

There is nothing in the evidence which enables us to find any contract between Henderson and the persons to whom the orders were given, other than that which is shewn upon the face of the orders—the affidavit of Smith only shews that he was not willing to supply him with material until he first got an order upon the defendants; but he did get an order and the order is produced, and his affidavit does not shew that he stipulated for an order in a form other than that which he obtained. We are, therefore, obliged for the purposes of the motion to look upon

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Street, J.

the orders themselves as governing the rights of the parties. The resolutions and letters of the defendants were referred to as strengthening the rights of the holders of the orders to be treated as equitable assignees of the fund. As a matter of fact, if admissible for the purpose, I do not see that they in any way do strengthen their position; but I do not see how they can be referred to. The question is whether Henderson has made to these creditors equitable assignments of portions of the fund in the hands of the defendants. Unless the written orders shew an intention to make such assignments, we must assume for the purposes of the present motion that he did not intend to do so. Then, if he did not intend to do so, how can anything which the defendants may have said or done, convert into an equitable assignment of Henderson's property something which he did not intend to have that operation? The question, therefore, is whether these orders operate as equitable assignments, and I am obliged, with great deference to the learned Chief Justice whose judgment is appealed against, to come to the conclusion that orders in the form of those given by Henderson here do not constitute equitable assignments, whatever may have been the intention of the party who gave and the parties who received them. They are simply orders for the payment of money, no fund being referred to out of which they are to be paid, and are directly, it appears to me, within the authority of *Hall* v. *Prittie*, 17 A. R. 306, in which the leading authorities are collected or referred to. See also *Percival* v. *Dunn*, 29 Ch. D. 128.

If, therefore, the decision of this question had rested upon the evidence before the learned Chief Justice of the Common Pleas, I think we should have been obliged to allow the appeal. At the request, however, of the counsel for the respondents, we have allowed evidence to be given before Mr. Justice Falconbridge, at the last Goderich Assizes on behalf of any of the parties who desired to shew that the state of facts in evidence upon which the appeal was brought did not fully shew the position of the parties.

Judgment.

treet, J.

The evidence taken before my brother Falconbridge at Goderich leaves no doubt whatever as to the intention of Henderson in giving, and of the several claimants in taking, the orders here in question. There was only one fund out of which the directors could possibly be expected to pay the orders; the nature of that fund and its origin were well known to all the parties; and when Henderson promised the persons with whom he dealt orders upon the directors, it is clear that he meant to give, and that the claimants expected to get, orders which were to be paid out of the contract price of the building which he was putting up for them. Not only this, but it is equally plain that the directors understood the orders as intended to deal with portions of the contract price and to be payable only out of that particular fund. Under these circumstances, I think we are at liberty to open our eyes to what the real intention of all the parties to the transaction was, and to give effect to it by declaring that Henderson did make an equitable assignment to each of the claimants of a portion equal to the amount of the written order given him of a portion of the fund in question, and that the fund should be distributed upon that footing.

The disposition of the costs remains to be considered.

In the order of 23rd March, 1891, certain costs were reserved which do not appear to have been disposed of by the judgment appealed against: these are the costs of the action of *Lane* v. *Dungannon*, and of the motions in the Chancery Division on the 23rd February and 23rd March, respectively.

With regard to the costs of the action, the defendants have been discharged from any liability to the plaintiff for them by the order of 9th March, 1891, and the plaintiff should be entitled to have his costs paid to him out of the money in Court.

The motion of 23rd February was founded upon material which was insufficient under the statute ch. 124, R. S. O., sec. 7, sub-sec. 2, inasmuch as it did not shew and it was not the fact that the assignee had refused or neglected, under the authority of the creditors or otherwise, to proceed with the action of *Lane* v. *Dungannon*. The assignee, however, did not appear upon the motion by reason of the miscarriage of some papers; the order, therefore, went by default; and it became necessary that the order of 23rd March should be made correcting that of 23rd February, and providing for the present application. I think, under these circumstances, that there should be no costs of the order of 23rd February, and that the assignee should have his costs of the order of 23rd March out of the money in Court.

The present appellants should pay the costs of the motion before Sir Thomas Galt, C.J., and of the appeal.

ARMOUR, C. J.:—

Agreed in the result.

[CHANCERY DIVISION.]

BANNAN v. THE CORPORATION OF THE CITY OF TORONTO.

Municipal corporations—Victualling houses—By-law to forfeit license invalid—R. S. O. c. 184, s. 285.

The power given to municipal corporations under s. 285 of R. S. O. c. 184, "to determine the time during which victualling licenses shall be in force" does not confer any power to forfeit such licenses, but merely to fix the duration of the license.

The power to create a forfeiture of property is one which must be expressly given to a corporation by the legislature, and such an extraordinary power is least of all to be inferred where the legislature has provided other means of enforcing by-laws by means of fine and amerciament, as in this case.

Statement. THE plaintiff in this case, John Bannan, was a victualling house keeper in Toronto, and the transferee of a license to one Hame, issued on January 14th, 1892.

On March 18th, 1892, Robert Awde, Inspector of Licenses for the city of Toronto, notified the plaintiff that his license had been cancelled by reason of his conviction under section 50 of the "Liquor License Act," R. S. O. c. 194, and according to the license regulations contained in section 19 of By-law 2453 of the city.

Section 19 of By-law 2453 was as follows:—

"In case any person who has taken out a license to keep an intelligence office, a victualling house, a bowling alley, a billiard table, a roller skating rink, a rifle or shooting gallery, or a cigar and tobacco store, under this by-law, is convicted of a breach of any of the provisions of the same, or shall be convicted of a breach of any of the provisions of the by-laws regarding tavern and shop licenses of the License Commissioners of the city, or of any of the provisions of the Liquor License Act, such person upon conviction as aforesaid in addition to the penalty imposed for the infraction thereof, shall absolutely forfeit his license for the remainder of the current year, and the general Inspector of Licenses shall duly notify the party whose license is so forfeited, and the chief constable of the city of such forfeiture."

Statement.

The plaintiff now brought this action against the corporation, claiming to have it declared that so much of section 19 of By-law 2453, as provides for the forfeiture of licenses of persons who have taken out licenses for victualling houses be declared to be *ultra vires* of the defendant corporation; that in any event he, being a transferee of the license and not the person who had taken out the same, could not incur the forfeiture declared in said section 19; and that the defendants should be restrained from enforcing their said cancellation of his license.

The action came on for trial at Toronto before BOYD, C., on April 23rd, 1892.

DuVernet, for the plaintiff. Even if section 19 of the by-law is valid, it would not apply to a transferee of the original license: *Re Dunlop*, 12 C. L. T. 168. But it was *ultra vires*. The municipality have added to the provisions of the Act: *Kirk* v. *Nowill*, 1 T. R. 118; *McKenzie* v. *Campbell*, 1 U. C. R. 241; *Smith* v. *Riordan*, 5 O. R. 647; *Re Smith and the City of Toronto*, 10 C. P. 225; *Re Bright and the City of Toronto*, 12 C. P. 433; *Heise* v. *Town Council of Columbia*, 6 Rich. (S. Car.) 404. There should be judicial investigation to justify forfeiture: Stone's Justices' Man., 26th ed., p. 465.

Mowat, for the defendants. The action is improper; the by-law has not been quashed; *Smith* v. *The Corporation of the City of Toronto*, 11 C. P. 200. The police are the only persons moving, not the city: Dillon on Munic. Corp., 4th ed., vol. 2, sec. 975; *Forsyth* v. *Canniff and the City of Toronto*, 20 O. R. 478; Woods' Master and Servant, 2nd ed., p. 916. The by-law is not bad on its face. *Re Smith* was not a case under the present Act. The transfer of license was given provisionally, as was the original license.

Du Vernet, in reply, cited *Hurber* v. *Baugh*, 43 Iowa 514; R. S. O. c. 184, sec. 285; *Alexander* v. *The Corporation of the Township of Howard*, 14 O. R. 22; *Malott* v. *Corporation of Mersea*, 9 O. R. 611; *Rose* v. *Township of Wawanosh*, 19 O. R. 294; *Connor* v. *Middagh*, 16 A. R. 356.

Judgment.

Boyd, C.

April 27th, 1892. BOYD, C.:—

Under the Municipal Act the City Council has power to pass by-laws for limiting the number of and regulating victualling houses, ordinaries, and houses where fruit, oysters, clams or victuals are sold to be eaten therein * *, and for licensing the same when no other provision exists therefor, and for fixing the rates of such licenses, not exceeding $20 (R. S. O. c. 184, sec. 489, ss. 7, 8). Section 285 of the same Act provides as an incident of licensing such a calling that the by-law may "determine the time [during which] the license shall be in force."

By sec. 479, sub-secs. 17, 18 and 19, of the same Act, power is given to inflict reasonable fines and penalties for breach of any of the by-laws of the corporation to be collected by distress and sale of the offender's goods, and failing payment in this way to inflict reasonable punishment by way of imprisonment.

Under the "Liquor License Act" provision is made for annulling or suspending the license of persons who are convicted of keeping disorderly houses of public entertainment: R. S. O. cap. 194, sec. 79. In the Municipal Act in the case of Intelligence offices provision is made for the passing of by-laws for limiting the duration of or revoking any license to such offices: sec. 504, s-s. 3. But no such power appears to be explicitly conferred in the case of victualling licenses *i. e.* the right to forfeit the license, unless it can be inferred from the general words in section 285, as to determining the time during which the license shall be in force. But that does not to me appear to be the obvious and ordinary meaning of these words; it is rather an expression of that inherent power which the corporation had to fix the duration of the license in point of time upon its being granted or issued. If there is unconditional power to grant a license there is power to limit it for any period which may be thought proper. The language of the statute refers rather to the term of the license fixed at its inception than to a provision for forfeiture during its currency: *Hoffman*

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Boyd, C.

v. *Bond*, 32 L. T. 775; *Kirk* v. *Nowill*, 1 T. R. at p. 124. This last case which has been universally followed, decides that the power to create a *forfeiture* of property is one which must be expressly given to a corporation by parliament, and that such an extraordinary power is least of all to be inferred when parliament has provided other means of enforcing by-laws by means of fine and amerciament.

In this case the victualling house license was issued in January, 1892, to George Hame, to be in force till Dec. 31st, 1892, and the transfer of the license to the plaintiff was sanctioned by the city in February, 1892. No doubt both license and transfer was declared to be subject to this proviso: "Provided that the person licensed shall observe, fulfil and keep all statutes, by-laws, rules and regulations respecting the same which have been passed, or which may hereafter be passed by the legislature of the province, or the council of the corporation of the city." But these words do not purport to affect the determination of the time during which the license is to be in force—that is expressed to be until December 31st, 1892.

On March 15th, 1892, the plaintiff was convicted under sec. 50 of the "Liquor License Act," R. S. O. 194, of having permitted liquor to be consumed in his victualling house by persons other than members of his family or employees or guests not being customers, and was fined $20 and costs. That is apparently the least penalty as provided by section 85 of that Act, which also provides for increased penalties for subsequent offences, but is silent as to forfeiture of the license. Nevertheless the general inspector of licenses for the city proceeded to declare the license for the plaintiff's victualling house to be cancelled, void, and of no effect on the 18th of March, and so notified the plaintiff. This action was stated to be taken pursuant to license regulation contained in By-law 2453, section 19. The material parts of that by-law provide that in case a person who has taken out a license to keep a victualling house is convicted of a breach of any of the provisions of the Liquor License Act, such person, in addition to the penalty im-

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Boyd, C.

posed for infraction thereof, shall absolutely forfeit his license for the remainder of the current year."

This then purports to impose a cumulative penalty of forfeiture, in addition to the pecuniary penalties imposed by the statute, and it is open to both the objections adjudged to be fatal in *Kirk* v. *Nowill*, 1 T. R. 118.

The general power to regulate, while it enables rules to be made for the maintenance of order and the like, does not give power to rule out, to annul or extinguish the subject of municipal supervision. That is well settled by many decisions, *Re Smith and the City of Toronto*, 10 C. P. 225; *In re Bright and the City of Toronto*, 12 C. P. 433; *Ward* v. *Folkestone Waterworks Co.*, 24 Q. B. D. 334, and *Sharp* v. *Wakefield*, (1891), A. C. 182, per Lord Bramwell. The American case of *Heise* v. *Town Council of Columbia*, 6 Rich (S. Car.) 404, is well decided on the principles of English law, and is referred to as of authority in the last edition of Dillon's Mun. Corp., 4th ed., vol. i., sec. 346. *Hurber* v. *Baugh*, 43 Iowa 514, is easily distinguishable; for there legislative authority had been conferred upon the municipality to enforce its ordinances "by fine, penalty and forfeiture." Dillon does not mention that *Heise* v. *Town Council of Columbia* was followed (in a later case than the Iowa decision) in *Staates* v. *Borough of Washington*, 44 New J. 605, 612 (1882). See also *Staates* v. *Borough of Washington*, 45 New J. 318.

I notice that the bond taken from the plaintiff when the city approved of the transfer of license to him, has this condition that the plaintiff shall so long as the license remains in force and unforfeited, keep good order and rule in his house, and not suffer or allow any gambling or other disorderly practice therein. This points to the 79th section of the "Liquor License Act" (R. S. O. c. 194), and probably exhausts the ground upon which a forfeiture could proceed. But the plaintiff was not convicted under that section, nor does the evidence disclose any grave personal malpractice on his part, which should in reason work a revocation of his license.

Judgment.

Boyd, C.

The action of the city authorities declaring a forfeiture should be annulled, and the by-law on which it proceeds should so far as it relates to victualling houses be declared *ultra vires*. No preliminaries (as to notice or quashing) are needed when the by-law is on its face invalid, and the relief sought is to restrain action being taken thereon by the municipality which is injurious to the party asking the intervention of the Court. The plaintiff should get his costs subsequent to the statement of claim, following *Holt* v. *The Corporation of Medonte* (a). It is right in these cases, when the municipality acts through its officers, that the cause of complaint should be fairly brought to the notice of the corporation that they may "approbate or reprobate." If when the matter is thus presented, defence is made, the result should be from that time as in the case of ordinary litigants.

This will cover costs of the contested injunction motion.

A. H. F. L.

[CHANCERY DIVISION.]

REGINA EX REL. CHICK V. SMITH.

Municipal corporations—Town councillor—Qualification—Quo warranto—Alienation—Cesser of term of leasehold qualification before election—Acquisition of new leasehold qualification—R. S. O. ch. 184, sec. 73—51 Vict. ch. 28, sec. 9 (O.).

A town councillor, when nominated, was possessed of a sufficient leasehold qualification, the term of which, however, expired before the election; in the meanwhile he had acquired another leasehold property on which he sought to qualify :—

Held, on quo warranto proceedings, that he could do so under R. S. O. ch. 184, sec. 73, as amended by 51 Vict. ch. 28, sec. 9, since the cesser of the term of the first leasehold amounted to an alienation by operation of law within the meaning of the statute.

Statement.

THIS was an appeal from the order of His Honour, C. R. Horne, the County Judge of the County of Essex, in a *quo warranto* proceeding commenced on the relation of Thomas Chick to set aside the election of J. A. Smith, as councillor for the fifth ward of the town of Windsor.

(a.) April 16th, 1892. Noted 28 C. L. J. 379, will be reported in this volume of the Ontario Reports. REP.

Statement. The circumstances of the case, and the sections of the statutes, in question, are set out in the following judgment:

Horne, Co. J.—The relator seeks to disqualify the respondent as councillor for the 5th ward of the town of Windsor on the ground that at the time of the election he had not the necessary property qualification.

The respondent in his oath of qualification qualifies, or seeks to qualify, as tenant of the north part of lot three, part lot one, west side Windsor avenue, of the value of $1,200 and over. The property is assessed at $1,700.

The election was held on the 28th of December, 1891. That was the day of nomination, the polling being on the 4th day of January, 1892.

The roll for 1891 was finally revised on the 28th day of December, 1891.

The respondent became tenant of the property on which he seeks to qualify on the 1st day of February, 1891, so that he was not rated on the assessment roll for 1890, which was the last revised roll before the election, for the property upon which he took the oath of qualification.

The respondent contends, however, that in 1890 he was rated as tenant on the roll for that year of the west half of lot number ten, north side of Chatham street farm 81 and 82 for the sum of $2,000, and that such property was alienated by him to his landlord on the 1st day of February, 1891, and that as he was at the time of the election tenant of the property on which he seeks to qualify that he has been duly elected.

By section 73 of the Municipal Act, R. S. O. ch. 184, no person shall be qualified to be elected as mayor, alderman, reeve, deputy-reeve or councillor of any municipality unless such person resides within the municipality, or within two miles thereof, etc., and has, or whose wife has, at the time of the election as proprietor or tenant a legal or equitable freehold or leasehold, or partly legal and partly equitable, rated in his own name or in the name of his wife on the last revised assessment roll of the municipality to at least

Statement.

the value following, over and above all charges, liens, and incumbrances affecting the same:

In towns, freehold to $600, or leasehold to $1,200, etc., and so on in the same proportion.

But if within any municipality any such person is at the time of election in actual occupation of any such freehold rated in his own name or in the name of his wife, on the last revised assessment roll of the said municipality, he will be entitled to be elected if the value at which such freehold is actually rated in said assessment roll amounts to not less than $2,000, and for that purpose the said value shall not be affected or reduced by any lien, encumbrance, or charge existing or affecting such freehold.

This section was amended by 51 Vict. ch. 28, sec. 9, by adding thereto the following sub-sections:

(2) No person who has, or whose wife has, property duly rated on the last revised assessment roll sufficient to qualify him as in the last preceding sub-section required, shall be deemed to be disqualified by the alienation by sale or otherwise of the said property between the date of the return of the roll and the time of his election, provided that at the time of his election such person is resident within the municipality and has, or his wife has, as proprietor or tenant, a legal or equitable freehold or leasehold, or partly freehold or partly legal and partly equitable estate of sufficient assessed value to qualify, etc.

(3) In the case of the election of a person qualified under the preceding sub-section, the oath of office under sub-section 2 of section 270 of this Act may be taken, striking out all the words thereof after the word "occupation," in the thirteenth line of the said sub-section, and inserting in lieu thereof the following words: "And I have such an estate actually rated on the last revised assessment roll of this township (naming it), at an amount not less than $2,000."

These sections are not very clear. In sub-section 2 it refers to the last preceding sub-section. But there is not a sub-section, preceding it, unless it be the latter part of

Statement. section 73, commencing at the word "but;" and it would almost appear that the person qualifying under these subsections was limited to townships.

It appears clear that the legislature intended, where the property was assessed for anything less than $2,000, that the person qualifying for councillor for towns must have an estate of freehold to the amount of $600, or leasehold $1,200, or in the like proportion over and above all incumbrances; but where the freehold property is assessed at $2,000, and the person is in actual occupation of any such freehold, the incumbrances are not to be taken into consideration.

In sub-section 2, no person who has, or whose wife has, property duly rated, etc., as in the last preceding subsection, etc., shall be deemed to be disqualified by the alienation, by sale or otherwise, of the said property between the date of the return of the roll and the time of his election, provided that at the time of his election such person has, etc., as proprietor or tenant, a sufficient freehold or leasehold qualification.

In sub-section 3, in case of a person qualifying under the preceding section, he may take the oath mentioned in sub-section 2 of section 270, and this seems to contemplate that the person qualifying must have been in actual occupation and was actually rated at not less than $2,000.

It would appear to me that the legislature intended these sub-sections to apply to the last part of section 73, commencing at the word "but," for why should the person intending to qualify take oath as in sub-section 2, section 270, that he had such an estate actually rated on the last revised assessment roll at an amount not less than $2,000, and that he was actually in occupation thereof; for if the person were qualifying under the first part of section 73 it would not be necessary to state that he had been in actual possession.

Then if it were intended that where a person had been assessed as a tenant on the last revised assessment roll, and his term had expired between the time of the revision of

Statement.

the roll and the election, but he has at the time of the election the proper qualification, it would have been very easy to have so declared it.

Mr. Bartlet rests his case entirely on the meaning of the words "alienation or otherwise," and contends that where a person is a tenant for a term of years that, at the expiration of such term, he alienates the property to his landlord by giving up possession to him. I cannot put this construction on these words. It appears to me there would not be anything to alienate. He would not have any interest in the land. Suppose the tenant gave up possession of the property to the landlord immediately on the expiration of the time, could it be said because he could have held tortiously against the landlord that he is alienating an interest in the land? 7

It will be noticed that in the latter part of section 73 the words are "in actual occupation" of any such freehold, clearly excluding leasehold. And the qualification of the person seems to depend on the fact of his being rated, either in the name of himself or his wife, for a freehold estate assessed at not less than $2,000, and that he must have been in actual occupation.

I think that the respondent had not, at the time of the election complained of, such an estate as would qualify him for the office of councillor, and that he was not duly elected. The order will go for a new election, the relator to have his costs.

The appeal was argued on March 21st, 1892, before Boyd, C.

Hoyles, Q.C., for the defendant. The amending Act, 51 Vict. ch. 28, sec. 9, is remedial and should be liberally construed: Maxwell on Statutes, 2nd ed., p. 90; Lewin on the Law of Trusts, 8th ed., p. 102; Interpretation Act, R. S. O. ch. 1, sec. 8, sub-sec. 39.

H. S. Osler, for the relator. The amending Act is not directed to the termination of a lease. Exemption should

Argument. not be extended further than is expressly provided. There was no alienation of the leasehold here. Moreover this new section gives no relief except in case of townships.

Hoyles, in reply, referred to *Regina ex rel. Clancey*, v. *McIntosh*, 46 U. C. R. 98; *Regina ex rel. Lachford* v. *Frizell*, 9 C. L. J., N. S. 27.

March 24th, 1892.—BOYD, C.:

In Dr. Murray's Dictionary the meaning given to "*alien*" and its later equivalent, "*alienate*," is "to transfer the property or ownership of anything, to make over to another owner." And the law dictionaries say that with an appropriate context it may be by act of the party or by operation of law. See Stroud's Judicial Dictionary, *sub voce*, and *Sands* v. *The Standard Ins. Co.*, 26 Gr. 113, 118, etc. The Municipal Act in the qualification clauses R. S. O. ch. 184, at p. 1783, declares in effect that "a tenancy for a year" may form a sufficient property qualification, which of course expires by efluxion of time at the year's end. But this is one of the items of property embraced in the amending Act of 1888, 51 Vict. ch. 28, sec. 9, providing that "alienation of the property" between the return of the roll and time of the election shall not be deemed to disqualify if the person is sufficiently qualified otherwise at the time of election. The intention of the change in the law is to prevent disqualification by a change of property: in technical phrase there is no alienation when a term expires; for what is carved out of the freehold is consumed or at an end; but as to the subsequent enjoyment of the use of the property there is a transfer by the provisions of the original bargain from the leaseholder or tenant to the proprietor or owner, when the term is exhausted. I may invoke the canon of statutory construction enunciated by the Privy Council in *Salmon* v. *Duncombe*, 11 App. Cas. 627, where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draughtsman's unskilfulness or ignorance of law except in

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the case of necessity or the absolute intractability of the language used (though it may be more pertinent to the African colony of Natal than to this Province).

The leasehold upon which the defendant qualified ended before the election, but at the time of the election he had acquired another leasehold of sufficient value, upon which he asserts qualification by virtue of the amendment in 1888, to the Municipal Act already cited.

There was by operation of law "the making over to another owner" of the possession and enjoyment of that which had been before enjoyed during the term by the candidate. In popular esteem the land is itself regarded as in possession whatever be the nature of the estate, and with the cesser of the leasehold that possession was transferred by operation of law to the next holder. Such a transaction, which depends on the contract for the leasehold, may be fairly deemed to be within the purview of the legislature, and to be comprehended in the language used in the amending statute, as an "alienation of the property otherwise than by sale."

I do not feel pressed by any other difficulties suggested as to this amended clause being applicable only to rural or township municipalities; and having regard to the choice of the voters and the expenses of a new election, I give my doubts in favour of the defendant. As the point is a new one, of difficulty, and not without doubt, I give no costs, while I confirm the respondent in his seat as councillor.

A. H. F. L.

[CHANCERY DIVISION.]

SMITH V. SPEARS.

Mortgage—Power of sale—Sale by way of exchange—"Sell and absolutely dispose of."

A mortgagee with power of sale under the Short Form Mortgage Act can exercise the power by way of exchange for other land instead of, in the usual way, by sale for money. The words "absolutely dispose of" in the power are appropriate to an exchange.

Statement. THIS was an appeal by the defendant from the report of the Master-in-Ordinary, whereby he found that the plaintiff could make a good title to the lands in the pleadings in this action mentioned, which was brought by Catharine F. Smith against J. S. Spears, for specific performance of an agreement whereby the defendant, it was alleged, agreed with the plaintiff to exchange certain freehold property in Toronto for a first mortgage on certain lands in the township of Flos, in the county of Simcoe, securing $1300.

The ground of appeal, with which the judgment here reported deals, was as follows:—

1. That the plaintiff claims title through one Jonathan Palmer, to whom a conveyance of the said lands was made under and by virtue of a power of sale contained in a certain mortgage made by one Kelly to Elizabeth Lount and others, which said mortgage gave a power to the said Elizabeth Lount and others to sell the lands mentioned therein in case of default in payment of principal and interest, and the evidence shews, as the fact is, that the said Elizabeth Lount and others exchanged the said lands with the said Palmer for other lands, purporting to do so in exercise of the said power of sale, and the learned Master was in error in finding as he did, that the said power of sale was legally exercised by the making of the said exchange and that the mortgagor's equity of redemption was barred thereby and a good title made.

The other circumstances of the case sufficiently appear from the judgment.

The appeal was argued on March 24th, 1892, before Boyd, C. **Argument.**

Macdonald, for appeal. Only a sale for cash was intended by the power of sale. The Master has been wrong in holding a sale and an exchange to mean the same thing: *M'Queen* v. *Farquhar*, 11 Ves. 467. The latest case I find is *McMichael* v. *Wilkie*, 18 A. R. 464, which shews that a person acting under a power of attorney to sell, could not exchange the lands for others. Neither here could there be a direct exchange. A power of sale in a mortgage is virtually a power of attorney to sell.

[Boyd, C. It is a power coupled with an interest, not a mere power of attorney.]

Surely to read into the power to sell a power to exchange would be a very serious thing.

We are entitled to a good title and to a first mortgage on the land. As it is, Kelly can come forward and redeem. If the power was not properly exercised, our mortgage is useless; it was given by one who had no title to the land.

F. A. Eddis, for the plaintiff. We had title by possession before we sold. Any equity would be between mortgagor and mortgagee as to amount: *In re Alison, Johnson* v. *Mounsey*, 11 Ch. D. 284. I have found no case where a power of sale in a mortgage has been exercised by exchange. Moreover the mortgagee treated the property taken as cash. We claim also as an innocent purchaser: *Court* v. *Walsh*, 1 O. R. 167; *Bright* v. *McMurray*, *ib.* 172.

March 26th, 1892. Boyd, C.:—

Kelly's mortgage for $1,000 at 10 per cent., payable in five years, was given September 20th, 1876. Default being made the land was offered for sale after proper notice and advertisement in 1878, but no sufficient bid was obtained and the property was withdrawn. The mortgagees took possession after this and held undisturbed possession for over eleven years. Thereafter, in November, 1889, the mortgagees carried out an offer to purchase the lands by one

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Boyd C.

Palmer for a consideration named in the deed of $3,000. This was in alleged pursuance of the power of sale in the mortgage, and of all other powers them thereunto enabling. In January, 1890, Palmer conveyed to Sparks, and Sparks made a mortgage to Frances Hall to secure $1,300, payable in five years from January 21st, 1890. This mortgage was assigned to the said Palmer, who assigned it to the plaintiff in August, 1890.

The master has found that the plaintiff has a good title to the said mortgage, which is to be given in exchange for land to the defendant. This is appealed from on the ground that the transaction between the mortgagees and Palmer was really an exchange of the land mortgaged for other land owned by Palmer, and that the power of sale in the Kelly mortgage did not justify an exchange.

The master's ruling might, I think, be upheld in two ways, viz: Because a title was acquired by possession as against Kelly which extinguished his right of redemption. The appellant objected to the fact of possession being proved by affidavits, but if he had desired oral evidence, the plaintiff was prepared to furnish it. If there is still doubt on this point it may be referred back at the expense of the defendant to have this furnished.

But again I think in the given evidence of this case the mortgagees were justified in exercising the power of sale so as to take land instead of money in return for the mortgaged property. There is no suggestion of *mala fides;* the land was not worth the debt upon it; and as against the mortgagor I think there was a valid transaction which extinguished his equity of redemption, if it was not already gone by the operation of the Statute of Limitations. There was in effect a sale of the mortgagee's land for a price which satisfied the original mortgage debt. The growth of the law in the exposition of the scope of powers is elucidated in the judgment of Jessel, M. R., in *In re Frith and Osborne,* 3 Ch. D. 618. He there decides that a power of exchange is properly executed by a partition. He puts this on the broad ground which had been hinted at in *Abel*

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v. *Heathcote*, 2 Ves. 98, but doubted by Lord Eldon in *M'Queen* v. *Farquhar*, 11 Ves. 467. In *Abel* v. *Heathcote*, as reported in 4 Bro. C. C. 277, Eyre, L. Com., held that the word "sell" would justify a partition. In the judgment of Lord Loughborough in 2 Ves. Jr. as to the partition being effected under a power to exchange, he says at p. 100:—"If any person had been ingenious enough to think of this objection at the time of the partition, by making the trustees sell, receive the money, and buy a third of the same estate, the whole would have been within the words of the power. * * It is in effect clearly, though not literally, within the power." In a text writer that can rarely be consulted without advantage, it is said:—"It would seem that under a form of sale, a partition or an exchange can be effected indirectly. A partition by selling the estate and repurchasing with the proceeds in as many separate parts as there are persons entitled; and an exchange by selling one estate and repurchasing the other intended to be taken in exchange": Watson's Comp. of Equity, 2nd ed., vol. 2, p. 876. But the effect of Sir George Jessel's decision is that it may be done directly, which is but an easy and obvious advance, by the abolition of an immaterial formality. That which may be done *per obliquum* may surely in this age of substance as opposed to fiction be done *per directum*. There is reason for giving this flexibility of power in the case of mortgagees: the extended words of the power of sale in the Short Forms Act are "to sell and absolutely dispose of," which latter are appropriate to an exchange. See *In re Frith and Osborne*, 3 Ch. D. at p. 64, and the mortgagee has not a mere power, but that and much more. It may well be that the holder of a power of attorney to sell could not amplify that into a power to exchange: such an agent is to get money for his principal: but if a mortgagee is satisfied to take for payment of his debt the price of the land sold in money's worth or in other land, that is his own affair. So that in the result I think the law is in this case brought back to the point enunciated by Eyre

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L. Com., though that opinion was not favoured by Lord Eldon.

The matter, however, is placed beyond peradventure by the extinction of the right to redeem by the possession of the mortgagees under sec. 19 of R. S. O. ch. 111, and *In re Alison, Johnson* v. *Mounsey*, 11 Ch. D. 284. I see no merit, apart from this, in the contention, because if there is a right of redemption in Kelly he could only get the land upon payment of a much larger amount than is represented by the $1,300 mortgage.

Subject to the right of the appellant to ask *vivâ voce* evidence of possession, which he may have on payment of costs of this appeal, I think a good title is now manifested. If the further evidence corroborates the affidavit, I think the further costs should be borne by the appellant.

A. H. F. L.

[COMMON PLEAS DIVISION.]

MASURET V. STEWART AND LAMPMAN.

Fraudulent conveyance—Colourable sale of goods—Following money in hands of nominal purchaser—Direction to pay proceeds into Court—Execution.

Where moneys arising from a feigned sale of goods, fraudulent and void as against creditors, were, at the time of the commencement of the action by a creditor to set the same aside, in the hands of the nominal purchaser, one of the defendants and a party to the transaction, he was ordered to pay the moneys into Court for distribution among the creditors of the insolvent, and in default of payment by him, it was ordered that execution should issue for the amount.

Statement

THIS was an action tried at London on the 11th and 12th November, 1891, before MEREDITH, J., who, at the close of the evidence, called upon counsel for the defendant Lampman (the other defendant not appearing) to support the impeached transaction upon the merits; and, during the argument, intimated that the defence in this respect could not be sustained. He then called upon counsel for the

Statement.

plaintiff to show any right to follow the proceeds of the goods, which had been sold and converted into money before action brought; referring, during this argument, to R. S. O. ch. 124, sec. 8, and the cases mentioned in his judgment, and intimating that the plaintiff was precluded by such cases from obtaining the relief sought; and that if the money could be reached, it should be under execution or by attachment, and that an action ought not to be necessary.

Judgment was pronounced at the close of this argument.

The facts of the case are set out in the judgment of ROSE, J.

November 12th, 1891. MEREDITH, J.:—

Further consideration of this case has failed to alter my judgment upon the facts in it, formed during the trial, and given some expression to during Mr. Meredith's argument last night.

Looking at all the circumstances of this extraordinary transaction, I was, and am, quite unable to bring my mind to any other conclusion than that it was a colourable, not a real, one—a scheme entered into between the defendants at a time when the defendant Stewart was, to the knowledge of each, in insolvent circumstances, and carried out, as far as it has been, with intent, on the part of both, to defeat the creditors of the defendant Stewart in the recovery of their just claims against him.

Having regard to all the circumstances, it is impossible for me to reach the conclusion that the transaction was a fair one, and intended to pass the property for a valuable consideration.

Honest transactions are not made in such a way. Honest transactions do not in their terms needlessly so effectively defeat creditors; do not give a consideration which is to revert to the purchaser at the touch of the creditor by execution against the seller.

Judgment.

Meredith, J.

The after conduct of the defendant Lampman is significant. All that was done in regard to the farm was after the issue of the writ. Was it not more likely that, even had the transaction been an honest one, this defendant would have given up the proceeds of his co-defendant's property to the creditors and have retained his farm rather than go through the pretence of possession, management and control by the lad between fifteen and sixteen years of age, this defendant being paid in fruit off the farm for his daily, or almost daily, attendance and services there?

The transaction upon the merits must be sustained, if sustained at all, upon, virtually, the testimony of the purchaser alone.

With much regret I am obliged to say that his testimony was not given in a manner that favourably impressed me. No one could, in my opinion, choose but think it was given with some compunctions of conscience, or perhaps some fear of the consequence of it. His wife was not called as a witness, nor were any of the persons who were present at the stock-taking, nor was the solicitor who prepared the lease in question.

But, according to cases binding upon me, as the goods were sold and converted into money, into a shape "that cannot be earmarked," as it was said in some of them, by the defendant Lampman before execution, the plaintiff's action fails, and I am compelled on this ground, but upon it alone, to dismiss it. The action is therefore dismissed with costs, but only as of a demurrer to the statement allowed. I refer to *Davis* v. *Wickson*, 1 O. R. 369; *Stuart* v. *Tremain*, 3 O. R. 190; *Robertson* v. *Holland*, 16 O. R. 532; and see also *Ross* v. *Dunn*, 16 A. R. 552.

I may add that I regret the law is such as to prevent the creditors reaching the money in question.

The plaintiff moved on notice to set aside the judgment, and to have judgment entered in his favor.

In Hilary Sittings, February 9th, 1892, before a Div-

Judgment.

Meredith, J.

isional Court composed of GALT, C. J., and ROSE, J.; *Gibbons*, Q. C. supported the motion. The learned Judge found that the sale to Lampman was fraudulent, but because Lampman had sold to a third party, he was of the opinion that the plaintiff could not follow the proceeds. The learned Judge found that there was no real transaction, but that Lampman was merely custodian for Stewart. Under the circumstances the money obtained by Lampman was really Stewart's, and the plaintiff, as representing the creditors of Stewart, is entitled to the money, and is entitled to a declarative decree to that effect. In *Cornish* v. *Clark*, L. R. 14 Eq. 184, 189, a form of such decree is given. See also, Waite on Fraudulent Conveyances, 2nd ed., 253, where all the cases are collected. There is no case where there was not a *bonâ fide* debt in which the proceeds were held not to be followable. The plaintiff is entitled to the relief sought, apart from the statute of Elizabeth. The plaintiff is entitled to garnish the money and to engraft these proceedings into the garnishee proceedings.

W. R. Meredith, Q. C., contra. The transaction between Stewart and Lampman was *bonâ fide*, and the judgment of the learned Judge on this point is wrong; but, assuming there was fraud, then can the plaintiff follow the proceeds? He clearly cannot do so. The statute of Elizabeth only applies to the goods in specie and not to the proceeds. The plaintiff contends that he is entitled to garnish the money, but this cannot be done: *Vyse* v. *Brown*, 13. Q. B. D. 199. Then he says, if he cannot garnish, he is entitled to the assistance of the Court to seize the money in Lampman's hands, and to have a declarative decree to that effect. This is not the nature of the action; and, even if the court were to make such a declaration, it could not be enforced. He referred to *Longeway* v. *Mitchell*, 17 Gr. 190; *Macdonald* v. *McCall*, 12 A. R. 593; 13 S. C. R. 247.

Judgment.

Rose, J.

February 27th, 1892. Rose, J.:—

The plaintiffs were not execution creditors, but sue on behalf of themselves and all other creditors of the defendant Stewart.

It is sought to reach certain moneys which came into the hands of the defendant Lampman on the following state of facts: Stewart and Lampman were cousins. Stewart was insolvent. He entered into a feigned or fictitious bargain with Lampman, who was a farmer—Stewart being a storekeeper—that Stewart was to transfer to Lampman all his stock-in-trade, valued at some $1,200, in consideration of a lease of a farm which Lampman was to give him. They immediately went to a conveyancer and had a lease drawn, by the terms of which Stewart was to become the lessee of the farm for the term of five years, subject to a rent of $400 a year, payable in advance, as follows: $1,000 at the time of signing and delivery of the lease; and $200 on the 7th day of December, in each and every year during the said term.

It was provided by the lease that if the term thereby granted, or any of the goods and chattels of the lessee, should, at any time during the term, be seized or taken in execution or attachment by any creditor of the said lessee; or if the said lessee should make any chattel mortgage or bill of sale of any of his crops or other goods and chattels, or assignment for the benefit of his creditors, or become a bankrupt or insolvent, and take the benefit of any Act that might be in force for bankrupt or insolvent debtors, or should attempt to abandon such premises, or to sell and dispose of his farm stock and implements so that there would not, in the event of such sale or disposal, be a sufficient distress on said premises for the then accruing rent, in each and every such case, the then current and next ensuing year's rent and taxes, should immediately become due and payable, and the bargain thereby granted, should immediately become forfeited and void.

The same day that this lease was entered into the two defendants proceeded to the store, where the stock was valued by a man, one Cole, who is spoken of as an intending purchaser, and forthwith without any delay the whole stock-in-trade was sold to Cole at sixty cents in the dollar. Stewart never went into possession of the farm, but the defendant Lampman continued in possession and worked the same. A few days after the defendant Stewart absconded and has not since returned to this country. His son, a lad of fifteen or sixteen, went upon the farm, but it is perfectly manifest that he was not there as a farmer to manage the farm, and that the possession of the farm was never changed, but that the defendant Lampman was and continued to be the owner, proprietor, and occupant, and not in any wise subject to the order or control of Stewart.

The learned Judge found as a fact that the transaction was "a colourable and not a real one—a scheme entered into between the defendants at a time when the defendant Stewart was, to the knowledge of each defendant, in insolvent circumstances, and carried out, as far as it has been carried out, with intent on the part of both to defeat the creditors of the defendant Stewart in the recovery of their just claims against him." He further found that it was impossible to reach the conclusion that the transaction was a fair one, and intended to pass the property for valuable consideration.

The learned Judge further stated as follows: "But according to the cases binding upon me, as the goods were sold and converted into money, into a shape 'that cannot be earmarked', as it was said in some of them, by the defendant Lampman before execution, the plaintiff's action fails, and I am compelled on this ground, but upon it alone, to dismiss it. The action is therefore dismissed with costs, but only as a demurrer to the statement of claim allowed."

The learned Judge referred to *Davis* v. *Wickson*, 1 O. R. 369; *Stuart* v. *Tremain*, 3 O. R. 190; *Robertson* v. *Holland*, 16 O. R. 532, and *Ross* v. *Dunn*, 16 A. R. 552.

Upon the conclusion of the judgment Mr. Gibbons, for

Judgment.

Rose, J.

the plaintiff, said: "I think it is clear upon your Lordship's finding that it was not a real transaction." To which the learned Judge said: "You have it, Mr. Gibbons, as fully as I can put it. I can add nothing."

Against this judgment the plaintiffs have moved.

I think the findings of the learned Judge are to be supported, as I have above indicated; and, having regard to them and the evidence, I find the facts as I have above stated.

It seems to me very clear that the sale to Cole was not a sale by Lampman to Cole, but was a sale by Stewart to Cole. I disregard the form of the transaction, and find that the money which came into the hands of Lampman was money which belonged to Stewart and thus to his creditors, and money which was exigible in execution in the hands of Lampman if the creditors had physically been able to reach it. At least $700 of this money was in Lampman's possession at the time of the institution of proceedings. The sale took place in January, and at the trial he stated that he deposited $700 of the money in the spring. The action was commenced in February. I think that we must disregard the subsequent disposition of the money, and that Lampman must be treated as being in possession of the specific money during the continuance of the action. The decree must relate back to the beginning of the action, and any subsequent disposition of the money by Lampman cannot free him from the liability to account for the money which was in his hands at the time of the issue of the writ. Lampman, it appears, was a creditor of Stewart, but nothing turns upon this to assist the transaction, for Lampman stated that in entering into the transaction he never thought of the note at all, that it had never entered into his mind, so that this was not a transaction of transfer of property for payment of a debt.

This case is quite unlike any case which has heretofore been decided. Mr. Meredith very frankly admitted that the facts took it outside of any of the cases. It was a mere question whether the principle of any of these cases governed.

Judgment.

Rose, J.

This Division considered the authorities in *Robertson* v. *Holland*, 16 O. R. 532, to the judgments in which case I refer to avoid repetition. I do not feel any difficulty by reason of the decision in that case, because there the property had been transferred prior to the bringing of the action, although I am not sure—and I do not intend to commit myself further than I have done—that a fraudulent transferree, grantee, donee, or bailee of property cannot be made by the Court to account for the property which is fraudulently given into his hands in an action at the suit of the creditors of the fraudulent transferror, grantor, donor or bailor.

I think the decisions have gone as far as they should go, and I should be glad to see the whole subject reviewed by an appellate tribunal in view of the decision to which I am about to refer. While desirous of not legislating by judicial decrees, it does seem to me in a case like the present, where the creditors come before the Court bringing their debtor and the party who, at the time of the bringing of the action, held in his hands specific property belonging to the debtor, be it money or any other property, it would be a great miscarriage and failure of justice if the Court could not order the party holding such property to account for it to the creditors. The fact that he sets up an ownership of the property which does not exist, only emphasises the necessity of the interference of the Court to declare the true ownership of the property; and once the Court is seized of the matter, a declaration being made, it seems not only natural justice but the only proper result that consequent relief should follow upon such declaration.

It appearing here that $700 of the specific money—the proceeds of the sale of goods made to Cole—were in the hands of Lampman at the time of the issue of the writ, I think the proper order to be to direct Lampman to pay that money into Court forthwith and failing obedience to such order that the plaintiff should be at liberty to issue execution, so as to enforce the payment of that money into Court, to be distributed among creditors with the usual directions.

Judgment.

Rose, J.

I am glad that such a direction is supported by the authority cited to us by Mr. Gibbons, namely, *Cornish* v. *Clark*, L. R. 14 Eq. 184. There James Clark, the elder, being indebted to the plaintiffs, and having property consisting of his stock-in-trade, comprising three steam threshing machines, valued at about £200 each, £300 deposited in the local bank, and a mortgage debt owing to him of £350; gave to each of his three sons a threshing machine; to each of his six daughters £50, being a division of the £300 among them, and assigned to trustees upon trust to divide the same among his six daughters and the children of the deceased, the mortgage debt of £350.

Lord Romilly, M.R., declared the transaction invalid, using these words, at p. 189: "I think the whole bad as against creditors, but merely as against them, and that the donees must ratably contribute to pay the debt and the costs of the suit." Previously in his judgment he had said, "I think it" (the settlement or gift) "equally invalid" having regard to the scope and object of the statute," referring to 13 Eliz. ch. 5.

I should have noticed that the suit there was instituted by the plaintiffs on behalf of themselves and all other creditors of James Clark, the elder, against the said James Clark, the elder, and his children, as defendants, to set aside certain gifts made by James Clark, the elder, in favour of his children, as being void against creditors under the statute of 13 Eliz. ch. 5. The minutes of decree were spoken to, and the form was settled by the Court.

I give the minutes in full:—

> "**Minutes**—Declare that the gifts by James Clark the elder of three steam threshing machines to the defendants James Clark the younger, Mark Clark, and William Clark, respectively, and of the said several sums of £50 to the defendants [the daughters], and the indenture of settlement dated the 12th of November, 1868, were, and are respectively fraudulent and void as against the plaintiffs and all other the creditors against the estate of the said James Clark the elder, deceased: and declare that, as between the defendants, the funeral and administration expenses and debts of the intestate, James Clark the elder, and the plaintiffs' costs of the suit, ought to be borne and paid by the defendants,

Judgment.

Rose, J.

other than the defendant, the trustee of the said indenture of settlement, ratably in proportion to the amount or value of the said several gifts to them respectively, and of their respective interests under the said settlement; and this declaration to be without prejudice to the right of the plaintiffs to enforce this decree against all or any of the defendants, and against all or any part of the estate of the intestate, as they may be advised. Order that the proceeds of the sale of one of the machines (which had been sold) and the said several sums of £50 be paid into Court, and that the following accounts and enquiries be taken, [the usual accounts and enquiries in a creditors' suit.] Liberty to apply at Chambers for a sale of the machines remaining unsold: the defendants, other than the trustee, to pay the plaintiffs' costs up to and including the hearing: the trustee to retain his costs out of the surplus (if any) of the fund under the settlement. Reserve further consideration as to contribution of defendants *inter se*, and costs not before provided for."

The father, James Clark the elder, died during the pendency of the proceedings, but nothing appears to have turned on that, except that provision was made in the decree for the application of the proceeds of the property which came into the hands of the various donees.

The learned Master of the Rolls said: "I think it of no moment in such matters whether the parting of the goods is by voluntary settlement or by gift, whether it is in anticipation of death or of bankruptcy, or whether it is by the free will of the donor, or whether it is at the instance of the donees." Previously the learned Judge had said: "I am of opinion that the statute of 13 Elizabeth, ch. 5, was passed to meet and counteract this particular evil by which the property of the debtor was removed out of the reach of the creditors."

The case which we have before us, is stronger in its facts in favour of the creditors for the reason stated that there was not here even a fraudulent conveyance or transfer of the stock in trade, for as I find the facts the purchase money which came into the hands of the defendant Lampman, belonged to and was the property of the debtor Stewart.

I have not found the judgment or form of the decree commented upon in any other subsequent decision. I find it cited in Bump on Fraudulent Conveyances, 3rd ed., at pp. 267 and 620.

Judgment.

Rose, J.

Reference may also be made to Waite on Fraudulent Conveyances, 2nd ed., sec. 177, p. 255, where the learned author says: "The property in the hands of a fraudulent purchaser, is held by him in trust for the creditors of the fraudulent vendor, and when the property is converted into money the fund thus created, is impressed with the same trust. Were the rule otherwise, the grantee might defeat a creditor's claim by fraudulently changing the character of the property. In equity such money in the hands of fraudulent grantee is a fund held for the benefit of the creditors of the grantor; and while such creditors may not be able to maintain an action at law for money had and received for their use, because they were never the owners of or had title to the property which had been converted into money, yet a Court of equity, having all the interested parties before it, possessed the power to direct such application of it as would be just."

Whether in the light of the decisions in our own Courts the above can be taken to be a correct statement of the law, it certainly is a correct statement of what one would wish to be the law for the purpose of working out the rights of the parties.

In *Robertson* v. *Holland* I referred in the judgment I there delivered to *Labatt* v. *Bixel*, 28 Gr. 593, where the late learned Chancellor Spragge directed by his judgment that a fraudulent transferee of certain book debts should account for the moneys that he had realized out of the book debts which were assigned to him in contravention of the Act. In *Robertson* v. *Holland* I said that I was unable to distinguish that case on any clear principle from *Davis* v. *Wickson* or *Stewart* v. *Tremain*; but, on a more careful perusal of *Labatt* v. *Bixel*, I find that nothing is said as to when the assignee of the book debts collected the same; and it occurs to me that the learned Chancellor may have proceeded upon evidence which shewed that the collection was made after the institution of the suit, and, if so, such decision would not be in conflict with any of the other cases to which we have been referred.

I think, therefore, that judgment must go, declaring that the transaction between Stewart and Lampman was a fraudulent scheme or contrivance for the purpose of defeating the creditors of Stewart: that the moneys which were in the hands of Lampman at the beginning of this suit were the moneys of Stewart, and held by him as the trustee for the creditors of Stewart, and that all the parties being before the Court, the defendant Lampman be ordered to pay the sum of $700 forthwith into Court, being the sum found to be in his hands at the commencement of this action: that he pay the plaintiffs their costs of this suit, and that the plaintiffs be at liberty to issue execution to enforce payment of such sum of $700 and costs; that the moneys so being paid into Court be subject to such further application as the plaintiffs may find necessary for the purpose of having them paid out in payment of claims, and that for such purposes further directions and subsequent costs be reserved. The defendant Lampman must also pay the costs of this motion.

GALT, C. J., concurred.

[CHANCERY DIVISION.]

HOLT ET AL. v. THE CORPORATION OF THE TOWNSHIP OF MEDONTE, ET AL.

Municipal corporations—Public schools—By-law to divide school section—Necessity for seal and signature—Injunction—Parties.

A by-law of a township corporation for the purpose of dividing a school section is invalid unless under the corporate seal, and signed by the head and by the clerk of the corporation.

The township corporation and the individual members of the proposed new school board, are proper parties to an action to have an invalid by-law for such a purpose set aside.

Statement.

THIS was an action brought by William Holt and the Board of Public School Trustees for school section number four of the township of Medonte in the county of Simcoe against the Corporation of the township of Medonte, the Board of Public School Trustees for school section number sixteen of the said township and William Campbell, Francis Greenlaw and Joseph Rumble, trustees of said section sixteen, to have it declared that the attempted division of school section number four for school purposes was illegal.

The statement of claim set out that William Holt was a resident and ratepayer of section four, and sued on behalf of the other ratepayers as well as himself: that on April 15th, 1891, a petition was presented at a meeting of the township council by the defendants Campbell, Greenlaw, Rumble and others, praying the said council to pass a by-law to form a new school section by dividing section four: that at that meeting a resolution was passed as follows:

"On motion of * * seconded by * * the clerk was instructed to notify the trustees of school section No. 4, that the council will at its next meeting consider the advisability of passing a by-law for the purpose of dividing school section No. 4."

That no further resolution was passed, nor was any notice given to any ratepayers until April 29th. That on

April 24th the secretary-treasurer of school section No. 4 received the following notice from the township clerk: Statement.

"MEDONTE, April 17th, 1891.

The Trustees of school section No. 4, Hillsdale.

Gentlemen,—I have been directed by the council to notify you that they intend at their next meeting on April 29th, considering the advisability of passing a by-law for the purpose of dividing school section No. 4, Medonte."

That at said meeting the said council without further notice and against the protests of some ratepayers, passed a by-law separating certain lots from school section four, and formed them into a new school section as No. 16.

The statement of claim further alleged that in consequence of protests and objections by ratepayers the council on June 5th repealed the said by-law by another, and that neither of said by-laws ever had the seal of the corporation affixed.

It was then further alleged that an appeal was had to the county council by the defendants Campbell, Greenlaw and Rumble, and others, against the latter by-law and proceedings were ordered by way of arbitration under section 82 of the Public Schools' Act, 54 Vict. c. 55 (O.), and that an award was made by which the latter by-law was declared invalid: and the school trustees of section four were notified by the school inspector, and that thereupon the township clerk and the defendants, Campbell, Greenlaw and Rumble, proceeded to organize school section sixteen and were elected school trustees.

The statement of claim asked that the by-law of April 29th, and all proceedings taken thereunder be declared illegal and irregular, and also asked for an injunction to restrain the levying of any school rate for said section sixteen.

The defendants filed statements of defence justifying their acts, the particulars of which are not necessary to be set out, as the judgment of the learned Judge who tried the action rested upon the invalidity of both the by-laws, for want of the signature of the reeve and the seal of the corporation.

Argument.

The action was tried at the sittings at Barrie on April 6th, 1892, before **Boyd**, C.

Marsh, Q. C., and *Hewson*, for the plaintiffs. The first by-law was invalid, no sufficient notice of intention to pass it was given: 54 Vict. c. 55, sec. 81, sub-sec. 2 (O.); *Patterson and the Corporation of the Township of Hope*, 30 U. C. R. 484 at 488; *Griffiths* v. *Municipality of Grantham*, 6 C. P. 274; *Re Ness and the Township of Saltfleet*, 13 U. C. R. at pp. 420 and 421. The by-law is also invalid because it is not under seal: R. S. O. ch. 184, sec. 288; *Re Croft and the Township of Brooke*, 17 U. C. R. 269; *Re Mottashed and the County of Prince Edward*, 30 U. C. R. 74. The division of the school section must be effected by by-law and not by a resolution: 54 Vict. c. 55, sec. 81 (O.). Executive duties may be performed by resolution, but not legislative duties such as this: *Croft* v. *the Town Council of Peterborough*, 5 C. P. at p. 46; Harrison's Municipal Manual, 5th ed., pp. 209 and 523; Municipal Act, R. S. O. c. 184.

Pepler, Q. C., and *J. A. McCarthy*, for the defendants. The action is technical and should not be aided by the Court. This is not the proper mode of testing the validity of or setting aside the by-law. The school board and individual members thereof are improperly joined as defendants. The action should be against the township council only to set aside the by-law. No notice of action was given: R. S. O. ch. 73, sec. 14: *The Corporation of the County of Bruce* v. *McLay*, 11 A. R. at 485; *Spry* v. *Mumby*, 11 C. P. 285; *McDougall* v. *Peterson*, 40 U. C. R. at p. 99. The mode and sufficiency of the notice is in the discretion of the council: *Shaw and The Township of Manvers*, 19 U. C. R. 288; *Taylor and The Township of West Williams*, 30 U. C. R. 337. No by-law was necessary, a resolution was sufficient: *The Corporation of the Township of Pembroke* v. *The Canada Central R. W. Co.*, 3 O. R. 503 at 508; R. S. O. ch. 225, sec. 82 (1). Even if the by-law was defective either in substance or in form, any such defect was cured by sec. 96 of 54 Vict. c. 55 (O.) Argument.

Marsh, Q. C., in reply. The board of school trustees and the individuals are properly joined as defendants: *Wallace* v. *The Board of Public School Trustees of Lobo*, 11 O. R. 648. No notice of action was necessary: *Flower* v. *Local Board of Low Leyton*, 5 Ch. D. 347; *Folger* v. *Minton*, 10 U. C. R. 423; *Lewis* v. *Teale*, 32 U. C. R. 108; *Ontario Industrial Loan and Investment Co.* v. *Lindsay*, 3 O. R. 66, 4 O. R. 473.

April 16th, 1892. Boyd, C.:—

The requirements of the Municipal Act as to the formal manner in which every council shall exercise its powers are of a general character, and apply to the action of township councils in making territorial changes for school purposes. The powers of the municipal corporation are to be exercised by by-law when not otherwise authorized or provided for, and this by-law is to be under the corporate seal, signed by the head and by the clerk of the corporation: R. S. O. cap. 184, secs. 282, 288.

The division of school sections is a very important part of the work of government which is entrusted to municipalities involving the exercise of legislative powers, as to which the conclusion of the council should be embodied in a by-law, by the very terms of the enabling section: R. S. O. cap. 225, sec. 81.

The effect of this section providing for a by-law is not reduced so as to permit of a resolution, because of the words "by-law or resolution" being found in section 82. In that section "by-law" refers to the action of the council in changing school boundaries, and "resolution" probably refers to their refusal to act; but that no special significance is to be attributed to this word would seem to follow from the fact that it is dropped altogether in the Act of 1891, whereby the public school Acts were consolidated and revised (54 Vict. C. 55, sec. 82 (O.).)

In this case the council of the township of Medonte in-

Judgment.

Boyd, C.

tended to enact a by-law to divide school section four in that municipality, bearing date 29th April, 1891, which is signed by the clerk, and purports to be signed by the Reeve, but there is no corporate or other seal attached, and in fact the Reeve did not sign or authorize it to be signed, his name being used by the clerk in pursuance of some practice which it was taken for granted was legitimate.

The council proceeded to repeal this alleged by-law by another equally and similarly inoperative as to seal and signature, dated 5th June, 1891. This assumed repealing by-law was made the subject of appeal to the county council, and this resulted in the appointment of arbitrators under sec. 82 of the Public Schools' Act by resolution of the 19th June, 1891. This body decided that the repealing by-law was invalid on 14th November, 1891, so that in effect the original assumed by-law of 29th April, 1891, was restored, but restored with all its inherent and fatal imperfections: *The Queen* v. *Mary Wood*, 5 E. & B. 49.

The vital point of the litigation therefore it seems to me depends on the validity of the by-law, which alone justifies the division of the school section into two parts. It, however, is in my opinion ineffectual, because it is not a by-law; so that it neither accomplishes the object of the corporate action, nor does it bind the ratepayers of school section four as constituted before the attempted division.

Various other points were elaborately argued, but I do not give any opinion thereon because of what I have now determined. The suit is properly constituted by having not only the township but the constituents of the board of trustees for the *de facto* new school section before the Court.

These defendants should pay the costs occasioned by their defence, subsequent to the filing of the defence. The township of Medonte should not pay or receive costs. I overrule the various preliminary objections as to notice of action, etc.

The defendants should be restrained from acting on the supposed division of the section.

G. A. B.

[CHANCERY DIVISION.]

KREH V. MOSES.

Life insurance—Gift—Declaration of trust—Will—Absence of witnesses.

A person insured his life and signed a document directed to the managers of the insurance company, in these words: "I give and bequeath to * * the amount stated on the policy given on my life by the S— Life Insurance Co. To be paid to none other unless at my request, dated later." After showing or reading the policy which he retained, he handed the document to the plaintiff, remarking: "There, that is as good as a will":—

Held, that on account of its incompleteness, the transaction was not a gift or a declaration of trust, as the trust intended was not irrevocable, nor could the paper take effect as a will.

Statement.

THIS was an action against an administrator to recover the amount of a life insurance policy received by him, which it was claimed the plaintiff was entitled to under an instrument in writing, signed by the insured, one James Good Moses, deceased; and which instrument, together with the other material facts, are set out in the judgment.

The action was tried at Stratford, on April 12th, 1892, before BOYD, C.

Moscrip, for the defendant, was called on by the Court. The document is an improperly executed will, the words used being, "I give and bequeath." It is a bequest of the moneys payable under the policy: *Irons* v. *Smallpiece*, 2 B. & Ald. 551; *Lee* v. *The Bank of British North America*, 30 C. P. 255; Wharton's Law Lexicon, 8th ed., p. 87, under "Bequeath,"; Stroud's Judicial Dictionary, p. 207, under "Devise." It is not an assignment of the policy. Even if it was an assignment, plaintiff could not get the money, as under the policy itself, it goes to his "legal representatives"; which term has a known use in our law signifying "executors" or "administrators": Stroud, 431. The contract of insurance was complete and could only have been changed by the parties to it. The

Argument. plaintiff could only recover, even if the assignment were good, in the event of the insured living until 1st May, 1919, as the policy provides for payment to his "legal representatives," in event of death before that date.

Idington, Q. C., for the plaintiff. The instrument is a revocable assignment or a trust, and shews that the deceased's intention was that the plaintiff should have the benefit of the policy: *Pearson* v. *The Amicable Assurance Office*, 27 Beav. 429; *Cook* v. *Black*, 1 Ha. 390; *M'Fadden* v. *Jenkyns*, 1 Ha. 458.

April 19th, 1892. BOYD, C.:—

The deceased Moses, having become engaged to the plaintiff, Miss Kreh, insured his life for $500 with the Sun Life Company, and soon after gave her a writing in these words:

"To the managers of the Sun Life Insurance Co.—I give and bequeath to Miss Minnie Kreh, of the province of Ontario, county of Perth, township of Downie, the amount stated on the policy given on my life by the Sun Life Insurance Co.

(Signed) JAMES GOOD MOSES.

May 15th, 1890.

To be paid to none other unless at my request, dated later. JAMES GOOD MOSES, Downie, Ontario."

He said to her at the time, "There, that is as good as a will," and shewed her or read to her the policy, but himself retained it. The policy was on the endowment principle, running for twenty years; and the provision for payment was to the insured or his assigns at the end of the appointed term, or to his "legal representatives" in case of his death before that time.

Soon after he went to the States, pushing his fortune, fell ill there, returned home and died in his father's house.

The father duly obtained letters of administration to his estate, and procured payment of the $500 from the company. Neither father nor company knew anything of the paper held by the plaintiff, who first made her claim after payment.

The transaction, therefore, as far as it went for the benefit of the plaintiff, was a purely voluntary one, and it rests entirely upon the meaning and effect of the paper signed by the deceased. What was the intent of the deceased as manifested in the writing, interpreted by the light of surrounding circumstances? Was it a transaction *inter vivos*, or does it carry the characteristics of a testamentary act?

If *inter vivos*, it must be either in the nature of a gift or to be construed as a declaration of trust. Bearing in mind, however, its voluntary character, it cannot be held as a gift on account of incompleteness. The policy itself was not handed over, and nothing was done by way of changing the designation of the beneficiary in the policy, so as to constitute a contract enforceable by the plaintiff against the company. Upon death, by the terms of the contract, the money was to be paid to the legal representatives of the insured, and it was so paid, whereby the company was completely discharged. How then can the proceeds of the policy be followed into or recovered from the hands of the administrator, unless (which is the second position) there be a valid declaration of trust?

Now much uncertainty in the doctrines of the Court has been cleared up by the decision in *Milroy* v. *Lord*, 4 D. F. & J. 264, one of the results of which is illustrated in *Richards* v. *Delbridge*, L. R., 18 Eq. 11, thus: That the Court will endeavour to carry out a man's intention in the line of a gift, or in the line of a trust; but for a man to make himself a trustee, there must be expressions used which have that meaning, and that an imperfect gift will not be validated by being converted into a perfect trust. An expression of a present or of a future gift, does not amount to an effectual declaration of trust.

The point is very concisely put by Bacon, V. C., in *Heartley* v. *Nicholson*, L. R. 19 Eq. at p. 242, in these words: "It is not necessary that the declaration of a trust should be in terms explicit. But what I take the law to require is, that the donor should have evinced by acts [or words], which admit of no other interpretation, that he himself had ceased to be, and that some other person had become the beneficial owner of the subject of the gift or transfer; and that such legal right to it, if any, as he retained, was held by him in trust for the donee." Assuming that enough appears to raise some trust—which, however, I do not say is so—I think the cases go to shew that the trust intended must be irrevocable, before the Court will enforce a pure act of volition against the donor or his representatives.

Here the deceased expressly reserved a power of revocation, or of further designation of the payee, and that being so, it would seem impossible for the holder of this paper to enforce it against the person insured (had he been alive), by procuring an assignment of the policy, for that was not the intention: and by parity of reason—if not *à fortiori*—it could not be enforced against the representatives: *In re Caplen's Estate—Bulbeck* v. *Silvester*, 45 L. J. Ch. 280; *Antrobus* v. *Smith*, 12 Ves. at p. 47.

But these considerations lead to the last alternative, the one which I think is the correct solution of the case: that this writing was of a testamentary character, meant to be acted on only after the death of the donor. The word used in the paper, "bequeath," is significant, and of like significance was the comment of the deceased upon the effect of the paper in handing it to the plaintiff.

Sir J. P. Wilde said, in *Cock* v. *Cooke*, L. R. 1 P. & D. at p. 243: "It is undoubted law that whatever be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent on his death for its vigour and effect, it is testamentary." Of course this writing cannot take effect as such testamentary paper, because of its want of witnesses; but this infirmity cannot work its conversion into a good declaration of trust: *Johnson* v. *Ball*, 5 D. & S. 85. I must leave it as it was left by the deceased, "in-

Judgment.

Boyd, C.

complete, ineffectual and invalid." See per Knight-Bruce, L. J., in *In re Patterson's Estate; Mitchell* v. *Smith*, 4 D. J. & S. 425; (a case much in point) as is also *In re William Hughes*, 36 W. R. 821 (1888). There are also two very instructive Irish decisions supporting my conclusions: *Lee* v. *Magrath*, 10 L. R. Ir. 45 and 313, and *Gason* v. *Rich*, 19 L. R. Ir. 391, (1886.)

It is perhaps worth noting as a warning against trusting even to the most admirable text-books, that I was much perplexed by the passage in Bunyon's Law of Life Assurance, 3rd ed., p. 453, in which the law is given as held by Pearson, J., in *Pethybridge* v. *Burrow*, 28 Sol. J. 517, as decided in 1884, where the testator had signed a document stating that he gave a debenture bond to the plaintiff, but retained the document during his lifetime for the purpose of drawing the dividends for his own use, and requested his executors to hand her the bond on his decease. This was held to operate as a gift *in futuro*, and the document was declared to be a complete declaration of trust to which the Court would give effect. But I find that this decision was on appeal to the Lords Justices, overruled—they holding that the memorandum was an ineffectual attempt to assign: See *Re Shield*: *Pethybridge* v. *Burrow*, 53 L. T. R. N. S. 5. Though this was reported in September, 1885, and Mr. Bunyon's book issued in 1891, it is not noted in the text or addenda.

The action fails; while I regret the result, I cannot change it: I should have been better satisfied with a different conclusion, but I do not think costs should be given against the plaintiff.

G. A. B.

[CHANCERY DIVISION.]

MUTTLEBURY V. TAYLOR ET AL.

Mortgage—Covenant—Right of party liable to pay one, to demand assignment without paying the others.

The owner of property mortgaged it to the plaintiff and then sold subject to the mortgage, taking from the purchaser a second mortgage as part of his purchase money, which he assigned to the plaintiff. The purchaser then sold to one of the defendants, who, to obtain an extension of time on the first mortgage, entered into a covenant with the plaintiff to pay it and afterwards sold the property.

In a foreclosure action the plaintiff claimed an order for the payment of the first mortgage by the covenantor under his covenant, and the latter refused to pay the amount due on it unless the plaintiff would assign the mortgage to him:—

Held, that the plaintiff was not bound to assign to the covenantor unless he paid off both mortgages.

Statement. THIS was an action for foreclosure brought by Francis Walter Muttlebury against William Benjamin Taylor and others interested in the property in question under the following circumstances:

One Robert Brown had been the owner of the property and had given a mortgage on it to the plaintiff for $2,500, and had then sold to one Clara Hayes subject to that mortgage, taking as part of the purchase money a second mortgage for $2,961, which second mortgage was afterwards assigned to the plaintiff.

Clara Hayes then sold, subject to both the mortgages, to one William Windeler, who agreed with her to pay them off, and in order to obtain an extension of time for the payment of the first, which was maturing, with her concurrence, entered into a covenant with the plaintiff by which he agreed to become liable for its due payment.

Windeler subsequently sold and transferred the property to another purchaser. In this action the plaintiff asked for an order against Windeler for the payment of the amount due under the first mortgage, and interest under his covenant to pay.

The defendant Windeler set up that the property had passed out of his hands, but that he was willing to pay the amount due on the first mortgage under his covenant if the plaintiff would assign that mortgage to him. Statement.

The plaintiff declined to assign the first mortgage unless Windeler would pay off both, in which case he was willing to assign them to him.*

The action was tried at the Toronto Sittings on April 25th, 1892, before BOYD, C.

The usual judgment of foreclosure was granted against all the defendants except Windeler, and the trial proceeded as to him.

F. E. Hodgins, for the plaintiff. Windeler was a principal and not a surety. He agreed with Hayes to pay off both mortgages: *Boyd* v. *Johnston*, 19 O. R. 598. His parting with the estate does not constitute him a mere trustee: *Aldous* v. *Hicks*, 21 O. R. 95. He contracted with the plaintiff for his own benefit, and is principal debtor: *Wickham* v. *Wickham*, 2 K. & J. 478; De Colyar's Law of Guarantees, Bl. ed. p. 112; *Fitzgerald* v. *Dressler*, 5 Jur. N. S. 598. Hayes covenanted to pay Brown; that covenant is assigned to the plaintiff, so he has a direct personal remedy against Hayes. Windeler is not entitled to an assignment as he is not entitled to a reconveyance: *Alderson* v. *Elgie*, 26 Ch. D. 567. I also refer to *Teevan* v. *Smith*, 20 Ch. D. 724; *Rogers* v. *Wilson*, 7 C. L. T. 399; *Farebrother* v. *Wodehouse*, 23 Beav. 18 and 25; *Forbes* v. *Jackson*, 19 Ch. D. 615; *Fewter* v. *Charleton*, 10 Ha. 646; *Mills* v. *Jennings*, 13 Ch. D. 639; *The Scottish American Investment Co.* v. *Tennant*, 19 O. R. 263; *Kinnaird* v. *Trollope*, 39 Ch. D. 634 and 646; 1 Prideaux Precedents in Conveyancing, 14th ed. p. 485; De Colyar, Bl. ed., p. 230.

D. Urquhart, contra. This action as far as Windeler is concerned is purely one on covenant. When the land was conveyed by Brown to Hayes, the land was principal debtor, and Brown merely a surety: *Jenkinson* v. *Harcourt*, Kay 688. Windeler was not personally liable at first. When he did make himself personally liable for the

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* Other facts were set out which it is unnecessary to state, as they not relevant to the point decided.—REP.

Argument. debt secured by the *first* mortgage, the land was the principal debtor, and his personal covenant was only in suretyship for the debt charged on the land. Even if he ever was a principal debtor when he sold to his purchaser he became then a mere surety : *Blackley* v. *Kenny*, 18 A. R. 135.

This is not an action for redemption, and the fact that the plaintiff holds both mortgages makes no difference: *Bowker* v. *Bull*, 1 Sim. N. S. 29, conflicts with *Farebrother* v. *Wodehouse*, 23 Beav. 18, which was not cited in it. See also *Gray* v. *Coughlin*, 18 S. C. R. 553 ; *Waring* v. *Ward*, Ves. 332.

Hodgins, in reply. *Jenkinson* v. *Harcourt*, cited by defendant was a case between two volunteers. Here the plaintiff was an assignee for value of all the second mortgage.

April 27, 1892. BOYD, C.:—

The facts are rather complicated, but when understood it seems reasonably plain that the contention of Windeler to pay the first mortgage, and obtain an assignment of it to hold for his own benefit against the land is not maintainable.

Take first the devolution of the estate. Brown as owner mortgages to the plaintiff for $2,500 in April, 1888. Then Brown sells the land to Hayes and as part of the price takes back the second mortgage on the land for $2,961 in April, 1889. Brown covenants to pay the first mortgage. Hayes covenants to pay the second and takes subject to the first. The second mortgage is then assigned (by way of security for $1,285) to the plaintiff in May, 1889.

Then Hayes and Windeler agree to exchange lands by which the equity in the land in question is to be acquired by Windeler. Pending this, and apparently contemporaneously with obtaining a deed of the equity of redemption, Windeler covenants with the plaintiff to pay the first mortgage for $2,500. This covenant is dated 30th October, 1889, and on same day a conveyance from Hayes to Windeler is registered (its date being 29th June, 1889).

This conveyance is made subject to the two mortgages, and the legal effect of it is that Windeler becomes as between him, Brown and Hayes primarily liable to pay

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Boyd, C.

both these mortgages to the plaintiff, though apart from his covenant of October, 1889, the plaintiff would have no direct remedy against him. The acquisition of the ultimate equity therefore *per se* casts upon Windeler the duty or obligation of indemnifying the parties personally liable against both mortgages—inasmuch as he having the land must clear it of its burdens.

Now his personal direct liability to the plaintiff on the covenant does not alter this other underlying equitable liability arising from the very nature of the dealings.

The covenant does not make him a surety *quoad* Brown, though that would be the result if he had not also been purchaser of the equity of redemption. His character is that of a principal and as such his payment of the first mortgage would only be a fulfilment of his obligation to hold Brown harmless therefrom, which arose out of his getting the conveyance from Hayes of the equity of redemption subject to this and the second mortgage. His position requires him to satisfy both mortgages, and it does not matter in whose hands they are. The fact of the second being held by the plaintiff as security for $1,285 at the date of the covenant is of no moment because *quoad* Hayes the defendant Windeler was bound to pay off the whole of that second mortgage. This covenant then is not a material factor in the case as regards the plaintiff's right to foreclosure for both mortgages, and the usual judgment should be drawn up with costs to the plaintiff. The defendants will add these costs to their respective claims.

I proceed upon the law as enunciated in *Blackley* v. *Kenny*, 19 O. R. 169, 18 A. R. 135, which in no wise conflicts with what is decided in *Aldous* v. *Hicks*, 21 O. R. 95. Both cases recognize the law to be that the purchaser of an equity of redemption becomes the principal for the payment of the mortgage debt, and that any dealing between the mortgagee and the purchaser which prejudicially affects the terms of the original contract for payment contained in the mortgage will discharge the mortgagor as being in the circumstances merely a surety for the debt.

G. A. B.

[COMMON PLEAS DIVISION.]

LEMESURIER V. MACAULAY.

Revivor—Lapse of time—Agreement of solicitors—Effect of.

In 1867 an action of ejectment was brought by L. and notice of trial given, and the case entered for trial for 15th October following. The trial was postponed, and on 21st October L. conveyed the lands to I. On the 8th January, 1871, L. died, and on 14th May, 1886, I. conveyed to the plaintiff. In February, 1892, an *ex parte* order under Rule 620 was obtained by the plaintiff from the local registrar, reviving the action in the plaintiff's name. It appeared that in January, 1872, the then plaintiff's solicitors had notified the defendant's solicitors of the plaintiff's intention of reviving the action, and they gave notice of trial for the ensuing assizes, whereupon it was agreed between the solicitors that on the then plaintiff's solicitors refraining from reviving and proceeding to trial, the defendant's solicitors would abide by the result of another named suit, which, if in favour of the plaintiff, an order of revivor might then issue and judgment be entered for the plaintiff :—

Held, That the original action was governed by C. S. U. C., ch. 27, sec. 22, and terminated on the 21st October, 1867, when the plaintiff conveyed to I.; that after such a lapse of time the plaintiff's rights being barred by the statute of limitations no order of revivor should have issued, and that the Court would give no effect to the agreement made by the solicitor, for to do so would be an injustice to the client.

Statement. THIS was a motion on behalf of the defendants to set aside an *ex parte* order made by the Local Registrar at Cobourg reviving the original suit.

The action was originally brought by Henry Lemesurier, the younger, against Margaret Macaulay and Henry Macaulay, and by order of revivor, dated February, 1892, was revived in the name of Catherine McLennan against Henry Macaulay, Jane Laferty and Thomas Laferty.

Marsh, Q. C., supported the motion.
Hilton, contra.

March 7th, 1892. GALT, C. J. :—

This case, which is of considerable importance, was most fully argued by the learned counsel on both sides, and has occasioned me much consideration as I am unable to find any case bearing exactly on the point.

It appears that the plaintiff Lemesurier commenced an action of ejectment to recover the lands now in question

Judgment.

Galt, C.J.

some time in the year 1867. The case was entered at Cobourg Assizes in October, 1867, and notice of trial was given for the 15th October, 1867. The trial was postponed, and on the 21st day of October 1867, the plaintiff Henry Lemesurier conveyed the lands in question to one George Irvine. Henry Lemesurier died on the 8th January, 1871. On the 14th day of May, 1886, George Irvine conveyed these lands to the plaintiff; and it was in pursuance of the right of transfer by such conveyance that the order now in question was made. The order was made under Rules 620, and 621; but, it appears to me, that the case must be disposed of as the law stood at the time when Henry Lemesurier was or claimed to be the owner of the land.

The Consolidated Statutes of Upper Canada, ch. 27, sec. 22, in treating of an action of ejectment, enacts as follows: "In case the title of the claimant as alleged in the writ existed at the time of service thereof, but had expired before the trial, the claimant shall, notwithstanding, be entitled to a verdict according to the fact that he was entitled at the time of serving the writ and to judgment for his costs of suit."

It is manifest from this that in the case provided for by the statute, no judgment could have been given whereby the claimant could have recovered possession of the land.

In Cole on Ejectment, with reference to the evidence given on trials of ejectment, it is stated, at p. 289, that if such title expired since the writ was served the verdict may so find, and thereupon the plaintiff will be entitled to a judgment for his costs of his suit.

On the consideration of the provisions of the statute, I am satisfied that when reference is made to the expiration of the title of the plaintiff, it has no reference to a sale or deed by him, but must be held to be what may be termed an expiration of his title, namely, supposing him to have been tenant for life or tenant during the life of another party; and that after the suit had commenced the title of that other party had expired by death, then the claimant would be entitled to the costs of his suit if he could show that at the time when the suit was commenced he was entitled to the possession. But it does not apply to a case like the present where the plaintiff transfers by deed his right to another party.

In my opinion, therefore, the suit terminated on the 21st October, 1867.

Before the Rules in question were adopted by the Common Law Courts, the practice of the Court of Chancery was under certain circumstances to continue a suit by what may be termed a supplemental bill; but in cases where a great lapse of time had been allowed the Court would not continue an existing suit but would require the parties to file an original bill.

In the case of *Bland* v. *Davison*, 21 Beav. 312, which was a demurrer to a bill of revivor filed in December, 1855, which stated that in August, 1831, Sir John Bland had instituted a suit against the defendant. Sir John Bland died in March, 1835, and this application was, as I have said, in December, 1855, and the prayer of the bill was that the suit might stand revived against the defendant. The Master of the Rolls gave his judgment briefly as follows, p. 313: "I am of opinion, that if there were any equity, it could only be asserted by original bill, and that a bill of revivor will not lie. After this length of time, and after all the parties are dead, a revivor cannot be allowed. According to the argument of the plaintiff, a suit might be revived 100 years after the abatement, in defiance of the rule which the court has adopted in analogy to the rules of law."

In the present case the suit was commenced in 1867, and the motion for revivor was not made until February of the present year. It appears however, that on the 23rd of January, 1879, the attorney for the plaintiff in the suit of *Henry Lemesurier* v. *Margaret Macaulay, and Henry Macaulay*, notified the attorney for the defendants that the plaintiff intended to proceed in this cause after the end of one calendar month from the service thereof on him of an order to revive this suit and giving him notice of trial herein for the next Assizes to be held at Cobourg. In consequence of that notice a negotiation took place between Mr. Francis, who is now dead, acting for the defendants, and Messrs. McLennan, who are the attorneys for the present plaintiff, and were also attorneys in the suit of Henry Lemesurier, whereby it was agreed as follows: "Whereas the documentary evidence both in this suit and the other case of the Hon. George Irvine, plaintiff, and Peter Weaver, defendant, in the Court of Common Pleas is the same so far as the paper title of the Hon. George Irvine is concerned, the attorneys for both parties in this suit have come to an agreement and undertaking on their respective parts as follows: 'That is to say, in consideration of Messrs. McLennan refraining from reviving this suit and proceeding to the trial of this suit, I, Charles Francis, attorney for the above named defendant, undertake and agree that this suit shall abide the result of the said suit of *Irvine* v. *Weaver*, and that, in the event of the plaintiffs by order of revivor, to be issued hereafter, succeeding herein, the defendants shall withdraw their defence and let the plaintiff sign judgment for the recovery of possession of the land in dispute."

It was upon this agreement that Mr. Hilton based his argument.

In my opinion however such an argument is not entitled to prevail. It is quite true that as a general rule if a case is settled between counsel at the trial the Court will not interfere, still that is qualified as I am about to state.

In *Matthews* v. *Munster*, 20 Q. B. D. 141, in which the Court upheld an agreement made between the counsel in the absence of the defendant, Lord Esher, M. R. in his judgment states at p. 143: "I apprehend that it is not contended that this power" (namely the power of a counsel to settle a case) "cannot be controlled by the Court. It is clear that it can be, * *. If therefore, counsel were to conduct the cause in such a manner that an unjust advantage would be given to the other side, or to act under a mistake in such a way as to produce some injustice, the Court has authority to overrule the action of the advocate."

Judgment.

Galt, C.J.

I cannot imagine a case in which this doctrine would be more applicable than the present. According to my view of the law the action had ceased in 1867. In 1874, the limitation for real property actions had been reduced from twenty to ten years, consequently at the time when Mr. Francis made this arrangement the title of his clients had become absolute. The original action having terminated, as I have already stated, on the 21st October, 1867, when the plaintiff transferred his interest to the Hon. George Irvine, in my opinion this motion must be made absolute with costs.

[CHANCERY DIVISION.]

MARRIOTT V. MCKAY.

Dower—Will—Benefit under, to widow—Election—Administration action—Estoppel.

A testator bequeathed his personal estate to his widow absolutely, and devised his real estate to his executors to be by them sold, and four per cent. of the proceeds paid to his widow, and the balance invested, and the income paid to his widow during her life, and afterwards the proceeds to be divided as directed; and he gave the rents, until the real estate was sold, to his widow:—

Held, that the widow was put to her election, and that she could not claim dower and to be tenant of the freehold at the same time.

Decision of ROBERTSON, J., reversed.

Statement.

THIS was a motion for payment out of the moneys in Court to the credit of this cause, to the plaintiff for her dower or thirds in the lands of the late William Marriott, who died seized in fee of real estate in St. Thomas of the value of about $4,000; and also for payment to the plaintiff out of the said moneys of the sum of $45, expended by her for improvements to the real estate yet unsold, as the acting executrix under the will of her late husband.

The testator died on April 14th, 1884, having first made and published his last will and testament, bearing date March 21st of that year, by which he appointed the plaintiff and the defendant, McKay, executrix and executor. **Statement.**

The testator also left personal estate of about the value of $524, all of which he specifically bequeathed to the plaintiff, who was his widow, subject to the payment of debts, funeral and testamentary expenses.

The will, after bequeathing the personal estate as above, continued as follows :—"I also devise to my said wife, Hannah Marriott, the rents of my real estate while the same remains unsold, after my decease.

I will devise and bequeath to my executrix and executor above named, all my real estate of whatever kind or nature, to be by them sold as soon as can advantageously be done, but not later than one year after my decease, and to be by them held upon the following trusts: —First, to pay my wife four per cent. of the proceeds of the sale of the said real estate, and to deposit the balance thereof in the Postoffice Savings Bank, or on other good and sufficient security, and to pay the interest arising therefrom to my wife, Hannah Marriott, during the term of her natural life, and at her death to divide the principal money equally between my brothers, John Oatis Marriott, and Thomas Henry Marriott, and my sisters, Jane Spencer, wife of William Spencer, and my youngest sister Lydia, whose husband's name I do not know, and my wife's sister, Fanny Breary, or if any of them are then deceased, to their child or children. If any of the five last-named parties should die before my said wife Hannah Marriott, and without leaving any child or children, my will is that their share go to the survivor or survivors of them."

Probate was granted to the executrix and executor, and the whole of the real estate, with the exception of a small house and lot thereon, of about the value of $300, was sold, and four per cent. of the purchase money had been paid over to the widow, and the balance paid into Court. The plaintiff brought this action for administration of the

Statement. estate, and on December 31st, 1890, pursuant to the judgment delivered therein, it was referred to the Master at St. Thomas to take the usual accounts. Neither in the action, nor before the Master, did the plaintiff claim that she was entitled to dower, and the report was silent as to such a claim.

The testator died without leaving issue. The plaintiff in her affidavit in support of the motion, *inter alia*, stated as follows:—

"I should have taken proceedings before this to recover dower in the said lands, but I was always told that all I could receive was what the will gave me, until I sought legal advice, which was within the last two months; that I am now of the age of sixty-five years."

The motion was opposed on two grounds: 1st, The plaintiff was estopped by reason of her not having claimed dower in this action either before the Master or otherwise. 2nd, The plaintiff was bound to elect whether she would accept the provision made for her in the will, or take her dower, and having accepted the former, she could claim her dower or thirds also.

The motion was argued before ROBERTSON, J., on November 2nd, 1891.

Hoyles, Q. C., for the plaintiff, referred to *Ripley* v. *Ripley*, 28 Gr. 610; *Kennedy* v. *Nedrow*, 1 Dallas (Sup. Ct. of Penn.) 438.

W. M. Douglas for the defendants. The amount in Court is $1,247.05. The real estate sold for $3,846, except a small house and lot now occupied by the plaintiff, worth about $300. The provision made for her by the will, and the fact of her being appointed as executrix, and proving the will, show conclusively not only the intention of the testator that such provision was to be in lieu of dower, but that she so understood it, and accepted it as such: *Lapp* v. *Lapp*, 19 Grant, 603; *Card* v. *Cooley*, 6 O.R. 229; *Re Quimby, Quimby* v. *Quimby*, 5 O. R. 738; *Amsden* v. *Kyle*, 9 O. R.

439. Moreover, the plaintiff is bound by the report of the Master, the result of her own action. The question is *res judicata.* If the plaintiff's contention is right, the amount allowed her by the report having been accepted by her, with what she now claims as dower, would swallow up the whole of the estate. As to the claim for repairs, the plaintiff has occupied, and still occupies, the house on which she made the repairs, and it was her duty to repair. The will gave her, not only the personal estate, but four per cent. of the purchase money after paying off incumbrances, and also the interest on the residue for life; which shows that the testator never intended that she should have these sums as well as dower. **Argument.**

Hoyles, in reply. As to repairs, the plaintiff is not tenant for life. The property is to be sold under the will, and she is not bound to repair, as that would enure to the benefit of the reversioner. The case is not *res judicata,* as the question has not been adjudicated upon. A trust for sale does not interfere with her right as doweress: *McGarry* v. *Thompson,* 29 Gr. 287; nor does the bequest of four per cent. of the proceeds of the real estate. If the testator had given her a house out of several, that would not deprive her of her dower in addition, nor does it put her to her election: *Laidlaw* v. *Jackes,* 27 Gr. 101.

November 23rd, 1891. ROBERTSON, J.:—

[After stating the circumstances of the case as above]. I have fully considered this matter, and the conclusion I have come to is, that the plaintiff is not bound to elect. In my judgment she is entitled, not only to the provision made for her in the will, but to dower out of the real estate. There is nothing in the will which indicates an intention on the part of the testator that his wife should accept the provisions in her favour in the will in lieu of dower, and that being the case, the rule is that she is not bound to elect, but may claim her dower also.

I had occasion fully to consider this question lately in

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Robertson, J.

the case of *Wilson* v. *Harris*. (*b*), not reported. As I understand it, the law is, that whether the provision made by the will be given out of the particular estate in which she is entitled to dower, or out of that estate amongst other property, she will be entitled also to dower, unless in the first case the estate is insufficient to meet, or answer the provisions made by the will, as well as the dower, or unless upon the whole will an inconsistency appears between the provisions of it and the right to dower, such as to make the intention of the testator manifest that she was not to have both: *per* SPRAGGE, C., in *Murphy* v. *Murphy*, 25 Gr. at p. 82.

In *Birmingham* v. *Kirwan*, 2 S. & L., at p. 452, Lord Redesdale says: The intent to exclude by voluntary gift "must be demonstrated, either by express words, or by clear and manifest intention. If there be anything ambiguous or doubtful, if the Court cannot say that it was clearly the intention of the testator to exclude, then the averment that the gift was made in lieu of dower cannot be supported."

In *Re Biggar*, *Biggar* v. *Stinson*, 8 O. R. 372, the bequest in favour of the widow was in these words:—"I give and bequeath unto my beloved wife, Eliza Biggar, my dwelling in which we now live, during her natural life, all my household goods and furniture of every description, and $300 a year, which shall be secured to her out of my estate, and at her death, to be sold, and the proceeds to be equally divided among my heirs." This case was tried before my brother FERGUSON, and at p. 379 he says: "I have examined all the authorities referred to by counsel on this branch of the case, and scrutinized the contents of the will with some care, to see if there is any ground for the implication, and I am of the opinion that the widow is not put to her election, and that she is entitled to what is given her by the will, and also to her dower."

Now, in this case before me, there is a gift of the residue of his personal estate by the testator after payment of

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(*b*) NOTE.—Delivered September 1st, 1891.

Judgment.

Robertson, J.

debts, etc., to his widow absolutely. Then as to the real estate he directs it shall be sold, not later than a year after his death, and out of the proceeds, he directs four per cent. thereof to be paid over to his widow, and directs the residue to be invested, and the interest arising therefrom to be paid to her during her life, and after her decease, the principal is to be divided among certain of his sisters, brothers and his wife's sister. There is nothing to shew that this provision is made by the testator for his wife in lieu of dower.

The late Chancellor, also, in his judgment in *Murphy* v. *Murphy*, 25 Gr. 81, referred to the leading case of *Lawrence* v. *Lawrence*, 2 Vern. 365, in which case, he says, at p. 84: "The testator devised a part of his real estate and an annuity to his widow. By the report in appeal (3 Br. P. C. 483), it appears that what he devised to her was the manor of Sherrington and 'the mansion house where he lived,' and other lands of a certain annual value. The ultimate decision in the Lords was, that the widow was not put to her election. I refer to this case particularly, because the natural inference from the will is that the testator contemplated a personal use, occupation and enjoyment by his widow of his manor house devised, as in *Miall* v. *Bain*, 4 Mad. 119, was the case in respect to the house devised to the daughter; and still in the case of the house devised to the wife, she was held not to be put to her election."

Then as to whether the plaintiff is estopped from claiming dower now, she having instituted this action for administration, and not claiming dower in it, or in the Master's office, I think the cases cited by Mr. Hoyles, support his contention that she is not estopped. Strictly speaking, the action was for administration of the estate under the will; and the will does not in any way, as I have decided, interfere with the plaintiff's right to dower; that right she holds independent of the will; and although it would have been more convenient to have disposed of the whole matter then, yet according to the cases, she has not forfeited her rights.

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Robertson, J.

As appears by the report of the Master and the affidavit of the plaintiff filed on this motion, the real estate realized about $4,000. The purchasers would buy free of dower; the age of the widow, at the death of the testator (the time when she would become entitled), was fifty-eight years; and to capitalize the dower, according to the rule adopted by this Court, at six per cent, would amount to $682, which would be first payable out of the money realized; this would leave $3,318, from which the amount of the incumbrances on one of the properties, according to the report, must be deducted, $321; leaving in the hands of executors, $2,997. From this is to be deducted four per cent. $119.88, bequeathed to plaintiff under the will, which leaves $2,877.12 for investment for the widow for life, and after her death, for distribution among the several legatees mentioned in the will. This, of course, is subject to the contingencies of costs, debts, commission, etc., which must be worked out in the Master's office, I having entered into the above more for the purpose of illustrating how the accounts should be taken on the basis of the claim for dower being now made and allowed.

In *Lapp* v. *Lapp*, 16 Gr. 159, the late Chancellor directed an enquiry for the purpose of ascertaining whether the estate of the testator was sufficient to satisfy both, the dower of the widow and the provisions made for her under the will.

In *Pearson* v. *Pearson*, 1 Bro. C.C. 292, Lord Loughborough directed an enquiry of the same nature, and these enquiries were for the purpose of aiding the Court in construing the will, with the view of ascertaining the intention of the testator, for the reason, as it was contended, if the provision made was greater than the estate would yield, over and above the dower, that fact would manifest an intention on the part of the testator to put the widow to her election.

I have considered other cases on this point, all of which support the view I have taken. I therefore declare that the plaintiff is entitled to be paid out of the fund now in

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Robertson, J.

Court for her dower in the lands, of which the testator, William Marriott, died seized; and for that purpose let it be referred back to the Master at St. Thomas, to ascertain the value of such dower, and to take an account of how matters stand in this action, as between the plaintiff as executrix, legatee, and doweress, and the defendant as executor; it appearing to me that a new account should be taken, on the basis that the dower of the plaintiff should be deducted from the total value of the real estate, in the first instance, before the amount due on the mortgage, and the four per cent. bequeathed to the plaintiff, after the amount due on encumbrances, commission and disbursements are deducted.

Then as to repairs made by the plaintiff on the house not yet sold, I think she is entitled to be recouped that amount also. Costs of this motion and incident thereto, to be paid out of the fund. Further directions and costs of reference reserved before a Judge in Chambers.

The defendant now moved before the Divisional Court by way of appeal, and the motion came on for argument before BOYD, C., and FERGUSON, J., on February 23rd, 1892.

J. A. Robinson, for the motion. We say the matter is *res judicata*. As to the two cases on which ROBERTSON, J., decided against us on this point, *Ripley* v. *Ripley*, 28 Gr. 610, was a case of an annuity, and quite unlike our case. The American case *Re Dallas*, was one of partition, where dower is an estate in the lands, which probably by American law, was not affected by the partition proceeding. [BOYD, C.—I don't think we can look to American cases to settle our practice.] As to the question of election, it is perfectly clear the testator intended that the widow should elect: *Amsden* v. *Kyle*, 9 O. R. 439; *Re Quimby, Quimby* v. *Quimby*, 5 O. R. 738.

Hoyles, Q. C., for the widow. I submit there is no estoppel. It was a clear mistake of law within the principles of

Argument. *Ripley* v. *Ripley*, 28 Gr. 610, which led to the widow not asserting her dower in the administration. Again, no one is injured by what has taken place. The fund being in Court, and her right being paramount, there is no reason why she did not come forward and ask the Court to do what it would do for a creditor. As to election, there is none. The rule is, you must find something on the face of the will, plainly inconsistent with the widow's right of dower. I refer to Cameron on Dower, p. 450, referring to Roger's on Husband and Wife, vol. 1, p. 582; *Bending* v. *Bending*, 3 Kay & J., 257, 264; *In re Courtier, Coles* v. *Courtier*, 34 Ch. D. 136.

March 29th, 1892. BOYD, C.:—

When no provision in lieu of dower is made by the will expressly, the rule of construction as to whether the widow is obliged to elect, is to ascertain whether the will contains any disposition of property inconsistent with the assertion to demand a third of the lands to be set out by metes and bounds for her use during life. In this will the testator gives to his wife all the rents of his land while it remains unsold: he directs his executors to sell all his real estate not later than a year after his death, and out of the proceeds of sale to pay the widow four per cent. of the whole, and to pay the interest accruing from the balance to her during her life, and at her death to divide the balance of principal money equally between his brothers and sisters named. That is to say, the wife gets all the rents till the sale, and upon the sale she gets four per cent. of the *corpus*, and a life estate in the balance of that *corpus*. It would disturb this scheme if the wife insisted on having one-third of the lands set apart for her specific use as doweress, and leaving to be now sold only the residue of the real property. The testator contemplates the whole of the land being sold and funded as directed after deducting her four per cent. of the principal money.

Judgment.

Boyd C.

Again, the principal acted on in *Westmacott* v. *Cockerline*, 13 Gr. 79, applies where a devise of all the lands to the widow *durante viduitate* puts her to elect. That devise gave her the freehold, and as tenant of the freehold she could not have dower assigned to her while she held that estate. The like inconsistency arises here. She gets all the interest, which is equivalent to a life estate in the whole, and holding that she cannot also claim and hold a further contemporaneous life estate in one-third as doweress. As she has received the benefits of the will, which are larger and more beneficial than the claim of doweress she has already elected against dower.

For the reasons given I cannot agree with the judgment of my brother Robertson, and I think it should be reversed on this point. As to the allowance for repairs, I am not disposed to interfere. This is not a case for costs of appeal nor for costs below.

See, also, *Roberts* v. *Smith*, 1 S. & S. 513, and *Bending* v. *Bending*, 3 K. & J., at p. 263.

FERGUSON. J. :—

By his will the testator gave to the widow Hannah Marriott all his personal property, subject to the payment of his debts and funeral and testamentary expenses. He then gave to her the rents of his real estate, while the same should remain unsold after his decease. He had, by a prior clause, appointed his wife and McKay, executrix and executor of the will.

The testator then bequeathed to his executrix and executor all his real estate of whatever kind or nature to be by them sold as soon as that could be advantageously done, but not later than one year after his decease. The proceeds of the sale to be held by them in trust: (1). To pay the widow four per cent of the same; (2). To deposit the balance of the proceeds of the sale in the postoffice savings bank, or on other good security, and to pay the interest "accruing therefrom" to the widow during the term *of*

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Ferguson, J.

her natural life; 3. And at her death, to divide the principal money equally amongst other persons as pointed out.

There seems to be nothing in the will to justify or in any way to vary these dispositions in favour of the testator's widow. The present action is for administration of the estate. The lands had, however, all been sold before these proceedings were commenced, excepting a small house and lot, the present residence of the widow. No mention of dower is made in the proceedings up to the report of Master, nor in the report. There was also an agreement made between the parties in some respects affecting the estate, and no mention of dower is made in this either. In the administration proceedings, the moneys of the estate came into Court.

After the report, an application was made to my brother Robertson for an order for the payment out to the widow of a sum the equivalent of her dower in the lands of the testator, and the sum also of $45, said to have been expended by her for improvements upon that part of the lands yet unsold, and on that motion, it was held that the widow was not put to her election by the will, and that she is entitled both to her dower and the benefit of the provisions of the will in her favour.

By this will the widow is given the whole of the residue of the personal estate after payment of the debts, etc., then, in effect, four per cent. of the lands and a life estate in the remaining ninety-six per cent. of the lands. See the case *Ripley* v. *Ripley*, 28 Gr. at p. 613, where the then Chancellor said: "Further, it is to be borne in mind that the dower is a *legal* right, which the dowress may litigate either in this Court or in a Court of law; *and the money now in Court*, represents what was that legal right of the plaintiff, if entitled to dower." The money in the present case is, as already stated, in Court. It represents the land, and for the purpose of a claim for dower, it is to be considered as if it were the land itself, let the modes of setting apart the dower be ever so different. Then one has a case in which the widow is given a small fractional part of the interest in the land out and out and a life estate in the residue. The direction by the testator that the lands should be converted into money; and the fact that the lands have been sold not subject to the right of dower, do not, I think, differ the case in principle from a case in which the widow is seeking to recover dower out of lands in fact. Where lands are devised in fee to a widow, it goes without saying, I think, that she cannot take these lands and claim dower also out of the same lands. This would seem to meet the case in respect of the four per cent.

As to the $45, I do not see that we should interfere.

This short question, then, as I think, arises: Can a widow to whom a life estate in lands is devised by her husband's will, claim and have such life estate and dower out of the same lands as well?

The question seems to me to be fully and properly answered in the negative by the decision in the case *Westmacott* v. *Cockerline*, 13 Gr. at page 80, by the late Chancellor VanKoughnet.

It seems to me that the widow in the present case is, as to this money, on principle, in the same position as if she were claiming dower out of the land, and claiming to be tenant of the freehold in the same land. I think she cannot have both, and that she was thus put to her election by the will.

As to the question of election having or not having been made, I have examined some authorities, amongst which are *Ripley* v. *Ripley, supra; Smith* v. *Drew*, 25 Gr., at pp. 191 and 192, and the cases there referred to by the learned Judge. It seems, however, so plain, that even if the widow has not elected, she ought to, and will elect to take the benefits given her by the will, that I need not further trouble myself in respect of this question.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

RE WALKER AND DREW.

Will—Construction—Devise—Estate in fee—"Absolutely"—"In the event of her death"—R. S. O. ch. 109, sec. 30.

A testator, who died on the 9th April, 1891, seized in fee, by his will devised and bequeathed all his real and personal estate to his wife absolutely, and in the event of her death to be equally divided among his children:—

Held, that the will was to be construed as if the words "in my life time" followed the words "in the event of her death," and that the widow took an estate in fee simple in the lands.

Construction of sec. 30 of the Wills Act, R. S. O. ch. 109.

Statement. ON the 9th June, 1892, a petition was presented to the Court, under the Vendor and Purchaser Act, R. S. O. ch. 112, sec. 3, by Sarah Ellen Walker, of the city of Toronto, widow, shewing:—

1. That by an agreement in writing, dated 11th May, 1892, the petitioner (the vendor) had agreed to sell to John Drew (the purchaser) certain lands in the city of Toronto.

2. That by requisition No. 4, respecting the title to the lands, the purchaser required to know how the vendor obtained title; which the vendor answered by producing the will of her deceased husband, Lewis Leslie Walker, and submitting that under the same she acquired a title in fee simple, she having survived the testator, who also left children under the age of twenty-one years him surviving.

The prayer was that the Court should declare that the vendor took an estate in fee simple in the lands in question under the will of the late Lewis Leslie Walker, and that the answer of the vendor to the purchaser's requisition No. 4 was a sufficient answer thereto.

The will was as follows:

"I devise and bequeath all the real and personal estate to which I shall die in any wise entitled, unto my wife Sarah Ellen Walker, absolutely, and in the event of her death, to be equally divided among my children, share and share alike; and I appoint the said Sarah Ellen Walker sole executrix of this my last will and testament."

Statement.

The will was dated 23rd February, 1891, and the testator died on the 9th April, 1891.

The testator at the time of his death was seized of the lands in fee.

The petition was argued before FALCONBRIDGE, J., in Court, on the 10th June, 1892.

A. H. Marsh, Q. C., for the vendor. The meaning of the will is, in the event of the wife's death in the lifetime of the testator. This would certainly be so in the case of personalty: 2 Jarman, 4th ed., pp. 752-755; Hawkins, 2nd ed., pp. 254-256. There are no cases in England since the Wills Act, but the American cases bearing out the proposition, are collected in Theobald, 3rd ed., p. 451. See also *Rogers* v. *Rogers*, 7 W. R. 541, and 2 Jarman, 5th (Am.) ed., p. 760.

J. M. Clark, for the purchaser. The will gives the wife an estate for life absolutely with remainder to the children as tenants in common. All the text writers refer to the same authorities, *e. g.*, *Bowen* v. *Scowcroft*, 2 Y. & C. 640; *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388. The word "absolutely" is not inconsistent with a life estate. "In the event of her death" is equivalent to "after her death." "Share and share alike" are words of distribution, and shew that the children were intended to take. I refer to Hawkins, 2nd ed., p. 192; *Smith* v. *Smith*, 8 O. R. 677; *Bradley* v. *Cartwright*, L. R. 2 C. P. 511; R. S. O. ch. 109, sec. 30.

August 1, 1892. FALCONBRIDGE, J.:—

The vendor, who is the widow of the testator, submits that under the will she acquired a title in fee simple to the lands in question. The testator left also children under the age of twenty-one years him surviving.

Judgment.

Falconbridge, J.

The purchaser contends that the widow has only an estate for life with remainder to the children as tenants in common, and that she cannot make title to the purchaser.

There is no doubt what the law is in such a case as regards personalty. The rule is succinctly stated in the 2nd (Am.) edition of Mr. Hawkins' Treatise, at p. 254:

"Where there is a bequest to one person, and 'in case of his death' to another, the gift over is construed to take effect only in the event of the death of the prior legatee *before the period of payment* or distribution, unless an intention appear to the contrary:" *Cambridge* v. *Rous*, 8 Ves. 12; *Ommaney* v. *Bevan*, 18 Ves. 291; *Home* v. *Pillans*, 2 Myl. & K. 15. "The rule is the same where the bequest is to A., and 'in the event of his death,' to B.:" *Re More's Trusts*, 10 Ha. 171; *Schenk* v. *Agnew*, 4 K. & J. 405; "or to A, and, 'if he die,' to B.:" *King* v. *Taylor*, 5 Ves. 806.

The only reason for ever applying a different rule to the case of a devise of realty, existed before the Wills Act, and is pointed out by Alderson, B., in *Bowen* v. *Scowcroft*, 2 Y. & C. at p. 660 (Dec. 1, 1837). "* * no case has been, or I believe can be, cited, in which such a construction has been applied to a devise of land. There is an obvious distinction between the two. A bequest of personal estate to A. gives him the whole interest—a devise of land to A. gives him only a life interest. In the for[illegible]r case, therefore, the words, 'in case of their demise' preceding a bequest over, cannot well have their proper effect except by considering them as applicable to a bequest over as a substitution for the previous gift, in case the party to whom it is given should not survive the testator. But in the case of land, the most natural meaning of the words (which seems to me to be 'after their demise,') may very reasonably have its full effect."

This reasoning is applicable only to the state of the law before the English Wills Act, 1 Vic. ch. 26, and in Ontario before 36 Vic. ch. 20, and it seems to me that Mr. Jarman so understands it (5th (Am.) ed., vol. 2, p. 760).

Judgment.

Falconbridge, J.

The case *Rogers* v. *Rogers*, 7 W. R. 541, is an authority in favour of the vendor's contention. It is a judgment of Kindersley, V. C. Citing this case, Mr. Theobald says, (3rd ed., p. 451): "On the other hand, if the devise gives A. the fee, a gift over, in case of A.'s death, will be held to refer to his death before the testator."

In support of the following dictum: "And in a will made since 1837, a devise to A. *simpliciter*, and in case of his death to B., would, it should seem, receive the same construction," (*i. e.*, would be an absolute devise to A., if he survive the testator), Mr. Hawkins cites several American cases: note p. 256.

This seems reasonable, and the only doubt which I have felt was as to the application of section 30,* of the "Wills Act of Ontario," R. S. O. ch. 109, viz., whether it was not arguing in a circle to invoke the section to pass the whole estate in the land devised, thereby declaring that "no contrary intention appears by the will," and then to use the section to defeat the contrary intention which, the purchaser claims, does appear.

Two considerations, in my opinion, answer this objection. First, the testator deals in the same way with all his real and personal estate. The same rule ought to be applied to both unless there is some constraining force compelling the contrary. Secondly, the use of the word "absolutely," which is, to my mind, meaningless in this connection as applied to a mere life estate.

The declaration will be that the vendor takes an estate in fee simple in the lands in question under the will, and the answer of the vendor to the purchaser's requisition number 4 is a sufficient answer thereto. See also *Randfield* v. *Randfield*, 8 H. L. C. 225; *Wright* v. *Stephens*, 4 B. & Ald. 574.

The point first comes up now squarely for decision, and each party will pay his own costs.

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*30. Where any real estate is devised to any person without any words of limitation, such devise shall, subject to the Devolution of Estates Act, be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, unless a contrary intention appears by the will.

[QUEEN'S BENCH DIVISION.]

ARMSTRONG ET AL. V. HEMSTREET ET AL.

Assignments and preferences—R. S. O. ch. 124, sec. 3, sub-sec. 1—Payment of money to a creditor—Transfer of cheque.

The handing by a debtor to his creditor of the cheque of a third person upon a bank in the place where the creditor lives, the maker of the cheque having funds there to meet it, is a "payment of money to a creditor" within the meaning of R. S. O. ch. 124, sec. 3, sub-sec. 1.

Statement. THIS was an action brought by C. B. Armstrong, the assignee of the estate of G. I. Lenentine, and by T. B. Escott & Co., creditors of Lenentine, on behalf of themselves and all other creditors, against R. H. Hemstreet, D. H. Price, and W. E. Murray, praying for a declaration that certain payments made by Lenentine to the defendants, shortly before his insolvency, might be declared to be preferential and void, and that the defendants might be ordered to account for them to the assignee of the estate.

The action was tried at the London Sittings, on April 5th, 1892, before FERGUSON, J.

The facts of the case proved at the trial were as follows:—

The defendants Price and Hemstreet had carried on a general store at Springfield, in the county of Elgin, which they sold out to Lenentine about 15th November, 1889, taking part cash and his notes for the balance, $3,000. It was a part of the terms of the sale that Lenentine was to furnish collateral security for the notes to the satisfaction of the defendant W. E. Murray, a private banker in the neighbourhood, who had agreed to discount the notes for Price and Hemstreet, and to renew them from time to time. This arrangement was carried out, and certain notes were deposited by Lenentine as collateral security for the payment of the $3,000 notes. On 24th July, 1891, the $3,000 had been reduced to $1,985, for which Murray held Lenentine's notes, indorsed by Price and Hemstreet, all over-due, **Statement.** with the collateral notes above mentioned. Lenentine's account current with Murray's Bank was over-drawn at the same time to the amount of $498.87, secured by the same collateral notes, and Murray had been calling upon Lenentine to cover it.

On or immediately before 24th July, 1891, Lenentine had agreed to sell out his stock to one E. A. Hemstreet (not the defendant), and had received a payment down from him of $500 by a cheque for that sum upon the Traders' Bank in Aylmer. This cheque he took to Murray's bank on the 24th July, 1891, and deposited it there to his own credit. On the 1st August, 1891, Lenentine made a further deposit to the credit of his account of $2,558.20, also by a cheque of E. A. Hemstreet. On the same day he gave Murray a cheque on his bank account for $1,981.35, to pay the notes held by Murray, indorsed by Price and Hemstreet; and withdrew by two other cheques the cash balance at his credit. In this way the whole indebtedness to Murray, including the over-drawn account, was satisfied; and Murray thereupon returned to Lenentine the collateral notes which he held and gave him up the notes for $1,981.35, having first cancelled them. Murray was aware that the money paid him by Lenentine was the proceeds of the sale of his stock-in-trade, but was not aware that Lenentine was insolvent at the time. On 7th August, 1891, Lenentine made an assignment to the plaintiff Armstrong for the benefit of his creditors. The debts of Lenentine remaining unpaid were $3,122.33; the assets were some $750, collected by the assignee from the book accounts. The collaterals held by Murray were shewn to have produced little or nothing.

Upon these facts the learned Judge delivered judgment orally in favour of the defendants as follows:—

FERGUSON, J.:—

It seems clear to me that this action cannot succeed. The transactions that are sought to be impugned were, in

Judgment.

Ferguson, J.

my opinion, nothing more or less than payments of money in the ordinary course of business. It was objected that they were not done in the ordinary course of business, as it was not an ordinary thing for this debtor to pay so much money at one time. Even if effect were given to this contention, the acts would certainly be payments of money to a creditor within the meaning of R. S. O. ch. 124, sec. 3, sub-sec. 1*; and the sub-sections of section 1 of 54 Vic. ch. 20 (O.), are all drawn subject to this third section.

Even if this were held not to be so, then there would have to be so large a restoration in value to Murray under sub-sec. 3 of sec. 3, ch. 124, that the action would not, most probably, bear any fruit for the creditors.

Again, under sub-sec. 4 of the same section, the valuable securities given up by Murray would have to be restored to him, and this would probably equal the whole amount paid to him. I have, however, placed my judgment on the first mentioned ground; that is, under sec. 3, sub-sec. 1.

The action must be dismissed with costs. I suppose the assignee ought to have solicitor and client costs out of the estate.

The plaintiffs moved at the Easter Sittings of the Divisional Court to set aside this judgment and enter judgment

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* 3. (1) Nothing in the preceding section shall apply to any assignment made to the sheriff of the county in which the debtor resides or carries on business, or to another assignee, resident within the Province of Ontario, with the consent of the creditors as hereinafter provided, for the purpose of paying ratably and proportionately and without preference or priority all the creditors of the debtor their just debts; nor to any *bonâ fide* sale or payment made in the ordinary course of trade or calling to innocent purchasers or parties; *nor to any payment of money to a creditor*, nor to any *bonâ fide* gift, conveyance, assignment, transfer or delivery over of any goods, securities or property of any kind, as above mentioned, 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; provided that the money paid, or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor.

for them against the defendant Murray, upon the ground **Argument.** that the preferences mentioned in the pleadings, to wit, the cheques of E. A. Hemstreet, transferred by Lenentine to the defendant Murray, were not cash payments, but were bills of exchange, and upon the further ground that the plaintiffs should, at all events, have had judgment in their favour for the overdrawn account of $500, for which Murray held no security.

The motion was argued on 27th May, 1890, before the Divisional Court (FALCONBRIDGE and STREET, JJ.)

Gibbons, Q. C., for the plaintiff.

G. T. Blackstock, Q. C., for the defendant Murray.

The following cases were referred to: *Campbell* v. *Roche*, 18 A. R. at p. 651; *Pritchard* v. *Hitchcock*, 6 M. & G. 151; *Marshall* v. *Lamb*, 5 Q. B. 115.

June 13, 1892. STREET, J.:—

It was pressed upon us by counsel for the plaintiffs that there was no "payment of money" by Lenentine to Murray within the meaning of the 1st sub-section of section 3 of ch. 124, R. S. O.; that the transaction was the transfer by the debtor to the creditor of instruments which were technically bills of exchange; and that it comes under section 2 and not within the exception in section 3. The fact that the cheques of E. A. Hemstreet were deposited by the debtor in the creditor's bank, instead of being paid direct to him, cannot affect in one way or the other the question to be determined, which is, whether the handing by the debtor to the creditor of the cheque of a third person upon a bank in the place where the creditor lived—the maker of the cheque having funds there to meet it—is a payment of money within the statute.

We were not referred to any authority in support of the argument, and we think that we should not give effect to it. The maker of the cheques had at his credit in the Traders'

Judgment.

Street, J.

Bank a balance sufficient to meet them; the payee Lenentine would have received the amount of them in bank bills had he presented the cheque and asked for them. Instead of doing so, he gave the cheques to his creditor Murray, who took them as cash, and no doubt obtained cash or credit for them. We think it would be placing entirely too restricted a construction upon the Act to hold that this was not a "payment of money," within its intention and meaning.

We think, therefore, that the motion of the plaintiffs should be dismissed with costs.

FALCONBRIDGE, J.:—

I agree.

If these cheques were not "money," then neither would bank notes be money, nor any other medium of exchange except coin—gold, silver, or other metal stamped by public authority. This was the original meaning of "money," coined as it was in Rome in the Temple of Juno the Admonisher (*moneta*). But now, in its wider sense, it means any equivalent or circulating medium readily used for the exchange of surplus goods or services. The Imperial Dictionary, *sub verb.*, says: "Bank notes, notes of hand, letters of credit, accepted bills on mercantile firms, etc., all representing coin, are called 'money.'"

[COMMON PLEAS DIVISION.]

Adamson v. The Corporation of The Township of Etobicoke.

Municipal law—Bonus to street railway from portion of township—54 Vic. ch. 42, sec. 36 (O.)—Petition for by majority of assessed owners—Voting on by-law—Majority.

Although under 54 Vic. ch. 42, sec. 36 (O.), it is necessary, when aid is sought to be granted to a street railway by a portion of a municipality, that a majority in number representing one-half in value of the persons shewn by the last assessment roll to be the owners of real property in such portion should petition for the passing of the by-law, it is sufficient if the by-law is carried at the poll by a majority of those voting upon it.

Statement. This was an application to quash by-law No. 494 of the municipality of the township of Etobicoke, granting a bonus to a street railway company, upon the grounds set out in the judgment.

H. S. Osler supported the motion.

Fullerton, Q. C., and *Wm. Pinkerton*, contra.

March 25th, 1892. Galt, C. J.:—

This case was most fully argued by the learned counsel on both sides. There were numerous objections taken on the motion as to bribery, personation and undue influence, but the principal objection was the first: "That the majority of the ratepayers defined in the petition for the said by-law did not assent thereto."

The number of votes as shewn by the list is one hundred and eighty-seven; of these one hundred and twenty-four voted, one hundred and seven in favour of the by-law and seventeen against.

It was alleged by Mr. Osler that from those who voted for the by-law seventeen should be deducted as representing persons who had improperly voted in other persons'

Judgment.

Galt, C. J.

names, so that only ninety voted for and seventeen against, and that under the provisions of the Act ninety-four were required.

If this contention be correct it is unnecessary to consider the others; and, if it is erroneous, the same result will follow, as out of one hundred and twenty-four votes there was a majority of no less than ninety, and, if the what may be termed false votes are deducted, no less than seventy-three.

Mr. Osler's contention was that under the provisions of 54 Vic. ch. 42, sec. 36 (O.), the majority must consist of a majority of the ratepayers within such portion of the municipality who are entitled to vote thereon; and in consequence as the majority, even without excluding the false votes, was only ninety, the by-law should not have been passed.

The provision of the Municipal Act as respects bonus by-laws is somewhat peculiar. By sec. 320 of R. S. O. ch. 184: "To render valid a by-law of a municipality for granting a bonus in aid of a railway, * * the assent shall be necessary of two-fifths of all ratepayers who were entitled to vote, as well as of a majority of the ratepayers voting on the by-law."

This section was amended by sec. 16 of 51 Vic. ch. 28 (O.), which enacts that, notwithstanding anything contained in that section, in case of a bonus for promoting the establishment of a manufactory, etc. (not a railway, which is not referred to), the words "two-fifths" shall be read as the words "two-thirds" instead of two-fifths; as respects "railways" there was no alteration. Such was the law when the 54 Vic. ch. 42 (O.), was passed.

Under the provision of the 36th section, "The majority in number" (not of the ratepayers) "of the persons shewn by the last revised assessment roll to be the owners of the real property comprised in any portion of a township," etc. "to be defined in the petition hereinafter referred to, and who represent at least one-half in value according to such assess-

Judgment.

Galt, C.J.

ment roll of such property, may petition the council to aid any street railway company," etc.

It is manifest from these express provisions that no person, although he may be a ratepayer, unless he is the proprietor of real property within the defined limits, has any right to be a petitioner; and this is very reasonable, for as the charge to be created would amount to what may be termed a permanent charge, it would not be just, that what may be termed a transient ratepayer, should be entitled to originate such charge; but it is equally just that such ratepayer should, after the "proprietors" have given their consent, have an opportunity of expressing his opinion as to the expediency of a by-law by which he would be assessed during his residence in the municipality, therefore the second sub-section enacts that "Upon receipt of such petition, the council after the assent of a majority of the ratepayers within such portion of the municipality, who are entitled to vote thereon, has been obtained, in the manner provided by the Municipal Act, may pass the by-law etc."

Then again, the provision is express, the assent of the majority of the ratepayers is to be obtained in the manner provided by the Municipal Act. By section 318 of ch. 184, after the clerk has received the ballot paper and statements he "shall declare the result and forthwith certify to the council under his hand whether the majority of the electors voting upon the by-law have approved or disapproved of the by-law."

In my judgment the by-law was properly assented to by a "majority of the ratepayers;" and the council were authorized to pass the by-law.

As respects the other objections, in view of the large majority, it is unnecessary to consider them, as it is manifest they could not have had the effect of interfering with the result.

Motion dismissed with costs.

[CHANCERY DIVISION.]

THE CORPORATION OF THE CITY OF TORONTO V. THE ONTARIO AND QUEBEC RAILWAY COMPANY.

Railways—Bonus—Condition—That machine shops shall be "located and maintained"—Amalgamation with larger company—Changing circumstances—Ceasing to maintain.

A railway company having obtained a bonus from the plaintiffs upon condition that its machine shops should be "located and maintained" within the city limits, did so erect and maintain them for some years, until authorized by legislation it amalgamated with and lost its identity in another company, all the engagements and agreements of the amalgamating companies being preserved. The amalgamated company was afterwards leased in perpetuity to a much larger railway company who removed the shops outside the city limits:—

Held, that although all engagements and agreements made by the original company were preserved, the amalgamation and leasing in perpetuity by the larger company of the smaller under the authority of Parliament imposed new relations upon the amalgamated road which worked a change in the policy as to the site and size of the machine shops and that the engagement had been satisfied by the maintenance of the said shops by the original company during its independent existence.

Statement.

THIS action was brought to restrain the defendants from removing certain car and machine shops from the city of Toronto, or in the alternative, for damages in consequence of their removal under the following circumstances:

In 1877, the corporation of Toronto granted a bonus of $250,000 to the Credit Valley Railway Company, and took from the company a bond for $500,000, one of the conditions of the bond being, that "the machine shops of the company except such as may be necessary along the line for the purpose of minor repairs, shall be located and maintained within the city limits."

By 46 Vic. ch. 50 (O.), the Credit Valley Railway Company was authorized to amalgamate with the Ontario and Quebec Railway Company, and it was therein provided (section 7) that, "with respect to all * * engagements and agreements made between the company and municipalities, the same shall be obligatory and binding upon the amalgamated company to the same extent as if such agreements had been made directly with such amalgamated company;" and that "the agreement for amalgamation Statement. * * shall contain stipulations or provisions whereby the amalgamating companies shall agree to be bound by and perform all such engagements and agreements."

In November, 1883, a deed of amalgamation was executed between the Credit Valley Company and the Ontario and Quebec Company, which, amongst other things, provided that, "the amalgamated company shall immediately on this agreement taking effect, assume and undertake the performance, payment and discharge of all debts, contracts, agreements and liabilities of both the said companies hereby agreeing to amalgamate."

In 1884, the agreement for amalgamation was confirmed by 47 Vic. ch. 61 (D.), which provided (sec. 9) "that any claim or right of suit or action against any of the said companies may be urged and prosecuted against the said Ontario and Quebec Railway Company, as fully and effectually as it might be urged or prosecuted against the company primarily bound."

In 1884, the amalgamated railway was leased to and became part of the Canadian Pacific Railway, and the lease was confirmed by 47 Vic. ch. 54 (D.).

The machine shops of the Credit Valley Railway Company were erected within the limits of the city of Toronto, and were there maintained until November, 1889, when the greater part of the machinery was removed to the Canadian Pacific Railway workshops at West Toronto Junction.

The action was tried at the Toronto Sittings, on May 4th, 1892, before BOYD, C.

Robinson, Q. C., for plaintiffs, stated the case.

Edward Blake, Q. C., for the defendants. There was a substantial performance of the conditions of the bond, as the machine shops were erected and maintained *bonâ fide* by the Credit Valley Railway Company, as long as that

Argument.

company existed, and subsequently by the Ontario and Quebec Railway Company.

Robinson, Q. C., in reply. Machine shops are referred to in and covered by section 7 of 46 Vic. ch. 50 (O.), under the words "stations and other matters." I refer to *Geauyeau* v. *Great Western R. W. Co.*, 3 A. R. 412, and *Wallace* v. *Great Western R. W. Co.*, 3 A. R. 44.

May 11th, 1892. BOYD, C.:—

The Credit Valley Railway was incorporated in 1871 by 34 Vic. ch. 38 (O.), and in 1877 obtained a bonus from the city of Toronto of $250,000 upon certain conditions, of which one was, "that the machine shops of the company (except such as may be necessary along the line for the purpose of minor repairs) shall be located and maintained within the city limits."

In 1883, the Ontario Legislature granted power to the company to amalgamate with the Ontario and Quebec Railway—a Dominion corporation—by 46 Vic. ch. 50 (O.), and a contemporaneous Act granting like power of amalgamation to the Ontario and Quebec Railway with the Credit Valley Railway, was passed by Canada, 46 Vic. ch. 58.

By Dominion statute of the same session the Credit Valley Railway was declared to be a work for the general advantage of Canada, and power was given to it to amalgamate with the Ontario and Quebec Railway: 46 Vic. ch. 57.

The deed of amalgamation by and between these two companies was ratified by parliament in 1884: 47 Vic. ch. 61 (D.), after which time the Credit Valley Railway ceased to exist, becoming a part of the Ontario and Quebec Railway.

By the same Act sanction was given to the leasing of the amalgamated road to the Canadian Pacific Railway in perpetuity. This legislation also provided that any contract, covenant, or agreement made by the Credit Valley Railway with any corporation, should remain unaffected

Judgment.

Boyd, C.

thereby: 46 Vic. ch. 57, sec. 5 (D.), and 47 Vic. ch. 61, sec. 9 (D.); 46 Vic. ch. 50, sec. 4 (O.); and that any claim thereupon might be prosecuted against the said amalgamated company, the present defendants.

It was further specifically provided by the Ontario statute of 1883, that certain "engagements and agreements with respect to the location and maintenance of stations and other matters" made between the Credit Valley Railway and municipalities, should be "obligatory and binding upon the amalgamated company, to the same extent as if such agreements had been made directly with such amalgamated company:" 46 Vic. ch. 50, sec. 7 (O.). Further on this point one clause in the deed of amalgamation so legalized, provides as follows: The amalgamated company shall, immediately on this agreement taking effect, assume and undertake the performance, payment and discharge of all debts, contracts, engagements and liabilities of both the said companies hereby agreeing to amalgamate, including the engagements and agreements mentioned in a certain Act of Ontario, being 46 Vic. ch. 50 (from which I have already cited the important passage); and in the Act of Canada, passed in the same year, ch. 57, par. 6, at p. 67, 47 Vic. 61 (D.).

It is stated that the Credit Valley Railway erected and maintained its machine shops in Toronto, till 1883, but since then they have been discontinued, owing to the requirements of the amalgamated line. Lately however very large machine workshops for the use of the Canadian Pacific Railway have been erected in West Toronto Junction, outside of the city limits.

The Credit Valley Railway was a short and comparatively unimportant line, and the kind of shops sufficient for its purposes would be quite unsuitable for the more extended operations of the amalgamated line; particularly in view of its connection with the Canadian Pacific Railway. In these circumstances, the opinion of the Court is asked whether any obligation exists in respect of the condition of the bonus, and if so, what would be the measure of damage.

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The stipulation was to locate and maintain the machine shops within the limits of Toronto. "Locate," has reference to the placing of the works at first, and the idea of permanence has to be sought in the next word "maintain." Does the maintenance of the machine shops during the independent life of the Credit Valley Railway satisfy the condition? Does the ceasing to maintain after the amalgamated life had begun, work a breach for which the defendants should answer?

In *The Corporation of the Township of Wallace* v. *The Great Western R. W. Co.*, 3 A. R. 44, the bonus was granted on condition that the road should "maintain a permanent station." This was held to be a continuing engagement, which required the company to keep up the buildings and stop such trains there as were usually stopped at ordinary stations.

In *Geauyeau* v. *Great Western R. W. Co.*, 3 A. R. 412, Patterson, J., at p. 423, referring to the use of the word "establish" in reference to the terminus and depôt, declined to read it as including to "maintain and use for ever;" and he refers to the changing circumstances in the conduct of railway operations, which would justify a change in the location of buildings without breaking an engagement to establish at a certain point.

I understand the result, in these two cases to be different for one reason, because "permanence" was an ingredient in the *Wallace Case* and was not in the *Geauyeau Case.* Here the engagement is not about a station (a comparatively simple thing), but as to the chief machine shop of the Credit Valley Railway. In the amalgamated system, a station could readily be maintained at a given point; but to place the chief workshops at an unsuitable place, would be disastrous to the concern. That may be a reason why "station" is, and "machine shop" is not, named in the statute 46 Vic. ch. 50, sec. 7 (O.). The machine shops suitable for the Credit Valley Railway would be inadequate for the much larger road, and it would be unreasonable to ask a division of shops, one equal to the possible

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requirements of the old Credit Valley Railway to be kept at Toronto, and the complementary one, sufficient for the uses of the Ontario and Quebec Railway, to be kept somewhere else.

The opinion of Patterson, J., as to the force of the word "establish," in the *Geauyeau Case*, is accepted by Hagarty, C. J. O., in *The Corporation of the Township of Nottawasuga* v. *The Hamilton and North Western R. W. Co.* 16 A. R. p. 67, who says further, that "if it be sought to bind the company for perpetuity or a distinct term of years to such user, apt words should be used in the contract."

With this accords the opinion of the Supreme Court of the United States, in a late case of *Texas Railway Co.* v. *Marshall*, 136 U. S. R. 393, decided in 1889. A bonus was granted by the city of Marshall to the Texas and Pacific Railway, in consideration of the company agreeing to permanently establish its eastern terminus and Texas offices at the city of Marshall, and to establish and construct at said city the main machine shops and car works of the said company. The city paid the bonus and the company made Marshall its eastern terminus, and built shops and established its principal offices there. In eight years Marshall ceased to be the eastern terminus of the road, and some of the shops were removed, and an action was brought such as this.

Mr. Justice Miller for the Court said: "If it were not for the word "permanent," * * we should not think it easy to justify the inference that the obligation was to maintain for ever at that place (Marshall) what the company engaged to establish there, p. 401. Again observing at p. 403, that the word "permanent," does not mean "for ever," or "lasting for ever," or "existing for ever;" he says: "It appears to us, * * that the contract on the part of the railroad company is satisfied and performed when it establishes and keeps a depôt, and sets in operation car works and machine shops, and keeps them going for eight years, and until the interests of the railroad company and the public demand the removal of some or all of these

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subjects of the contract to some other place." And at p. 402: "If, however, the city desired something more than this, if it desired to make sure that these establishments should for ever remain within the limits of the city, * * and that the railroad company should be bound to keep them there for ever, such an extraordinary obligation should have been acknowledged in words which admitted of no controversy. It would have been very easy to have inserted into the contract language which forbade the company from ever removing the terminus of the road to some other point or from ever removing or ceasing to use the depôt, or the car and machine shops, and thus have made the obligation perpetual. But it seems to us that the real essence of the contract was that the railroad company should, in its process of construction, make this city its eastern terminus, and should establish there its depôt, its machine shops and its car works; and that this should be done in the ordinary course of its business, with the purpose that it should be permanent."

This language and reasoning is pertinent to the present case. We have also further considerations. Toronto has here ceased to be the terminus of the Credit Valley Railway by the disappearance of that short road in a larger system. The amalgamation and concurrently the acquisition in perpetuity by the Canadian Pacific Railway of the control of this link in the chain, impose new relations on the amalgamated road which work a change of policy as to the site and size of the machine shops. Besides in this contract there is not found the difficult word "permanent;" which, however, was not found conclusive in the *Texas Case*.

On the question as argued before me, I should take it that the engagement is satisfied, but I would not conclude the city by this expression of opinion, if a reference as to damages is asked, as the facts are not spread on the record, nor are they otherwise in evidence before me. A possible right of relief as to damages, was considered by Mr. Justice

Miller in the *Texas Case*, and he suggests lines of investigation on that head at p. 406.

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I do not at present see in what way any substantial damages could be recovered; and it may be after I have thus dealt with the main question at issue, the parties will be content to have the action dismissed without costs.

G. A. B.

NOTE.—This action was not further prosecuted.—REP.

[CHANCERY DIVISION.]

FORWOOD V. THE CORPORATION OF THE CITY OF TORONTO.

Negligence—Accident—Street railway—Neglecting to stop a car—Driving over a man in broad daylight—Contributory negligence.

The plaintiff in broad daylight having hailed a westward bound tramway car, on the north track, crossed over from the south side of the street to get into it; the eastward bound car at the time was coming along on the south track at a fast trot, but was some 300 feet away, to the west. The plaintiff was somewhat intoxicated. As he took hold of the westward bound car to board it, he fell, and the eastward bound car passed over his foot, which was on the rail.

The jury found that there was no negligence on the part of the defendants, and that the plaintiff was not guilty of contributory negligence, on which the trial Judge entered judgment for the defendants:—

Held, that the attendant or surrounding circumstances were, in the absence of any explanatory evidence by the defendants, sufficient to raise the presumption that there was negligence on the part of those in charge of the eastward bound car, the consequence of which was the happening of the accident, and that there must be a new trial.

Statement.

THIS was an action brought by Thomas W. Forwood against the City of Toronto for damages resulting from a street railway car running over his foot, under circumstances which are fully set out in the judgments.

At the time of the accident the defendants were the owners and proprietors of the street railway.

Statement. The action was tried before Rose, J., and a jury at Toronto, on October 21st, 1891.

In answer to questions submitted, the jury found that the street railway officials were not guilty of negligence causing the accident; but, in answer to the question whether the plaintiff could, by exercise of reasonable care, have avoided the accident, they also replied in the negative.

The learned Judge directed judgment to be entered for the defendants, dismissing the plaintiff's action with costs.

The plaintiff now moved the Divisional Court by way of appeal, and the motion came on for hearing on February 22nd, 1892, before BOYD, C., and FERGUSON and ROBERTSON, JJ.

McCullough, for the motion. Thompson on Trials (ed. 1889), p. 758, shews that it was an improper argument for counsel for the city to address to the jury that they were taxpayers, and would have to pay the verdict themselves. It was an appeal to local prejudice. The plaintiff has as much right to be on the street as the railway company: *Springett* v. *Ball*, 4 F. & F. 472. Then, why did not the defendants call the driver of the car? Their not calling him is most material: *M'Kewen* v. *Cotching*, 27 L. J. Ex. 41. There is a very strong case in *Howland* v. *Union Street R. W. Co.*, 150 Mass. 86. See, also, Beven on Negligence, p. 140. The ringing of the bell was an invitation to a person to get on a car. Again, as Thompson on Trials, vol. 1, p. 790, says: "The concealing of evidence is an abomination and should be rooted out of the laws." I refer also to *Williams* v. *Great Western R. W. Co.*, 3 H. & N. 868; *Radley* v. *London and North-Western R. W. Co.*, 1 App. Cas. 754.

C. R. W. Biggar, Q.C., for the defendants. There is only one question of law in this case, and that seems fairly well settled. We say the plaintiff was negligent. As to the law, we refer to *Wakelin* v. *London and South-Western R. W. Co.*, 12 App. Cas. 41.

Argument.

McCullough, in reply. The Wakelin case has nothing to do with this case. In *Smith* v. *Wildes*, 143 Mass, 556, it is said it cannot be laid down as a universal proposition of law that it is negligence for a blind man to walk in the streets of Boston. See, also, Clerk and Lindsell's Law of Torts, p. 381.

Biggar, in reply, referred to Shearman and Redfield's Law of Negligence (4th ed.), sec. 88, 110.

March 29th, 1892. BOYD, C.:—

The trial judge expresses himself as not satisfied with the result. The reading of the evidence leaves an impression of surprise on my mind that the plaintiff should have suffered hurt as he did unless some strange carelessness is to be attributed to the driver of the Sherbourne street car, by which the plaintiff was run down. The person called as the driver of this car disproves his presence at any such accident as is in question, and in effect repudiates the idea that he could or would have driven over a man in the position of the plaintiff. Taking the defendants' own account of what happened, I cannot explain the accident unless on the theory that the driver of the Sherbourne car went blindly and recklessly on, notwithstanding that a man was partly on the track. No one can accept the suggestion of the driver of the Spadina car, that a passenger is running into danger if he tries to get into a stationary car by crossing over the track on which another car is approaching at a distance of 300 or 400 feet. But it was about this distance from the eastward bound Sherbourne car that the plaintiff crossed King street from the south side to get on the Spadina car, which had stopped at his hail. According to the conductor of this car, the plaintiff came staggering on as if in liquor, and as he took hold of the rear-rail he fell, and as the conductor was trying to get him up the other car passed and crushed his toe under the wheels. The driver of the Spadina car admits that if the driver of the approaching car had been doing his duty he should have seen the plaintiff as he came staggering across the road, and also that he should have seen him as he sat or lay partially upon the track. This driver also says that the approaching car was coming at a fast trot, but, according to the other driver called (Abbot), it is against the rules of the company to go at that rate along King street.

The defendants' own witnesses strongly suggest careless handling of the Sherbourne car as the operative cause of the accident. If the plaintiff's story is taken, he swears that the driver of the Sherbourne street car, if he liked, could have prevented running him down, and this is not contradicted.

So it comes that in the afternoon of a summer's day on King street, part of a man's foot is taken off, the man having been presumably seen recumbent or helpless on the rail more than a hundred feet ahead of the approaching car which did the mischief; and no explanation is given why it could not be avoided.

The Spadina car stopped to receive the plaintiff as a passenger; the driver of the car coming the opposite way saw this, and it was his business so to manage his going car as not to run over or against one who had to cross the track to gain the other car; and his duty of taking care is not lessened but increased if he sees the person has, from any cause, fallen on the street. All the circumstances here point to careless haste on the part of the driver, and do not indicate that the plaintiff stepped so suddenly and unexpectedly into the track of the car that it was impossible to pull up. As the usage of the street cars is to stop not at regular crossings, but at any point where a passenger appears, it becomes the duty of a car approaching that point to act with such caution as is required of persons driving over a crossing for foot travellers, that is, to drive slowly, cautiously and carefully (per Pollock C.J., in *Williams* v. *Richards*, 3 C. & K. 81). I am disposed to think with an eminent Scotch judge (Lord Moncrieff), that at such a point there is a strong presumption of negligence against a driver who runs down a person in daylight: *Cable*

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v. *Petrie*, 6 Rettie 1076 (1879). I may also note another Scotch case decided in 1884, which is not without pertinence to the present: *McDermaid* v. *Edinburgh Tramways Co.*, 12 Rettie 15, of which this is the head note or rubric: A cab had stopped to take in a passenger in a steep and narrow street; one of its wheels rested on the tramway rail. The driver of the tramway car proceeding down the incline saw the obstruction fifty yards away and whistled. He was going slowly, but he did not stop his car, because he expected up to the last moment that the cab would be drawn out of his way, and then from the steepness and greasiness of the street he was unable to do so. The car caught the cab and damaged both it and the horse: Held, that the driver was in fault in not stopping his car when he first saw the cab, and that the cabman was not guilty of contributory negligence. In the judgment Lord Moncrieff said, "I think it is plain that the tramway driver was not entitled, on any pretence whatever, to drive against this cab if he could by any means avoid it. If he could not by any means avoid it that might make a case of unavoidable accident * *. It would be a very dangerous precedent if we were to sanction the notion that the driver of a tramway car may drive into any obstacle that does not at once get out of his way."

This case should be sent down for further trial and with that view vacate the judgment and reserve the costs to abide the result.

FERGUSON, J.:—

After a perusal of the evidence I do not think that the plaintiff's account of the manner in which he approached the car going westward can be, for the purposes of this motion, considered the correct account. There is too much evidence against it, and it is not to me reasonable.

What the evidence in respect to this does show, as I think, is that the plaintiff, being on the south side of King street, "hailed" the car that was going westward; that the

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driver of that car saw him and stopped his car; that at the time the plaintiff "hailed" this car, the car going eastward was some 300 or 400 feet away (westward) from the car that was stopped, and was approaching (on the other track, of course) at a "fast trot"; that the plaintiff, having so "hailed" the car that he wanted, did not immediately proceed to it, but hesitated, so that the driver of the car thought he intended to wait where he (the plaintiff) was until the car going eastward should have passed. This, however, the plaintiff did not do, for it seems manifest that he proceeded to the rear end of the car that he had "hailed," and which had stopped before the car going eastward arrived at that place.

For some reason, that is not fully shown or explained, the plaintiff was at the side of the rear steps of this car, which was then standing, had hold of the wire (railing, it is called in the evidence), but was down upon the street with his right foot extended southward, and, as appears by the result, upon or over the rail of the other track. This appears to have been his position. There is some difference between the witnesses as to whether his face was eastward or westward, and other differences as well, but I do not consider these of importance.

This seems to be substantially the position of the plaintiff immediately before the happening of the accident, and I do not see that the evidence shews that there was any negligence on the part of those who were in charge of the car that was going westward. The plaintiff, in his evidence, complains that this car did not stop when he "hailed" it, and this he desires to make out was negligence. I do not see that it would be so in the sense required here; but, even if it would have been negligence, the plaintiff's evidence in regard to the fact seems to me to be entirely overborne by the evidence of the other witnesses who speak upon the subject.

Assuming, then, that there was not negligence on the part of those in charge of the car going westward, the plaintiff's case is that he was, immediately before the happening of the accident, in the position that I have endeavoured to describe, on the street opposite the steps at the rear end of the car going westward, and that the car going eastward was negligently driven over his foot to his injury. As already stated, the plaintiff must have gone across the track in front of the car going eastward very soon before the accident. This car was approaching on what is called a "fast trot." It was admittedly the duty of the driver to keep a reasonable lookout in front of his horses. Whether he did this or not he did drive over the plaintiff's foot. There is evidence that the plaintiff was staggering from intoxication when he so crossed from the south side of the street, and, if so, and the driver was looking as he should have done, one would say that he must have noticed this condition of the plaintiff. Against this, however, the plaintiff says that he was not drunk at the time. He does, however, admit that he had been drinking, and his evidence on the subject does not wear a firm aspect. I think it should be taken as proved that the plaintiff was in this condition as he crossed from the south side of the street before the car going eastward.

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Ferguson, J.

This car, though upon a track, was entirely under the control of the defendants; that is to say, no other person had any share in the management of it; it was approaching at the rate of speed above alluded to. Driving over a person on the street in broad daylight is, I think, an event of unusual occurrence; it is a thing that rarely occurs if those who drive use proper care. The driver of this car might have seen, I think ought to have seen, the plaintiff so crossing before his car in the condition in which he was; and although it may be said that the plaintiff did not by direct evidence shew any specified negligent act or omission on the part of those in charge of the car on which to rest his action, yet the happening of the accident and these attendant or surrounding circumstances are, I think, sufficient to raise the presumption that there was negligence on the part of those in charge of this car, the consequence of which was the happening of the accident. There

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is, I think, reasonable evidence, in the absence of any explanation by the defendants, that the accident arose from want of care on their part. See *Scott* v. *The London and St. Catharine's Docks Co.*, 3 H. & C. 596, 601. Shearman and Redfield on Negligence (4th ed.), sec. 59, where it is said: "The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer. The accident, the injury, and the circumstances under which they occurred, are in some cases sufficient to raise a presumption of negligence, and thus cast upon the defendant the burden of establishing his freedom from fault." The same subject is referred to by Baron Channell in *Bridges* v. *North London R. W. Co.*, L. R. 6 Q. B. at pp. 391 and 392 in the Exchequer Chamber, and although the case there was not one in which the proposition applied, yet the remarks of the learned judge indicate clearly that there are cases in which the plaintiff may give the required evidence of negligence without himself explaining the real cause of the accident, by proving the circumstances and thus raising a presumption that, if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant.

There are many cases and authorities sustaining this proposition, and it appears to me not to be necessary to go nearly so far to apply the proposition in the present case, as the Court went in the case of *Flannery* v. *Waterford and Limerick R. W. Co.*, Ir. R. 11 C. L. 30.

It is true that all the evidence to which I have alluded was not given by the plaintiff. There was, however, no motion for a nonsuit, and as I read the evidence, all these circumstances are shewn.

I cannot but be of the opinion that the burden was upon the defendants of shewing what has been sometimes called their "freedom from fault."

What the defendants did was to set up and rely upon "contributory negligence" of the plaintiff. Except in cases such as that referred to by Lord Fitzgerald in *Wake-*

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lin v. *London and South-Western R. W. Co.*, 12 App. Cas. at p. 52, where the propositions of negligence and contributory negligence are so interwoven as that the contributory negligence is brought out in the evidence of the plaintiff's witnesses, the issue respecting contributory negligence has to be proved by the defendant, and is a question of fact for the jury.

To prove contributory negligence of the plaintiff the defendants were called upon to shew that the plaintiff was guilty of negligence that was the *proximate cause* of the injury.

It has been said that the *proximate cause* of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which the event would not have occurred: Shearman and Redfield on Negligence (4th ed.), vol. 1, sec. 26.

In Smith on Negligence, at p. 227, contributory negligence is defined as being that sort of negligence which, being a cause of the injury, is of such a character that the defendant could not avoid the effects of it.

See the cases *Tuff* v. *Warman*, 5 C. B. N. S. 573; *Radley* v. *The Directors of the London and North-Western R. W. Co.*, 1 App. Cas. 754. Though a plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief, the plaintiff's negligence will not excuse him.

A defendant, in proving contributory negligence, must shew that the plaintiff's negligence was of such a character that the exercise of ordinary care upon the defendant's part would not have prevented the plaintiff's negligent act from causing the injury, and this is the sort of negligence that the law calls "contributory negligence": Smith on Negligence, 227. Proving less than this would not be proving "contributory negligence."

When, therefore, the defendants undertook to prove con-

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tributory negligence in the present case, this involved proving not only that the plaintiff was guilty of negligence, but also that the plaintiff's negligence was such that the accident could not have been avoided by due diligence on their part, that is to say: that the negligence of the plaintiff was the *proximate* cause of the accident.

The jury has found that the plaintiff might, by the exercise of reasonable care, have avoided the accident. This seems to me to have reference to the plaintiff's conduct from the beginning. Of course, if he had not been where he was, the accident would not have happened as it did, and it may be quite right to say that he was guilty of some negligence in being there as he was, but this is not really the question, which is, assuming the plaintiff to have been guilty of negligence, could the defendants by the exercise of reasonable care, notwithstanding such negligence of the plaintiff, have avoided the accident? This was, as I think, the real question.

The jury has found that the defendants were not guilty of negligence causing the accident. Now, assuming the real question to be as I have now stated it, can it be said that defendants gave evidence on which a jury might reasonably find in their favour? According to my view of the matter, there is really no evidence on the real point; the burden, it will be remembered, being upon the defendants. The plaintiff being where he was, say negligently there, if the driver of the car going eastward could and should have seen him, and after seeing him had time by a reasonable exertion to stop his car before it passed over the plaintiff's foot, and did not do so, then the accident must be considered to have taken place by the want of care of the defendants. The driver of this car was not called, nor, so far as I can see, was any material evidence given on this immediate subject. The driver that was called was manifestly not the driver of this car, I think. He simply knew nothing of the matter. For these reasons I am of the opinion that the finding of the jury acquitting the defendants of negligence causing the accident does not rest

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upon evidence on which a jury might reasonably so find, and cannot be permitted to stand.

I may add that if the finding of the jury that the plaintiff might by reasonable care have avoided the accident means that he might have done this notwithstanding any negligence of the defendants in respect to the car going eastward, which was the one that did the injury, on the rule or principle mentioned in the Law Quarterly Review of 1886, vol. 2, p. 507, referred to in Shearman and Redfield on Negligence (4th ed.), vol. 1, sec. 99, namely: The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it, I should then be of the opinion that the finding is unsupported by evidence on which a jury might reasonably find as they did; for, before there could be any reasonable finding on the subject, it must be shown what was the conduct of the car going eastward, what time there was within which to act, etc., and there is no evidence of this so far as I see. But I do not think that such is really the meaning of the question and answer.

I am of the opinion that the verdict should be set aside and a new trial had.

I understand that the learned trial Judge is not satisfied with the verdict, and this is an additional reason for setting it aside.

ROBERTSON, J.:—

I am of the same opinion. If the evidence of the driver Abbot is to be believed, it was not his car that ran over the plaintiff's foot—in fact he shows that it must have been some other Sherbourne street car, and most likely was. Abbot says he left the Walker House, at the corner of Front and York streets, at two minutes past four o'clock, and it takes eight minutes to go from there to George street. The accident happened in King street, opposite Bond's livery office, which is less than half way between the

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the Walker House and George street. This would make Abbot's car due at the place of the accident at a little before 4.06 p. m. The driver of the west bound car says that at the time of the accident he looked at his watch and it was exactly twelve minutes after four; this would not be ten minutes but six minutes after Abbot had passed down. Then his evidence shows that a Sherbourne street car leaves the Walker House every seven minutes, so that the next car after that driven by Abbot, would leave there at 4.09; this would bring the car to the scene of the accident at a little before 4.13. Making allowances for differences in watches, etc., it is reasonable, in connection with Abbot's positive denial that his car caused the accident, to assume that the car which followed him was the car which caused the injury to the plaintiff. If the defendants thought they could have discharged themselves from liability by calling the driver of the other Sherbourne street car, they doubtless would have done so; it was an absurdity to place in the witness box the driver of a car who could not have caused the accident, for the reason, if these two drivers are right as to time, that he must have been at the time of the accident somewhere east of Church street. It was all very well for counsel to say that he could not find any driver of a Sherbourne street car who knew of the accident. What he should have done was to call the man who drove the car which left the Walker House at 4.09 as well as the driver Abbot, who left at 4.02. He did not do so, and the consequence is that he has not established what, in my judgment, he must establish in order to be entitled to a verdict against the evidence of the plaintiff and his witnesses, viz.: that the accident was not caused by the negligence of the driver of the Sherbourne street car. For that reason, I think, there should be a new trial. But there is another ground which, in my judgment, entitles the plaintiff to a new trial, and it is this: The learned counsel for the defendant admits that he appealed to the jury, one-half of whom, it is said, were ratepayers of the city, in such a way as to excite what may be called

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local prejudice; he reminded the jury that they were ratepayers, and that if they gave damages to the plaintiff it would be in effect giving a verdict against themselves. I don't know that he put it quite so strongly as that, but he certainly alluded to the fact of their being ratepayers, sitting in judgment on a case in which they were, to a certain extent, pecuniarily interested. In my judgment, this was going too far. It is true the right of challenge might have been exercised by the plaintiff, and it is not usual to grant a new trial on the ground that a juror may be indirectly interested, as for instance, in a case where an action is brought against a joint stock company, and a juror happened to be a stockholder, in the absence of challenge and that nothing could be charged against the juror, in the way of misconduct, while in the discharge of his duties, a verdict could not be disturbed. But here we have counsel for the defendants actually inviting the jurors, who are ratepayers in the city against which the action is brought, to protect their own interests, which could most effectively be accomplished by rendering such a verdict as was given in this case. In *Williams* v. *Great Western R. W. Co.*, 3 H. & N., at p. 870, Pollock, C. B., said: "This was a motion for a new trial, on the ground of one of the jurymen being a shareholder in the company, and consequently open to a challenge if the fact had been known. Generally speaking, where there is ground of challenge, but no objection is taken, etc., that is no reason for granting a new trial. We cannot say that there are no circumstances which could induce the Court to interfere * * the Court might interfere if they perceived that injustice had been done." Here, according to my view, an injustice has been done, and taking into account the whole of the evidence as well as the charge of the learned Judge who tried the case, I cannot divest my mind of the idea that the jury were more or less influenced by the appeal made to them as ratepayers.

There should be a new trial, all costs to abide the event.

A. H. F. L.

[CHANCERY DIVISION.]

PATTERSON V. TANNER ET AL.

Mortgage—Power of sale—Exercise of—Obligation to carry out sale—Effect of on purchasers subject to the mortgage.

A mortgagee having exercised the power of sale in a mortgage and sold the land for sufficient to pay the mortgage and costs, cannot without sufficient reason treat the sale as a nullity, and fall back on the mortgage as if the exercise of the power was a mere matter of form.

Three joint owners of property mortgaged it and then sold to the plaintiff who covenanted to pay off the mortgage. The plaintiff sold to the defendant, taking a similar covenant. The mortgagees exercised the power of sale in their mortgage, and one of the original owners became the purchaser, at a price sufficient to pay the mortgage and costs. The purchaser though able, not being willing to carry out the sale, the mortgagees refrained from compelling him to do so and under threats of legal proceedings by the mortgagor collected the arrears and costs from the plaintiff.

In an action by the plaintiff to recover from his vendee the amount thus paid:—

Held, that he was not entitled to recover.

Statement. THIS was an action brought by Joseph Patterson against William Charles Tanner and Robert Bruce McArthur,* under the circumstances set out in the judgment.

The trial took place at the Toronto Assizes on June 27th, 1892, before STREET, J., without a jury.

E. D. Armour, Q. C., for the plaintiff, referred to *In re Flatt and the United Counties of Prescott and Russell*, 18 A. R. 1, and *Joice* v. *Duffy*, 5 U. C. L. J. (O. S.) 141.

A. Elliott, for defendant Tanner, referred to *Forbes* v. *Adamson*, 1 Ch. Cham. 117, and *Otter* v. *Lord Vaux*, 2 K. & J. 650.

A. McLean Macdonell, for defendant McArthur, referred to *Pegg* v. *Hobson*, 14 O. R. 272, and Fisher on Mortgages, 4th ed., 958.

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* Made a party defendant by order after action commenced.—REP.

July 6th, 1892. STREET, J.

Judgment.

Street, J.

The facts were as follows:

On 21st June, 1889, P. W. Ellis, R. Y. Ellis and M. C. Ellis mortgaged to the Western Canada Loan and Savings Co. certain lands in the city of Toronto to secure payment of $2,500 and interest, with the usual power of sale in case of default. On 24th September, 1889, P. W. Ellis, R. Y. Ellis and M. C. Ellis conveyed their equity of redemption in the same lands to the plaintiff, and the plaintiff, as part of the consideration for the conveyance, assumed payment of the mortgage above mentioned, and covenanted with the mortgagors to pay it, and to save them harmless against it.

On 28th March, 1890, the plaintiff conveyed the equity of redemption to the defendant Tanner, who in like manner agreed with him to assume and pay off the mortgage.

On 30th April, 1890, Tanner conveyed the equity of redemption to the defendant McArthur, who in like manner agreed with him to assume and pay off the mortgage.

It was stated by counsel that McArthur had afterwards conveyed to one Stevenson, who in his turn conveyed to one St. Denis, the present owner of the equity of redemption.

In October, 1891, the mortgagees gave to all parties notices of their intention to exercise the power of sale in their mortgage; and on the 3rd February, 1892, the property was offered for sale, and R. Y. Ellis, one of the mortgagors, became the purchaser at the price of $3,010, and signed a contract to purchase it at that price.

The purchaser refused to carry out his contract, and the mortgagees did not insist upon his doing so; their reason being that he and the two other mortgagors with him being already personally liable to the company upon their covenant to pay the mortgage money, the company had no object in entering upon an action for specific performance against one of them. No actual release of the contract to purchase had been given to R. Y. Ellis, but the

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Street, J.

company had accepted from the plaintiff on 5th April, 1892, payment of the arrears of interest upon their mortgage and of the costs of the sale, amounting in the whole to $437.07. This payment was made at the request of the mortgagors, and upon their threat to enforce payment of the whole amount of the mortgage against him.

This action is brought by the plaintiff to recover from his grantee, the defendant Tanner, this sum of $437.07, upon the covenant of the latter to pay off the mortgage and to indemnify him.

The defendant Tanner claims relief over against the defendant McArthur, to whom he conveyed; and an order has been made for the trial of the issue between the defendants, at the same time with the trial of those between the plaintiff and the defendant, Tanner.

Both the defendants set up that the plaintiff was under no liability to pay anything because of the purchase by R. Y. Ellis of the property under the power of sale.

The mortgagees having exercised their power of sale and entered into a contract to sell the mortgaged premises, cannot be permitted without some sufficient reason to treat the sale as a nullity, and fall back upon their mortgage as if the exercise of the power had been a mere matter of form. See the statutory form of the power of sale at p. 972, of the Revised Statutes of Ontario.

Their solicitor was examined as a witness, and produced the papers connected with the sale. He was unable to give any reason for not proceeding with the contract than the one I have mentioned above. It was not suggested that there was anything to prevent the company from enforcing the contract against the purchaser, R. Y. Ellis, whose ability to perform it was not disputed.

Under these circumstances, the company could not have recovered upon the covenants in their mortgage against the mortgagors, the price at which Mr. R. Y. Ellis bought, having been more than sufficient to pay the mortgage in full with the costs of sale, for the fact of the sale might have been set up as an answer. If the contract

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had been rescinded for good cause, that would have been in all probability a sufficient reply to such a defence; and so far as R. Y. Ellis was concerned, the fact (if it be a fact) that the contract with him had been rescinded with his consent, would have been a good reply. But as to the other mortgagors, there would have been no reply; unless their consent to the rescission of the contract had been shewn. If all three mortgagors had been shewn to have consented to the rescission of the contract, the mortgagees no doubt could have recovered the mortgage money from them; but the right of the mortgagors to have recourse over against their grantee, the plaintiff, would, in my opinion, have been at an end; for the mortgagors and mortgagees could not be permitted to play fast and loose with a contract to the detriment of others. In any event, therefore, it appears to me that the mortgagors, whether they had or had not a good defence to an action by the mortgagees, had no right of action against the present plaintiff under the circumstances, and the plaintiff can, therefore, have none against the defendant Tanner.

It was contended by counsel for the plaintiff that the mortgagors, or any of them, buying the property under power of sale, did not change their position, and were still entitled to enforce the mortgage against the subsequent parties, who, on their part, were still entitled to redeem the purchasers as if they were still simply mortgagees. Two cases were cited as supporting this position: *Otter* v. *Lord Vaux*, 2 K. & J. 650, and *Forbes* v. *Adamson*, 1 Ch. Cham. 117.

Neither of those cases, however, appears to aid this argument. In the former case, a mortgagor made two mortgages to different persons, with a power of sale to the first. Under the power of sale he purchased the property for a sum not sufficient to cover the amount of both mortgages, and sought to assert the title thus obtained against the second mortgagee. It was held that he could not do so; that he was in the same position with regard to the second mortgagee as if he had simply paid off the first

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mortgagee; the result of which would have been to have improved the security of the second mortgagee by giving him the first charge upon the mortgaged lands. The reason for so holding is, however, expressly stated to be that, in paying off the first mortgage, the mortgagor was doing no more than his duty *as between him and the second mortgagee,* whom he was bound to pay and whose security he was bound to make good. This reason is not applicable here, for the mortgagors, the Messrs. Ellis, were under no obligation as between themselves and their grantee of the equity of redemption to pay off the mortgage; on the contrary, it was the duty of the grantee to pay it off and hold them harmless against it.

Forbes v. *Adamson* does not appear to me to touch the question in the present case.

I think, therefore, that the action should be dismissed with costs as against the defendant Tanner; they have not, apparently, claimed any relief against the defendant McArthur, and I do not understand from the papers how he became a party; he is entitled to recover his costs either from Tanner or from the plaintiff; and as Tanner would be entitled to recover the costs over from the plaintiff, I think the proper order will be to give McArthur also his costs as against the plaintiff.

G. A B.

[CHANCERY DIVISION.]

MILLER V. RYERSON.

Medical Practitioner—Limitation of actions—College of Physicians and Surgeons, Ontario—R. S. O. ch. 148, sec. 40—Infant.

An action for malpractice against a registered member of the "College of Physicians and Surgeons of Ontario," was brought within one year from the time when the alleged ill effects of the treatment developed, but more than a year from the date when the professional services terminated:—

Held, that the action was barred under "The Ontario Medical Act," R. S. O. ch. 148, sec. 40.

Infancy does not prevent the running of the Statute.

THIS was an action brought by Jenny Miller, an infant, **Statement.** by her father, Samuel Miller, as her next friend, against G. S. Ryerson, a physician, for malpractice and negligent treatment.

The action was tried at Toronto on March 28th, 1892, before Sir THOMAS GALT, C. J.

J. G. Holmes, for the plaintiff.

Bigelow, Q. C., and *Aylesworth*, Q. C., for the defendant.

No evidence was taken, as the defendant relied upon section 40 of R. S. O. ch. 148, as a defence.

It appeared, as agreed upon by counsel, that the plaintiff was a child six years of age, when the treatment was administered, from the effects of which it was alleged she became permanently deaf and dumb: that the alleged effect of the treatment did not become apparent until three years afterwards, but within one year from the commencement of the action, and it was contended by the plaintiff that infancy was a disability under R. S. O. ch. 60, sec. 3. The action was not commenced until April, 1891, nearly four years from the time of the treatment, which took place in the fall of 1887.

The learned Chief Justice dismissed the action, holding that it was brought too late, and that section 40 of R. S. O. ch. 148, protected the defendant.

Statement. From this judgment the plaintiff appealed, and the appeal was argued in the Divisional Court on June 2nd, 1892, before BOYD, C., and ROBERTSON and MEREDITH, JJ.

J. G. Holmes, for the appeal. The provision of the statute relied on by the defendant, protects a medical practitioner too much. There has been no judicial construction of section 40 as yet. The plaintiff was an infant six years old when treated, and nine years old when the action was commenced, and the permanency of the injury was not discovered until three years after the treatment. If an action must be brought within one year from the treatment, there would be no remedy in cases like this for incalculable wrong. The time should count from the period when the injury, which really is the cause of action, is apparent, and this action was brought within a year from that period. There is no cause of action without the injury. In any event the infancy of the plaintiff was a disability under R. S. O. ch. 60, sec. 3, and the action has been brought in time. Both statutes must be read together and a fair construction arrived at.

Bigelow, Q. C., and *Aylesworth*, Q. C., contra. The statute fixes the time absolutely as when the "services terminated," that is, when the treatment was administered. No person could say when the effects of any treatment terminated. The time runs from the period when the injurious act was done, although its consequences may not then be apparent: *Miller* v. *The Corporation of the Township of North Fredericksburgh*, 25 U. C. R. 31; Buswell on the Statute of Limitations and Adverse Possession, sec. 104, and case there cited of *Buckinghamshire* v. *Drury*, in Wilmot's Opinions 177. Infancy is no answer unless the statute so provides. Section 3 of R. S. O. ch. 60, does not apply, as the actions for damages there referred to, mean actions for damages given by statutes. If infancy availed the plaintiff, the action might be kept alive for twenty-one years; Maxwell on the Interpretation of Statutes, 2nd ed., 7.

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Holmes, in reply. In section 3, R. S. O. ch. 60, "damages" is a separate head from "sums of money given by any statute."

June 28th, 1892. BOYD, C.:—

In a case of alleged malpractice, the right of action is given to the person suffering therefrom, though an infant as it does not arise out of contract, but as a tort. The right of action arises forthwith, and is not suspended till the infant is of age. In 1887, a new Statute of Limitation was passed in reference to this class of actions in these words:

"No duly registered member of the College of Physicians and Surgeons of Ontario, shall be liable to any action for negligence or malpractice, by reason of professional services requested or rendered, unless such action be commenced within one year from the date when in the matter complained of such professional services terminated:" R. S. O. ch. 148, sec. 40.

This in consolidation is separated from the more general law as to limitation in certain actions to be found in R. S. O. ch. 60. By section 3 of that Act, infancy is classed as a disability, and time does not run till the person injured attains twenty-one years. But this qualification cannot properly be read into the special Act passed for the protection of the duly registered member of the College of Physicians and Surgeons of Ontario. That stands apart as an absolute provision limiting the period within which the action shall be brought to a year from the termination of the particular professional services. The reasoning and observations of Bacon, V. C., in an analogous case, are pertinent to the present contention: *Forster* v. *Patterson*, 17 Ch. D. at p. 135.

Besides, I am of opinion that the term "damages," in section 1 of R. S. O. ch. 60, sub-sec. *(g)*, is to be read with its context as meaning a class of penal proceedings where the remedy is upon a statute, therefore not applicable to

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Boyd, C.

this case. The limitation of this action (but for the special Act) would be under the statute of 21 James, which still further lessens the propriety of reading its disability clause into the Act of 1887. The proposition seems plain that no exception in favour of infants is to be implied in derogation of the general words of this Act, prohibiting actions for negligence against a physician unless brought within the year; *Buckinghamshire* v. *Drury*; Wilmot's Opinions, 177, cited in Buswell on the Statute of Limitations and Adverse Possession, sec. 104.

I cannot accede to the argument that time does not run against the cause of action till the effects of the treatment develop, so as to produce mischievous consequences. That would be a not unreasonable provision to make, but our business is to deal with what the legislature has said, not with what it might have said.

The liability arises when professional services were rendered; the Ontario Statute bars an action a year after these services terminate: that is, end as a matter of fact. The result may be that, if no disastrous consequences are manifest till a year after the close of the professional employment, the right of action is gone or rather never arose as an available remedy, but that only shews what an admirable safeguard has been thrown around the College of Physicians and Surgeons of Ontario. This legislation appears to be unique, not copied from the statute-book of any other country, and may need considerable amendment before it can commend itself as being fair all round.

The nonsuit was right and should be affirmed.

MEREDITH, J.:—

There is no escape from the conclusion that the ruling of the trial Judge was right, and that this motion must be dismissed.

We have not to deal with any question of the wisdom or unwisdom of the enactment; the words are too plain

Judgment.

Meredith, J.

to leave any doubt as to the intention of the framers of the provision, given effect to by the legislature: "No duly registered member * * shall be liable to any action, * * unless such action be commenced within one year from the date when * * such professional services terminated."

Plainly the services terminated here much more than a year before the commencement of the action; and there is consequently no liability to any action for the maltreatment alleged, whether brought by the parent or the child.

We cannot exclude from the provisions of the Act persons under disability, nor, however hard any case within them may be, apply a new rule as to the time when a cause of action arises; such cases and matters are proper for the consideration of the legislature not the courts.

Nor can the provisions of any Statute of Limitations, respecting persons under disability, be incorporated into this Act. It is not an Act respecting limitations of actions, but one passed mainly for the benefit of the medical profession; nor is the provision in question an amendment of the provisions of any such statute, but simply a provision for the special protection of the registered members of that profession. And the application of the appropriate saving provision of the Statute of James would prevent the action being barred until six years after the disability ceased, contrary to the obvious intention to curtail the ordinary right of action to one year only.

The section does not seem to be very accurately worded, but the want of accuracy of expression does not dim the obvious purpose of the persons at whose instance it was framed and passed—the object of the provision "according to the true intent, meaning and spirit thereof."

Robertson, J., concurred.

G. A. B.

[CHANCERY DIVISION.]

IN THE MATTER OF THE ARBITRATION RESPECTING THE TORONTO STREET RAILWAY COMPANY.

Toronto Street Railway Company—Franchise—Property—Roadbed.

Under the statutes and the agreement set out in the judgment the Toronto Street Railway Company from time to time constructed and operated lines of street railway in the city of Toronto, extending over a period of thirty years, when in pursuance of provisions in the agreement in that behalf the city proceeded to assume the ownership of the railway and the property used in connection with its working, and to fix by arbitration the amount to be paid therefor.

By an agreement between the city and the company the former had on payment by the latter of a fixed sum per mile constructed certain portions of permanent pavement which the company would otherwise have been bound to do.

In the award made the railways were valued as being street railways in use, but the arbitrators who signed the award declined to allow anything for the value of any privilege or franchise extending beyond the period of thirty years, and also refused to allow anything to the company for the pavements. On a motion against the award:—

Held, that the "privilege" or franchise could not be properly said to have been limited to thirty years only, because there was no obligation on the part of the city to assume the ownership of the railway at the expiration of that term, although it had a right to do so:—

Held, however, that this privilege or franchise could not be construed to be "property" the value of which was intended to be taken into account by the arbitrators when the city assumed the ownership of the railway. No provision was made for its valuation, either as to the basis on which it was to be ascertained, or otherwise, indicating that it was not contemplated by the respective parties that the city should in money pay to the company for that which they, with the sanction and authority of the legislature, had granted for a term which they had the right to terminate after a fixed period:—

Held, also, that the arrangement between the company and the city as to the pavements did not entitle the former to have them treated as part of its railway property, to be valued and paid for by the city.

Statement. THIS was a motion to set aside or refer back the award made by two of the arbitrators in the arbitration proceeding between the City of Toronto and the Toronto Street Railway Company, upon the grounds and under the circumstances fully set out in the judgment.

The motion was argued before ROBERTSON, J., on November 4th, and continued *de die in diem* until November 10th, 1892.

McCarthy, Q. C., *Moss*, Q. C., and *Shepley*, Q. C., for the motion. Although subsequent legislation has enlarged, there is enough under the 18th resolution to warrant the

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allowance demanded in respect to the franchise. By the 4th and 5th sections of the Act passed on the 18th of May, 1861, 24 Vic. ch. 83, Easton was authorized to construct and work a street railway, and the city empowered to pass a by-law, which was duly passed, and whereby a franchise, either perpetual or for the life of the corporation (because there was no limit) was given to the company. The city made a grant for the life of the corporation annexing the condition that it might acquire the franchise. This was a mere option in favour of the city. It need not have done so, but as it has, must pay its value. The subsequent legislation enlarged the appellants' rights. By the Act of Incorporation, sec. 13, there was power to mortgage all the property. By the Act passed January 23rd, 1869, 32 Vic. ch. 81 (O.), the franchise could be absolutely sold, and all the property and franchise was to pass. Thus the purchaser, under these proceedings, stands in a better position than Easton or his company. On March 29th, 1873, the purchaser obtained an Act of Incorporation, 36 Vic. ch. 101 (O.), and all the charter rights passed to this company. Then there was further legislation on February 10th, 1876, 39 Vic. ch. 63 (O.); March 2nd, 1877, 40 Vic. ch. 85 (O.); February 1st, 1883, 46 Vic. ch. 16 (O.); March 25th, 1884, 47 Vic. ch. 77 (O.) of which the latter, in clause 4, is important, referring to debentures to be either perpetual or terminable. The original position of the parties was, that although Easton could take, the city could not give. The city only had the power to permit this particular company to operate. It could not itself operate, nor could it permit any body else to do so. What the city had the right to do it got from the sovereign power, as the right to grant patents; no estate or right vested in the city. It was merely the exercise of a power: See *Bank of Augusta* v. *Earle,* 13 Peters, at p. 595; and Bouvier's Law Dictionary, p. 687, sub. v. "Franchise." Although apparently a grant from the city directly, it was in reality from the legislature: See *The People* v. *O'Brien,* 111 N. Y., pp. 1-27. The franchise thus granted was property belonging to the company, and as there were no words of limitation the grant is for

Argument. the life of the corporate body. This privilege could not be said to end with the thirty or thirty-five years, even if notice were given by the city. There must be something more to be done. It thus became not a fee simple or a lease, but a qualified or base fee. A fee because it may last for ever, and a base fee because it may be ended. A case on all fours is *Davis* v. *The Memphis and Charleston R. W. Co.*, 39 Am. & Eng. R. Cas. 65. This case is perfectly applicable to the 18th resolution before mentioned. Until this option is exercised, it continues as a mere privilege annexed to this estate which the company has. The city virtually granted an estate in fee with the privilege of assuming the ownership on payment of its value: see *Milhan* v. *Sharp*, 27 N. Y. 611, 620; *New Orleans, etc. R. W. Co.* v. *Delamore*, 114 U. S. 501-7-10. The franchise to be a corporation, and the franchises which may belong to the corporation differ in this respect, the one may be alienated; the others cannot: Chitty on Prer., pp. 132-3 2; Kyd on Corporations, vol. 1, p. 14. By the Relief Act 32 Vic. ch. 81 (O.), the words in section 1, "shall acquire good title," must mean a good title to the franchise, and therefore this right contended for passed. The legislature would not have granted the right to mortgage in perpetuity unless there was a right to hold in perpetuity. The right on the part of the city to run is assumed in the right to take over the property. The Court will not allow the sale of part of the property; it cannot be divided, and therefore it must have been intended that all passed: See *Gue* v. *Tide Water Canal Co.* 24 Howard 257-263; *People* v. *Brooklyn etc. R. W. Co.*, 89 N. Y. 75, 84-5; *Redfield* v. *The Corporation of Wickham*, 13 App. Cas. 467; *Gardner* v. *London, Chatham and Dover R. W. Co.*, L. R. 2 Ch. at p. 217; *Peto* v. *Welland R. W. Co.*, 9 Gr. 455, 458; *Galt* v. *The Erie and Niagara R. W. Co.*, 14 Gr. 499. By the 18th resolution until value paid, the property does not change hands. Property does not mean only rolling stock and the like, but that which enables this to be used. The case is brought within the *Turnpike Co.* v. *Illinois*, 96 U. S. 63. The case *City of*

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Toronto v. *Toronto Street R. W. Co.*, 15 A. R., pp. 30, 49, 50, aids in this construction; also *Toronto Street R. W. Co.* v. *Fleming*, 38 U. C. R. 116. The arbitrators exceeded their authority. They were simply to value, not to determine whether the items should be allowed or not. That was for another forum to determine. Through the medium of the city, acting as a delegate, this right was conferred, without which the right to be a corporation would be useless. This franchise of the company is necessary for the carrying on of its work. The city could not operate it; it had no power, either by enactment or as inherent in it: See Dillon on Mun. Corp., 4th ed., vol. 2, sec. 717; *Jackson County Horse R. W. Co.* v. *Interstate Rapid Transit R. W. Co.*, 24 Fed. R. 306; *Syracuse Water Co.* v. *Syracuse Water Co.*, 116 N. Y. 167; *Davis* v. *Mayor, etc., of New York*, 14 N. Y., at p. 529; *Stebbing* v. *The Metropolitan Board of Works*, L. R. 6 Q. B. 37; *Cowper Essex* v. *School Board for Acton*, 14 App. Cas. 153, 169; *Mayor, etc. of Montreal* v. *Brown and Spingle*, 2 App. Cas. 168, 184. As to the pavements, from 1877 onwards, the city did the whole work of constructing and repairing the streets, and assessed the company. In 1884, the company refused to pay the amount assessed because the work was not permanent, and an action was brought in respect of the said matter, which resulted in a reference by Mr. Justice Rose, and in order to save the expense and possible result of such an award under such reference, the agreement of January, 1889, was entered into, whereby the company agreed to pay the arrears claimed by the city, to forego the damages claimed by the company, and to pay $600 a mile per annum for the future. For this the city was to repair and construct without making any charge to the company, and therefore under this agreement, the company became entitled to the pavements thus constructed on the portions of the road in which the company was interested, which claim the arbitrators have disallowed. The arbitrators were bound to value all that was specified in the notice, and this embraced all the pavements: See *Regina* v. *London and North-Western*

Argument. *R. W. Co.*, 3 El. & Bl. 443; Browne & Theobald's Law of Railway Companies, 2nd ed., p. 160.

Robinson, Q. C., *S. H. Blake*, Q. C., and *Thomas Caswell*, for the respondents. If the contention is as claimed by the appellant, it is strange that no language is used which *primâ facie* imports such a conclusion as that which is asserted on behalf of the company. Here there is no right given from or by the sovereign power, or the legislature representing it. The corporation simply gives a privilege as to certain lands. The argument of the appellant is based upon the persistent misnomer of this privilege as a franchise and their adding to it the word "perpetual." The property the subject of the first ground of appeal is not a franchise. It is part of that which was acquired under this so called franchise. In all the proceedings the words "franchise" and "perpetual franchise" were not heard of in connection with the property of the company. It is not unreasonable in construing these documents not only to look at the surrounding circumstances, but also to see during the thirty intervening years the construction that was placed upon them by the parties to them, and looking at their own exposition of their meaning. Uniformly the idea of perpetuity is negatived and the limited continuance is ever and distinctly affirmed. The cases cited for the most part deal simply with the position that there may be a perpetual charter, but these authorities conclusively show that this may be qualified or limited as to time, as it may be in other respects. The city could not give this right in perpetuity: Dillon on Mun. Corp. 4th ed., sec. 705. By the Municipal law, the roads are vested in the the municipality. The American authorities must all be qualified by the legislative or charter rights granted in the various localities. This is no more a franchise than the right to lay gaspipes, or as to drainage is. It is a mere matter of local agreement. Here the agreement was to permit the company to construct and operate a street railway. The right of the company could not be used unless by the consent of the municipality, and on consenting the municipality may impose terms as to the time as well as

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other matters. The legislature granted to the city the right to work the railway, based upon the position thus affirmed. There is no case which warrants the contention of the appellants. *Davis* v. *Memphis*, 39 Am. & Eng. R. Cas. 65 raised simply an abstruse question as to reverter, and because of the peculiar circumstances of that case a peculiar rule had to be applied. Franchises and privileges of a like nature are always construed most strongly against the donee in favour of the public: *Turnpike* v. *Illinois*, 96 U. S. 63, 68-9. If the conclusion be not as contended for by the respondents, that the thirty years' period and the agreement of 1861 govern all that has been done, then we have chaos introduced, for with every fresh extension there must be a different starting point of time. Whereas, on the contention of the respondents, the thirty years' date for the original line with all its extensions. The agreement is not unilateral. It is to be taken as a whole. The city is bound for thirty years certain, and so is the company. As to the pavements, the company cannot possibly claim these pavements. The agreement of January 19th, 1889, was upon its face a mere temporary arrangement. There were arrears due. These were to be paid. The city was to do all the repairs needed in the meantime, but as the company could only under the Act claim in respect of roads constructed for and paid for by them, and these were not of that class, no allowance could have been made by the arbitrators in respect thereof. Any other contention would result in making the company a present of a sum of nearly one quarter of a million of dollars for roads not constructed for, paid for, or used by the company, which it is perfectly clear was not under the agreement intended by either of the parties.

April 5th, 1892. ROBERTSON, J.:—

The motion is made on behalf of the Street Railway Company to set aside the award made in the above matter by His Honour Judge Senkler, and Charles H. Ritchie, Q.C.,

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Robertson, J.

two of the arbitrators appointed to determine the value of the property of the Toronto Street Railway Company, of which the city of Toronto was assuming the ownership in pursuance of the right reserved in the agreement between the said city and Alexander Easton respecting the said street railway, and of the statutes in that behalf, or for reference back.

The parts of the award complained of are in these words:

"We are of opinion that upon the true construction of the agreement of March 26th, 1861, between the corporation of the city of Toronto and Alexander Easton, and the resolutions recited therein, the right and privilege to construct, maintain and operate street railways upon certain streets in the city of Toronto, was granted to the said Easton for the period of thirty years from the date therein mentioned only, and not in perpetuity, and that all street railways constructed in the city of Toronto by said Easton, or by the Toronto Street Railway Company, have been constructed and operated under privileges for the same term of thirty years, and not in perpetuity; and in valuing said railways we have valued the same as being railways in use, capable of being, and intended to be used and operated as street railways, but have not allowed anything for the value of any privilege or franchise extending beyond said period of thirty years, as we consider no privilege or franchise exists beyond that period.

We are also of opinion that on the true construction of the agreement of January 19th, 1889, between the Toronto Street Railway Company and the corporation of the city of Toronto, the company is not entitled to be paid for permanent pavements constructed by the city subsequent to December 31st, 1888, and we also think that such pavements cannot be considered as having been constructed or paid for by the company as to entitle it to any allowance therefor under the fifth section of chapter fifty-eight, fortieth Victoriæ (Statutes of Ontario), and we have, therefore, not allowed anything in respect thereof."

The grounds upon which the motion is made are:

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1. The said arbitrators exceeded their jurisdiction in declining to entertain the claims which were made by and on behalf of the street railway company for and in respect of the value of the franchises, rights and privileges belonging to the said company, viz.: the franchise to operate a street railway on those portions of King, Queen, and Yonge streets, which were granted to the said company's predecessor in title, the said Alexander Easton, by the agreement made between the said city of Toronto and the said Alexander Easton and the statute in that behalf, and the franchises subsequently and from time to time granted to the said street railway company by the said city of Toronto giving to the said street railway company the rights and privileges of operating a street railway on the other streets in the said city of Toronto on which the said street railway company had been authorized and empowered from time to time to operate a street railway within the limits of the said city.

2. And because the said arbitrators further exceeded their jurisdiction in declining to entertain the claim made by the said street railway company for the value of the permanent pavements constructed under or dealt with by the agreement between the said company and the said city, made on or about January 19th, 1889, which agreement is more particularly referred to in the affidavits filed.

3. And because the said arbitrators misconducted themselves in refusing to entertain the said claims, and failed to perform the duty required of and assumed by them under the provisions of the reference, which was to value the properties of the street railway company; and improperly undertook to determine questions beyond their authority and jurisdiction in assuming to decide that certain of the properties in respect of which the said claims were made, viz.: the franchise, rights, and privileges aforesaid, and the permanent pavements aforesaid did not belong to the said street railway company, and in refusing to place a value thereon.

4. Or, that the matter should be referred back to the

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said arbitrators with directions to them to value the said properties of the said street railway company on the grounds aforesaid.

5. And for the costs of this motion.

The history of the transaction out of which this litigation has arisen commences in the year 1861, in the early part of which a petition was presented to the city council signed by residents of the city praying the council to sanction the construction of street railways on certain streets of the city; and certain proposals in regard thereto were made by one Alexander Easton, with reference to the construction of such railways. Thereupon, on March 14th, 1861, the council of the city passed a series of resolutions upon the subject, setting forth the terms on which the corporation would enter into an agreement with Easton, in regard to his proposals. There were twenty-four of these resolutions, the first of which was in these words:—"That Alexander Easton be authorized to lay down street railways of approved construction on any of the streets of this city, such railways being of approved construction, and worked under such regulations as may be necessary for the protection of the citizens."

The 20th resolution provided, that: "The agreement to be made hereunder shall only have effect after the legislation necessary for legalizing the same shall have been obtained."

On March 26th, 1861, an agreement embodying these resolutions *in extenso*, was entered into between the city and Easton, and afterwards legislation in reference thereto was had, and "The Toronto Street Railway Company," was incorporated by 24 Vic. ch. 83 (assented to on May 18th, 1861). By the 4th section: "The company are hereby authorized and empowered to construct, complete, maintain and operate a double or single iron railway, with the necessary side tracks, switches and turnout, for the passage of cars, carriages, and other vehicles adapted to the same, upon and along any of the streets or highways in the city of Toronto, and the municipalities immediately

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adjoining the limits of the said city, or any of them, and to take, transport and carry passengers upon the same by the power and force of animals, and to construct and maintain all necessary works, buildings and conveniences therewith connected."

By section 5: "The company shall have full power to use and occupy any, and such parts of any of the streets or highways aforesaid, as may be required for the purpose of their railway track, and the laying of the rails, and the running of their cars and carriages; provided always that the consent of the said city and municipalities respectively, shall be first had and obtained, who are hereby respectively authorized to grant permission to the said company to construct their railway aforesaid, within their respective limits, across and along, and to use and occupy the said streets or highways or any part of them, for that purpose, upon such conditions, and for such period or periods as may be respectively agreed upon between the company and the said city or other municipalities aforesaid, or any of them."

By section 12: "The company may purchase, lease, hold or acquire, or transfer any real or personal estate necessary for carrying on the operations of the company."

By section 13: "The directors of the company may, from time to time, raise or borrow for the purposes of the company any sum or sums not exceeding in the whole $100,000, by the issue of bonds or debentures, in sums of not less than $100, on such terms and credit as they may think proper; and may pledge or mortgage all the property, tolls and income of the company, or any part thereof, for the repayment of the moneys so raised or borrowed and the interest thereon; provided always, that the consent of three-fourths in value of the stockholders of the company shall be first had and obtained at a special meeting to be called and held for that purpose."

By the 14th section: "The city and the adjoining municipalities or any of them, and the company, are authorized to make and enter into any agreement or covenants rela-

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ting to the construction of the railway for the paving, macadamizing, repairing and grading of the streets," etc. And section 15 authorizes the city, etc., to pass any by-laws, etc., for giving effect to any such agreements. Then section 16 is in these words:—"And whereas the said corporation of Toronto, on the 22nd day of March, 1861, entered into an agreement bearing that date, under the seal of the said city, with the said Alexander Easton (the promoter of the company), for the construction and operating of street railways within the said city, upon certain conditions therein mentioned, and among other things it was agreed that, so soon as legislative sanction was given to the same, that a by-law of the said city should be passed in accordance therewith; therefore the said recited agreement shall be held to be a valid and binding agreement, and that the corporation of Toronto had full power and authority to enter into and make such agreement upon the conditions and for the purposes therein mentioned, and the said corporation are hereby authorized to pass any by-law or by-laws for the purpose of carrying into effect the said recited agreement."

The agreement referred to was based upon the before mentioned resolutions, the eighteenth of which is perhaps the most important, as bearing on the question before me. It is in these words:—

"*Eighteenthly.* The privileges granted by the present agreement shall extend over a period of thirty years from this date, but at the expiration thereof the corporation may, after giving six months' notice, prior to the expiration of the said term, of their intention, assume the ownership of the railway, and all real and personal property in connection with the working thereof, on payment of their value, to be determined by arbitration, and in case the corporation should fail in exercising the right of assuming the ownership of the said railway at the expiration of thirty years as aforesaid, the corporation may, at the expiration of every five years to elapse after the first thirty years, exercise the same right of assuming

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the ownership of the said railway, and of all real and personal estate thereto appertaining, after one year's notice, to be given within the twelve months immediately preceding the expiration of every fifth year as aforesaid, and on payment of their value to be determined by arbitration."

The 19th resolution is also important, and is in these words: "*Nineteenth.* Should the proprietors at any time give up the railway, or cease to exercise the privilege hereby granted to them for a period of six months, they shall forfeit the entire property, including the rails, cars, etc., to the benefit of the corporation."

The agreement entered into goes on to state: "That in consideration of the amounts to be paid to the city by Easton ($5 per annum for each car run on the railway), and the covenants and agreements in the said resolutions and this agreement contained, and on his part to be kept and performed, the parties of the first part" (the city) "do hereby give and grant unto the said party of the second part" (Easton) "his executors, administrators and assigns, the exclusive right and privilege to construct, maintain and operate street railways, by single or double tracks, with all necessary turnouts, sidetracks and switches, in along and upon King street, Queen street and Yonge street in the said city, together with the right to the use of the tracks of the said railways as against all other vehicles whatsoever, for the said term of thirty years, upon the conditions, and subject to all the payments, regulations, provisions and stipulations in the above recited resolutions and these presents expressed and contained," etc., etc.

Afterwards, on July 22nd, 1861, the council passed the necessary by-law (No. 353) reciting the original petition, proposal and resolutions, also the agreement, and the fact of legislation, etc.

Subsequent agreements were entered into between the newly incorporated company, and the corporation of Yorkville, and the Toronto Roads Company, the terms of which it is not necessary to set out in this connection. After the

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formation of the street railway company, however, Easton, in January, 1862, duly assigned to that company all the rights secured to him under the agreement with the city of Toronto, in these words, "doth hereby assign, transfer and make over unto the party hereto of the second part, and their successors, the said hereinbefore recited agreement, and all the rights, privileges, powers, franchises and authority therein contained and conferred, and all the right and property, and interest of him the said party hereto of the first part in and to the same, for and during the full term of thirty years therein mentioned."

Under section 13 of the Act of incorporation, bonds or debentures of the company to the extent of $50,000, and a conveyance in trust to the Honourable William Cayley, to secure these debentures, was made by the company on February 10th, 1862:—This conveyance granted to William Cayley, "his heirs and assigns, and successors in the trusts hereby created, all the lands, street railway and property of the company, etc., etc., with the appurtenances belonging to, or to belong to, the said railway company, or used, or to be used therewith, and all franchises, rights and privileges of the said parties of the first part, whether acquired by their charter or otherwise," etc., etc.

The company incorporated in 1861, built only two of the lines contemplated by the original agreement, viz., Queen street, from Yonge street to the Asylum, and Yonge street, from King street to Bloor street, using in connection with these lines tracks laid from the junction of King and Yonge streets eastward to the St. Lawrence Market. The King street line mentioned in the 21st section was not built by this company.

The company having become insolvent, and their bonds being in arrear, an Act was obtained, in 1869, enabling the Honourable William Cayley, the mortgagee in trust, to sell the property.

This Act is 32 Vic. ch. 81 (O.), and *inter alia*, recites: "Whereas it is necessary that the said railway and its franchises should be absolutely sold to secure the uninter-

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rupted working of the said railway." And then it enacts: "Notwithstanding anything in any law or statute to the contrary, it shall be lawful for the said William Cayley, etc., to proceed, etc., to sell thereunder the said railway, and all the chattels, rights, privileges and franchises of the said company, etc., by public auction, etc., and by and under such sale the said purchaser, his heirs, etc., shall acquire a good title to the said railway, and all the chattels, rights, privileges, franchises and appurtenances thereto belonging, or in anywise appertaining, freed and discharged etc., and shall have full power to sell and dispose of the said railway rights, privileges, and foreclosures, or to use and work the same, etc., etc. * * Such purchaser shall and may have, enjoy, exercise and enforce all the rights, powers, claims, benefits, franchises and privileges granted to, or conferred on or held, etc., by the said railway company, by or under the Act of incorporation of the said railway company, or any amendments thereof, as fully and effectually as if such claim had been granted to such purchaser, and shall be subject to all the obligations imposed by the original Act of incorporation of the said company," etc., etc.

Under this Act the road was sold to William T. Kiely on April 7th, 1869, and the *habendum* is in these words: "The said the Toronto Street Railway, and all the chattels, rights, privileges and franchises of the said Toronto Street Railway Company, and all the appurtenances," etc.

By subsequent mesne conveyances the property became vested in Wm. T. Kiely and George W. Kiely, each being interested to the extent of an undivided half. And they afterwards obtained an Act of incorporation from the legislature (36 Vic. ch. 101), incorporating them and others under the name of the Toronto Street Railway Company, and for other purposes, and among other things it declares, the company shall have and enjoy all the rights, franchises, etc., enjoyed by the proprietors, etc., and shall be subject to all the obligations imposed by the Act, 31 Vic. ch 81 (the Relief Act), and also by the Act, 24 Vic. ch. 83 (incorpo-

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rating the original street railway company), "and shall be subject also to any valid and subsisting agreements, covenants and by-laws, made and enacted by and between the corporation of the city of Toronto and the said former company, or any of the proprietors under any of the aforesaid Acts," etc.

This new company went on and not only operated the railway then constructed, but from time to time extended its lines to numerous other streets within and beyond the city limits proper, and on November 23rd, 1889, the city gave the company notice of their intention, at the expiration of the term of the franchise (*sic*) granted to Alexander Easton, to assume the ownership of the railway, and of all real and personal property in connection with the working thereof on payment of their value, etc.

The Chancellor, in pursuance of 52 Vic. ch. 15 (O.), sec. 7, on the application of the city, by an order made on June 18th, 1890, appointed Edmund John Senkler, Esq., Judge of the County Court of the County of Lincoln, Samuel Barker, Esq., Barrister-at-Law, and Charles H. Ritchie, Esq., Q.C., the arbitrators, to ascertain the value to be determined by arbitration under the agreement entered into between the city and Alexander Easton. These gentlemen took upon themselves the burden of the said arbitration, but Mr. Barker, not being able to agree with the other two, declined to join with them in making the award.

Messrs. Senkler and Ritchie were of opinion that, upon the true construction of the agreement of March, 1861, and the resolutions recited therein, the right and privilege to construct, maintain and operate the street railways in question, was granted to Easton, for the period of thirty years, from the date therein mentioned only, and not in perpetuity, and that all the street railways which have been since constructed have been so constructed and operated under privileges for the same term of thirty years, and not in perpetuity, and they have valued the same as being railways in use, capable of being and intended to be used and operated as street railways, but have not

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allowed anything for any privilege or franchise extending beyond that period.

On the other hand, as I understand it, from the affidavit filed by the appellants made by Mr. Barker, he refused to join in the award because, contrary to his opinion, Messrs. Senkler and Ritchie refused to entertain the claims put forward by the railway company, that their franchise to operate the railway was "property" to be valued and paid for by the city, on its assuming the ownership of the railway.

This was the first matter of contention between the respective parties, and on which the arbitrators were not unanimous.

Then, the next point arose on the agreement of January 19th, 1889, as to the "permanent pavements" constructed by the city, subsequent to December 31st, 1888, on which there was also a difference of opinion. Messrs. Senkler and Ritchie being of opinion that such pavements should not be considered as having been constructed or paid for by the company, and that the company was not entitled to charge therefor, under the 5th section of chap. 58 of 40 Vic. (O.)—whereas Mr. Barker was of the opposite opinion.

I also understand, from the third portion of the notice of motion and the argument before me, that Messrs. Senkler and Ritchie were also of opinion that, under the agreement which was the basis of the reference, it became necessary for the arbitrators first to determine whether the company was entitled to compensation for the "franchise," and "the pavements" as "properties" to be paid for by the city on its assuming the ownership of the railway—before they entertained the question of their respective values; and on this question there was a difference of opinion, also, between them and Mr. Barker.

In regard to these several differences, I have not had the advantage of perusing, or in any way being informed of the several reasons which these several learned gentlemen had for their respective conclusions, but with that exception, I have had the most elaborate and learned arguments

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of eminent counsel on both sides, and not only what they personally urged before me, but I have availed myself of the arguments addressed to the learned arbitrators, reported in extenso, all of which, together with the multitudinous authorities and decisions of the courts not only of this province, but of England and the United States, which were referred to by them, I have perused and considered, the case having been presented to me on both sides, in such a manner as to have made it most interesting.

I shall discuss these questions in the order in which they were presented, and therefore shall consider the one, whether the "franchise" granted by the city by authority of the Act of the legislature was in perpetuity, or for the limited period of thirty years only; and whether, if I conclude it was in perpetuity, the majority of the arbitrators were right in refusing to allow anything for it, as a "property" extending beyond that period, before disposing of the other, which has reference to the permanent pavements constructed by the city, under its agreement with the company in January, 1889.

It is contended by the city that the privilege granted is not a franchise in the sense claimed for it by the company, but a mere easement, and that at the expiration of thirty years from the date mentioned in the agreement, that "easement" reverted to the city; that the "franchise" referred to in the several Acts of the legislature, touching and concerning this railway company and its predecessors in title, was a right or privilege to construct the several lines of railway on the streets of the city, and to operate them under certain conditions, including the right to levy tolls, etc., for the period of thirty years only.

On the other hand, the company contends that these privileges are what is known as "franchises," and embrace not only what the city admits, but extends the right to the company to exercise them in perpetuity; that the city had no authority or jurisdiction, without the aid of the legislature, to grant these rights, privileges or franchises, and that the title acquired was direct from the sovereign power,

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from which a franchise can only emanate, the city being a necessary consulting party by reason of its municipal jurisdiction over the streets within its corporation limits, and for the maintenance and keeping in order of the same for the use of the public. It is also contended on behalf of the company, that in regard to the subsequent extension of the railway lines to other streets than those which were constructed by the first company, there is no agreement as to the time the company was to be allowed to use such streets, and therefore there is no limitation of thirty years. But in case the contrary is held, and the thirty years' provision is applicable to more subsequently constructed lines, then the company contend that that time should be calculated from the date when the company was permitted to construct and operate each new line, and not from the time mentioned in the agreement of March, 1861.

It will be convenient to dispose of this contention before discussing the general question in which it is involved, and in order to do that satisfactorily it will be necessary to bear in mind all the facts and circumstances surrounding and connected with the dealings and transactions of the city and the several persons and corporations who have from time to time been engaged and interested in this street railway enterprise.

The question of street railways in the city of Toronto was brought before the council of the city by certain ratepayers, who petitioned it early in the year 1861, to sanction their construction, and this petition was followed by an application made by one Alex. Easton, for leave to construct. The result was that the council passed a series of resolutions, the first of which was, that Easton be authorized to lay down street railways, etc., to be worked under such regulations as might be necessary for the protection of the citizens. The fifth resolution declared that "the location of the line of railway on any of the streets shall not be made until the plans thereof shewing the position of the rails and other work on each street, shall have been submitted to and approved by the city surveyor," etc.; and

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by the eighth resolution, the railway was not to be opened to the public, nor put in operation, until the sanction of the council had been previously obtained by means of a special resolution to that effect, etc.: and by the twenty-fourth resolution, it is declared that, "in the event of any other parties proposing to construct railways on any of the streets not occupied by the party to whom the privilege is now to be granted, the nature of the proposals thus made shall be communicated to him, and the option of constructing such railways on similar conditions as are herein stipulated, shall be offered, but if such preference is not accepted within one month then the corporation may grant the privilege to any other parties."

These resolutions were embodied in an agreement which was afterwards in accordance with a provision made therein, legalized or authorized to be made by the legislature (24 Vic., ch. 83), and in that statute it is enacted that the company, which was also incorporated by that Act, was thereby "authorized and empowered to construct, complete, maintain and operate a double or single iron railway, etc., * * upon; and along any of the streets or highways of the city of Toronto," etc.; and by sec. 5, the company shall have power to use and occupy any and such parts of any of the streets, etc., as may be required for the purposes of their railway track, etc.

Now, up to the time of its insolvency, the only streets occupied by the original company were, Queen street from Yonge street to the Asylum, and Yonge street from King street to Bloor street, using in connection with these lines, tracks laid from the junction of King street and Yonge street eastward to the St. Lawrence Market: when an Act was obtained in 1869 (32 Vic., ch. 81), to provide for the sale of the railway, etc., under the mortgage to Mr. Cayley, which mortgage granted to Mr. Cayley "all franchises, rights and privileges of the company, whether acquired by charter or otherwise." Under this Act Mr. Cayley conveyed the whole of the railway property, and all its rights, privileges and franchises, etc., to a Mr. Kiely, who after-

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wards procured an Act incorporating a new company, and which new company became the proprietor of the said railway property. Another Act (36 Vic., ch. 101), was then obtained "to remove certain doubts as to the powers of the proprietors of the railway, and to incorporate them and others under the name of the Toronto Street Railway Company, etc., and by its sixth section it was declared that the company *inter alia*, "shall be subject also to any valid and subsisting agreements, covenants and by-laws, made and enacted by and between the corporation of the city of Toronto and the said former company, or any of the proprietors under any of the aforesaid Acts," being 32 Vic., ch. 81 (the Relief Act), 24 Vic., ch. 83 (the Act incorporating the original company). The company thus incorporated is the company now before me in this matter; and after it became proprietor, from time to time, extended the lines of railway authorized by resolutions of the council, passed from time to time as required, to numerous other streets within the city, as to which, however, there was no agreement as to time and details, other than the original agreement of March, 1861.

After due consideration, I am of opinion that all these lines subsequently constructed and operated by the present company on the streets, other than Queen and Yonge, were so constructed and operated under and by authority of that agreement, and subject to its several conditions; and that the period of thirty years is to be calculated from the date of that agreement, and not from the several times when the city subsequently gave permission to the company to operate on these several additional streets.

It is manifest to my mind that the original intention of both parties to the agreement was only to advance and extend the railway system throughout the city, as the requirements of the citizens might, from time to time, demand. It is clear that the agreement, and the statute authorizing it, extended to every street within the limits of the city and the adjoining municipalities, subject only to the leave and license of the city being granted to con-

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struct and operate the several lines after the company had complied with the requirements of the city, as certified by its surveyor. This, I have no doubt, was the intention; and to construe it otherwise would create difficulties so innumerable that the ultimate working of the system could not be carried on. In my judgment, therefore, the true intent and meaning of the agreement and the statute is, that when the thirty years expired under the agreement of March, 1861, viz., in March, 1891, the right reserved by the city to assume the ownership of the railway extended to the whole system, and not merely to that small portion of it which was first constructed and operated by Easton and his company, but to whatever might be in existence at the time when the city might determine to assume the ownership.

Then, as to the question of "franchise." The words of the agreement are: "The privilege granted by the present agreement shall extend over a period of thirty years from this date." Now, what is "the privilege granted"? The first resolution affords an answer: "That Alexander Easton be authorized to lay down street railways, of approved construction, on any of the streets of the city," * * to be "worked under such regulations as may be necessary for the protection of the citizens." Then follows the "regulations," which include the works necessary for constructing and laying down the several tracks, and all regulations, etc., in regard to taking up streets, license fees, times of running, duty of conductors, etc., etc.

At the time this agreement was entered into the city had not authority to grant this "privilege," but provision was made that until legislative authority was obtained the agreement was to be of no force or effect. This legislation took place, and by the same Act a company was incorporated for the purpose of working out the enterprise covered by the agreement. Then, going back to the resolutions on which the agreement is based, we find that by the eighteenth resolution it is provided that at the expiration of the thirty years, "the corporation may, after giving six months' notice prior to the expiration of the said term of their intention assume the ownership of the railway and all real and personal property in connection with the working thereof on payment of their value, to be determined by arbitration." Then comes a further provision, which to my mind gives the real character of the "privilege" granted, and affords most cogent evidence of what the real intention of all the parties was at the time of entering into this agreement, and this provision is in these words: "And in case the corporation should fail in exercising the right of assuming the ownership of the said railway at the expiration of the thirty years, as aforesaid, the corporation may at the expiration of five years, to elapse after the first thirty years, exercise the same right of assuming the ownership of the said railway, and of all real and personal estate thereto appertaining, after one year's notice, to be given within the twelve months immediately preceding every fifth year as aforesaid, and on payment of their value, to be determined by arbitration."

This, it will be seen, is a mere right reserved on the part of the city, which could be exercised or not; the exercising of it, however, could not take place until the expiration of the thirty years. To that extent the railway company may be said to be absolute masters of the situation, and, in case of failure to give the required notice, according to the proviso, that position would continue for another five years, absolutely, and so on for another, and another five years, at the option of the city. But more than this, the giving of the notice would not of itself disturb the railway company; there must be an ascertainment by arbitration of the value of the property, and, what is more important, the amount thus ascertained must be paid by the city to the railway company; so that there are at least three things to be done before the city could "assume the ownership."

Then, is this "privilege" a mere "easement," or is it, as contended for the company, a "franchise"; and if so, of what nature? After much consideration the conclusion I have come to is, that it is a "franchise" which the company

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enjoyed under their charter from the sovereign power, the legislature, although to be exercised only by and with the consent and approbation of the city corporation, in whom, under the Municipal Act, every public road, street, bridge, or other highway in the city, is vested for the use of the public, and which consent and approbation was manifested by the grant contained in the agreement of March, 1861; and so long as the city did not choose to exercise its reserved right in regard thereto must continue to exist in the railway company, subject to forfeiture, provided for in the 19th resolution:—

I think it clear, without the sanction of the legislature the "privilege" granted by the city would have no force or effect as put by Mr. McCarthy, Q. C., and Mr. Moss, Q. C., in their able arguments before me; without some legislative authority the city was incapable of sanctioning any use of its streets or highways by means of a street railway such as was contemplated here; they could not lay down such a street railway upon their highways themselves, or sanction the laying down of them, either by a company or an individual; in other words, if they had attempted to do so they would have laid themselves open to an action or indictment for obstructing the highways. Mr. Dillon in his work on Municipal Corporations, 4th ed., vol. 2, sec. 660, says: "The king cannot license the erection or commission of a nuisance (and he refers to Viner's, Abr. Title 'Nuisance F'.). Nor in this country" (the United States of America) and it is the same in Ontario, "Can a municipal corporation do so by virtue of any implied or general powers. A building, or other structure of a like nature, erected upon a street without the sanction of the legislature is a nuisance, and the local corporate authorities of a place cannot give a valid permission thus to occupy streets without express power to this end conferred upon them by charter or statute"; and he cites a number of American authorities in support of this. But it is not necessary to pursue this particular question here, because the city corporation, in 1861, recognized exactly its powers

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under the law as it then existed inasmuch as the agreement entered into between the city and Easton provided that until legislative sanction was first obtained the "privilege" which they were willing should be granted to Easton should have no force or effect.

The grant of this "privilege" having been sanctioned by legislative authority what does it amount to? As before stated, the learned counsel on behalf of the city contended that it was a mere easement; on the other hand, counsel for the company contended it is more than that. It is in fact they say a qualified or base fee, which according to Kent in his Commentaries (Black. ed.), vol. 4, p. 10, is an interest which may be continued for ever; but the estate is liable to be determined by some act or event circumscribing its continuance or extent * * Such estates are deemed fees, because it is said they have a possibility of enduring for ever.

Again it is contended, and I think with great force, that there is no reversion; that is to say, having granted the base fee, having granted an estate which by possibility may last for ever, the grantor retains no estate which he can sell or dispose of, because the fee cannot be in two persons at the same time, or any portion of it: *Davis* v. *Memphis and Charleston R. W. Co.*, 39 Am. & Eng. R. W. Cas. 65.

There are many definitions of the word "franchise," but the one most applicable is that given by Mr. Justice Field, in *Morgan* v. *Louisiana*, 93 U. S., at p. 223: "The franchises of a railway corporation are rights or privileges which are essential to the operation of the corporation, and without which its roads and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked."

Now, assuming this to be a correct definition of the word, when in this case would it terminate? Not, as a

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matter of course, at the end of thirty years, or thirty-five years, or forty years, or at the end of any subsequent five years, but on the city assuming the ownership of the railway under its reserved right at the end of some one of those periods; and not until then. It follows from this that the franchise would continue in the company until this act or event put an end to it. I am therefore of opinion that the "privilege" granted by the city to Alexander Easton, with the sanction of the legislature, was not only for thirty years certain, but was such an estate or interest as might continue for ever, but which was liable to be determined by the act of the city, as provided under its reserved right to assume the ownership of the railway.

I am, therefore, wholly unable to see how it can be successfully contested that this "privilege" was limited to thirty years only. There was no obligation on the part of the city to assume the ownership at the expiration of that term; the right was there, to be exercised should it so determine, but unless it was so pleased the railway company were powerless to compel assumption by the city. This being the case, and supposing the city did not exercise its right, what then? Would the "privilege" cease? Most certainly not—nor could the city move again in the matter until the expiration of another four years, when the notice of intention would be in order to assume the ownership on giving twelve months' notice, to expire at the end of five years from the end of the thirty years, and so on at the expiration of every five years. Then, during all these further periods, what about the "privilege"? It surely would continue; and more than that, if the company should, as provided by the 19th resolution, at any time give up the railway, or cease to exercise the "privilege" for a period of six months, they would forfeit the whole property, etc., thus imposing upon the company the absolute necessity of exercising the privilege, under a penalty of absolute forfeiture of all their property, etc.

But although I have come to that conclusion, it does not follow that Messrs. Senkler and Ritchie have erred in their determination not to allow "anything for the value of any privilege or franchise, extending beyond that period of thirty years."

In this regard I am labouring without the assistance of counsel on either side, inasmuch as the whole contention before me on this branch of the case was, whether the franchise was limited to thirty years, or was held in perpetuity. It seemed to be assumed by counsel that in the latter case an immense value might, and in fact would be attached to it; but after much thought and consideration I am forced to quite a different conclusion. In my judgment the right reserved by the city to assume the ownership of the railway, at the end of a certain fixed period, completely puts an end to, or deprives the company of, the right to recover for the value which might attach to the franchise, as if in the event of their being allowed to exercise it as proprietors. I do not see how the company can be heard to say that they have suffered by the assumption by the city of the ownership of this property. They knew they were liable to be deprived of it at the end of one or many of the periods named. It was to their interest to manage the undertaking in a way which would be of the greatest possible advantage to them during this limited term. They could not have made calculations in so doing that they should not only be paid for "all real and personal property in connection with the working" of the railway, but for the privilege which was to terminate as provided by the agreement.

This privilege or franchise cannot be construed to mean "property," the value of which was intended to be taken into account by the arbitrators when the city assumed the ownership of the railway. No provision is made for its valuation, either as to the basis on which it is to be ascertained, or otherwise; indicating, as it appears to me, that it was not contemplated by the respective parties that the city should in money pay to the company for that which they, with the sanction and authority of the legislature,

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had granted for a term which they had the right to terminate after a fixed period. It is true that the original company had a right to mortgage its "franchise," as well as all fixed and moveable property, and the present company became the purchasers under the mortgage, but that does not augment or extend the right to hold their "franchise" beyond the term when the city chose to exercise its reserved rights to assume the ownership. The mortgage was given subject to the law, and the determinate character of the franchises, and the right to terminate them was and is a part of the contract, as to which I refer to *Brooklyn Steam Transit Co.* v. *City of Brooklyn*, 78 N. Y. 524; *Mumma* v. *The Potomac Co.*, 8 Pet. 281; *Railroad Company* v. *Georgia*, 98 U. S 359; *Mayor, etc., Worcester* v. *Norwich & Worcester R. W. Co.*, 109 Mass. 163; *New York, Pennsylvania & Ohio R. W. Co.* v. *Parmlee*, 15 Weekly Law Bul. 239; *West Wisconsin R. W. Co.* v. *Board of Supervisors of Trempealeau Co.*, 93 U. S. 595; *The Northern R. W. Co.* v. *Miller*, 10 Barb., at p. 282; *Chicago R. W. Co.* v. *Iowa*, 94 U. S. 155.

As against this, some stress was laid by Mr. McCarthy, Q. C., on the very full and important case of *The People* v. *O'Brien*, 111 N. Y. 1, which in many respects resembles the case before me, but differs essentially in regard to the unlimited nature of the grant and the life of the corporation, which was created by a charter from the legislature and was subject to the provision of the General Railroad Act then in force in the State of New York, which provides that the legislature may annul or dissolve any corporation under the Act. The charter was granted under the authority of the laws of the State of New York (chap. 252 of 1884), which provides for the organization of street railroad companies, and while it (the company) is endowed with capacity to acquire and hold such rights and property, real and personal, as are necessary to enable it to transact the business for which it is created, and is allowed to mortgage its franchise as security for loans made to it, it has no present

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right or authority to construct or operate a railroad upon the streets of any municipality. This right it might acquire by purchase, but only from the city authorities, who can grant or refuse it at pleasure, and may grant their consent upon such terms and conditions as they choose to impose. The company organized did obtain, by resolution of the common council of the city of New York, authority to lay tracks and run cars over Broadway, upon certain terms and conditions prescribed in the resolution, but with no limitation as to time or power of revocation reserved. The company accepted the grant and fully complied with and performed all the said terms and conditions. It mortgaged its property and franchises as security for loans etc., and its bonds were purchased by investors without notice of any defect in their origin or execution; thereafter it was dissolved by statute (chap. 268, Laws of 1886). *Held*, that while the annulling Act was constitutional, etc., its effect was only to take the life of the corporation; that the corporation took through its grant from the city an indefeasible title to the land necessary to enable it to construct and maintain a street railway, and run cars thereon, including the street right or franchise, etc., etc.; that upon such dissolution its trustees then in office became vested with the title to its property under the provisions of the Revised Statutes, as trustees for its creditors and stockholders; and it was held that, although such a corporation be created for a limited period, it may acquire title in fee necessary for its use; and where the grant to it of the franchise to construct and operate its road in a city street is not by its terms limited and revocable, the grant is in fee, vesting the grantee with an interest in the street, in perpetuity, to the extent necessary for a street railway; the rights granted to be exercised by the corporation or whosoever may lawfully succeed to them. But the distinction between that case and this is, that there was no limit as to the time during which it could exercise the franchise granted by the city; it was in fact unlimited, and therefore the remarks of the Chief Justice who delivered the

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judgment of the court, at p. 37, to the effect: "That there are no reported cases in which the judgment of the court has ever taken the franchises or property of a corporation from its stockholders and creditors, through the exercise of the reserved power of amendment and repeal, or transferred it to other persons or corporations, without provision made for compensation," do not apply to this case before me. Now, here the time was limited in this respect. The city reserved the right to assume the ownership of the railway, etc., as before stated. So that while the franchise might be exercised in perpetuity by the company, the city had the right under certain conditions to terminate it, as I have already held, and this to my mind makes it conclusive that no value could be placed on that franchise when the ownership of the railway was assumed by the city. In fact that franchise, so far as the company was concerned, terminated upon that assumption, and it appears to me to be impossible to hold that the city should be obliged to pay for a franchise which was only granted for a time, after which it was to revert to the grantor, should it at any of the times mentioned in the deed of grant choose to assume the ownership of the railway, to which such franchise is attached.

Then, as to the question in which the valuation of the permanent pavements is involved, under the agreement of January 19th, 1889.

It appears that in 1887, 1888 and 1889, litigation was pending between the city and the company with regard to the liability of the company, with respect to pavements under the original agreement of March, 1861, and the statutes of 1876 and 1887, which, however, was finally settled on January 19th, 1889; by the agreement above referred to, the second section of which, in so far as it relates to the question, is in these words: "From December, 31st, 1888, the company is to pay the city, in lieu * * of the company's liabilities for construction, renewal, maintenance and repair, in respect of all the portions of streets occupied by the company's tracks, at

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the rate of $600 per mile of single track (or $1,200 per mile of double track) per annum, so long as the franchise of the company to use the said streets, or any of them, now extends." Then, by section 4: "The said payments shall be accepted by the city in full satisfaction and discharge of all claims upon the company in respect of the construction, renewal, maintenance and repair of all the aforesaid portions of the said streets, * * and hereafter the city shall undertake the construction, renewal, maintenance and repair of all the aforesaid portions of the said streets, but not of the company's tracks, ties and stringers."

Before this agreement was entered into it was the duty of the company, under their several Acts, to construct, renew, maintain and keep in good order and repair, the roadway between the rails, and for one foot six inches outside each rail, using for that purpose the same material and mode of construction, as that which, from time to time, was adopted and used for the remaining portion of the street by the city: sub-sec. 2 of sec. 1, 39 Vic. ch. 63 (O.), as amended by sec. 1, 49 Vic. ch. 85 (O.).

The "aforesaid portions of the said streets," then, comprised the roadbed between the rails, and one foot six inches outside of each rail.

To my mind there can be nothing clearer than what that agreement means. It is simply this: Instead of having one part of the roadbed of the streets made by the city, and that part of it between the rails and for eighteen inches outside of each rail made by the company, and to avoid the difficulties which past experience had taught both parties in working in that way, they agreed that the city should do the whole, the company laying down its ties, sleepers and rails, and that for the use of that part which the company under the original agreement and the several statutes was bound to construct and keep in repair, should pay the city an annual amount per mile for the use thereof. Surely that could give the company no property in the roadbed which they did not construct—it was a mere license to use it for and during the continuance of the

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time which the company had the right to use the streets under the agreement of 1861. But to claim that such an arrangement entitled the company to have this roadbed treated as part of its railway property to be valued and paid for by the city which had, at its own expense, constructed it, is something beyond my comprehension. If the agreement had been that the city should charge the company with the cost of construction, instead of for the use of it after it had been constructed, I could understand that it had a proper claim to get back the value of the life that remained in these roadbeds from the time the city assumed the ownership of the railway property; but the company did not expend anything whatever in their construction, and therefore it had no "property" in them after the expiration of its term.

Then, as to whether Messrs. Senkler and Ritchie, as set forth in the third ground on which this motion is made, improperly undertook to determine these questions, and to decide whether these "properties" for which claims were made did or did not belong to the company, it being contended that for the purposes of this arbitration they should have assumed that the company was entitled to compensation for these franchises, rights and privileges, as well as the permanent pavements, and that it was not open to the city to dispute the title of the company, before the arbitrators, to compensation, etc., leaving it to the city to take the necessary steps after the arbitrators had estimated the value thereof to reduce the award by the amount of the sum so fixed should the Court be of opinion that the city was not liable to pay the same.

In support of this contention, Mr. McCarthy cited *The Queen* v. *The London and North-Western R. W. Co.*, 3 Ell. & B. 443, in which it was held that the jury under the Imperial Statute, section 68, of the Lands Clauses Consolidated Act, 1845, had no power to enquire into the right of the claimant to the way which the defendants' railway had permanently obstructed in the construction of

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their railway, but were bound to assess compensation upon the assumption that it existed.

I cannot see how this case supports the contention before me. There it appeared that the company under the powers of the Act of Parliament (9 & 10 Vic. ch. 359), and in construction of the railway and works thereby authorized, permanently obstructed a private way leading from premises, etc., belonging to the claimants, as lessees for a term of years, and which way they claimed and alleged to be a way which was of right appurtenant to and used with the same premises, etc., which were injuriously affected by the obstruction, as it was claimed, and in consequence of which the attorney of the claimants served a notice and claim upon the company, reciting the obstruction, the right of the claimants to use such way, etc., the injury that they had suffered, etc., and they thereby gave the company notice that they required the company to pay them compensation in respect of the said way, etc., which, they, the company, had entered upon, etc., and that they claimed for the injuries to the same and in respect to their estate or interest in the said way, £2,300, as compensation, etc., and that unless the company was willing to pay that sum, and to enter into a written agreement for the purpose within twenty-one days, the claimants desired that the amount of compensation should be settled by a jury according to the provisions of the Act. The company issued a warrant reciting this notice but stating therein that they did not admit the claimants' right to the way, or the damage, or the injurious affection; but that they were willing that the amount of the said compensation should be settled as requested in the notice; and they required the sheriff to summon a jury to determine by their verdict the amount of compensation. The sheriff summoned a jury to try the question in dispute in the warrant. At the enquiry, the jury having been sworn to enquire and assess the compensation and damages in the warrant mentioned, evidence was given for and against the existence of the right. The claimants insisted that the existence of the right was to be taken for

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granted on the enquiry, and further that the right was proved. The company insisted that the right was disproved and that the jury ought to be told that the claimants were not entitled to any compensation. The sheriff told the jury to say whether the claimants were entitled to the way; but if they negatived this, to say what was the compensation to be paid on the assumption that the right existed. The jury found that the right of way did not exist and that on that ground the claimants had not sustained any damage; but on the supposition that they were to assume its existence, they settled the compensation at £150. This finding was specially incorporated in the verdict, and the sheriff gave judgment thereon that the claimants had not sustained damage. The Court, on the application of the claimants quashed the inquisition, verdict and judgment, upon *certiorari*, holding as I have above set forth; Erle, J., dissenting.

Upon the perusal of the reasons given by the learned Judges who determined as above it will easily be observed how very different these two cases are. There the statutes, the Lands Clauses Consolidated Act, 1845, 8 & 9 Vic., ch. 18, sec. 68, on which the question in that case turned, commences in this way: "If any party shall be entitled to any compensation, in respect of any lands, or of any interest therein which shall have been taken for, or injuriously affected by, the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction." "And if the compensation claimed * * shall exceed the sum of £50, such party may have the same settled, either by arbitration or by the verdict of a jury, as he shall think fit." Coleridge, J., in reference to this case says, at p. 464: "The person, then, who may proceed under this section, is one who is entitled to compensation. About this there can be, and we believe has been, no question; it must be a condition, whether precedent or subsequent, to his deriving any benefit from its provisions."

The statute makes clear what was intended in that case, but we must refer to the agreement of March, 1861, to ascertain what was intended in this case. The words are "at the expiration thereof (thirty years) the corporation may, after giving" notice, etc., "of their intention to assume the ownership of the railway and all real and personal property in connection with the working thereof, on payment of their value, to be determined by arbitration." Now, what is the condition precedent or subsequent to the company deriving any benefit from this provision of the agreement? Is it not that the "property" on which they claim to have a value ascertained is "property in connection with the working" of the railway? This must be admitted. Then if a dispute arises as to what is such property who is to determine that question? I do not think it is open to doubt. The arbitrators must be satisfied that there is a "property in connection with the working of the railway" before they can proceed to ascertain its value. They (Messrs. Senkler and Ritchie) say, in regard to the franchise, etc., that they have not allowed anything for it, as they "consider no privilege or franchise exists beyond that period," viz., the thirty years; and that being the case, there was no property to be valued. I think they were right in this, on the assumption that when the city assumed the ownership of the railway, any privilege or franchise that the company had would be determined. No "property" of that nature was being assumed by the city, there was or would be no such property to be assumed; and although the "franchise," when granted, was an estate or interest which might continue for ever, it was liable to be determined by the act of the city, and the arbitration was a necessary and preliminary proceeding to that end. If the city consummated the act by assuming the ownership, how could there be any "property" to be valued to the company in an estate or interest which was thus being terminated? What difference would it have made had these gentlemen been of opinion as I am, that the estate granted was an interest which might continue for ever, but which was liable to be

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determined, and having found it to be such, that there was no value attached to it? Only this,—it would have satisfied the contention of the company that the estate was not for thirty years only, and it would have come to the same conclusion in regard to the city's contention; that is, that there was no "property" in it of any value.

In *Regina* v. *Lancaster and Preston Junction R. W. Co.* 6 Q. B. 759, the finding of the jury that the claimant had sustained no damage was upheld; because, as Lord Denman expressed it, at p. 768: "The question whether any damage has been sustained or not is inseparable from the question how much damage has been sustained?" And according to Coleridge, J.: "Though the injury may only go to the quantum, that quantum may be nothing;" and the same reasoning is applicable to the claim of the company in regard to the permanent pavement.

On the whole case, therefore, I am of opinion that the conclusion come to by Messrs. Senkler and Ritchie was the right one; the difference between their view and mine in reference to the franchise being one more of sentiment than of substance, and one which I would not have taken so much trouble in determining had it not been for the very earnest manner in which the views of both parties were urged before me.

I am therefore obliged to dismiss the motion, and with costs.

A. H. F. L.

[CHANCERY DIVISION.]

JUDGE ET AL V. SPLANN, ET AL.

Will—Devise—Right to remain and live on "place" while unmarried—Interest in—Use of.

A testator by his will devised as follows:—"I will devise and bequeath to my wife S. J., all my real and personal property during her natural life, and that my daughter S. J., shall remain and live on said place as long as she remains unmarried." The only real estate or "place" the testator owned was his farm, on which his widow remained with the daughter until the former's death:—

Held, that the daughter had the right, after her mother's death, to live on the property so long as she remained unmarried, and that she had an estate in, and was entitled to the use of it, as she might choose to use it, for that period.

Statement. THIS was an action brought by the executors of the late John Judge against Thomas Splann and William Monds, who were purchasers of the interests of some of the members of the testator's family in the lands in question, and the rest of the members of the said family to obtain a construction of his will.

The will is set out in the judgment.

The action came on by way of motion for judgment and was argued on June 8th, 1892, before FERGUSON, J., in whose judgment the material portion of the will is set out.

Standish, for the plaintiffs.

A. Cassels, for the defendants, members of the family. The widow being now dead there is a life estate in Susannah. Before her death there was a tenancy in common. Susannah is thirty-seven years old and still unmarried: *Fulton* v. *Cummings*, 34 U. C. R. 331; *Gravenor* v. *Watkins*, L. R., 6 C. P. at p. 504. Even if she has not a life estate, she must be protected in living on the place until her marriage or death. If the widow had predeceased the testator Susannah's interest would have been a life estate, unless terminated by marriage.

Justin, for the purchasers, Splann and Monds. The testator distinctly made a difference between the widow

Argument. and the daughter. To the widow he gave a life estate, to the daughter a mere right to remain on the property until marriage: *Fulton* v. *Cummings*, 34 U. C. R. at p. 335. I also refer to *Gravenor* v. *Watkins*, L. R. 6 C. P. at p. 504, and to *Parker* v. *Parker*, 1 New Rep. 508.

Cassels, in reply. Susannah is not bound to *reside on* the place: *Mannox* v. *Greener*, L. R. 14 Eq. at p. 461; *Fulton* v. *Cummings*, 34 U. C. R. at p. 343.

June 16th, 1892. FERGUSON, J.:—

The action is for the construction of the last will of the late John Judge. This will is very short, and so far as material here, is as follows:

"I direct that all my just debts and funeral and testamentary expenses be paid and satisfied by my executors hereinafter named, as soon as conveniently may be, after my decease.

I give, devise and bequeath all my real and personal estate, of which I may die possessed of or interested in, in manner following, that is to say,

1st. I will and bequeath to my wife Susannah Judge all my real estate and personal property during her natural life, and that my daughter Susannah Judge shall remain and live on said place as long as she remains unmarried."

The will ends here, except as to the appointment of executors, etc.

The testator owned a valuable farm in the township of Caledon and personal property as well, and so far as I have been informed he did not own any other farm or "place." The early part of this short will indicates that the testator intended to dispose of all his property by the will but he did not do so, for, it is plain that the estate in fee in this farm is not disposed of, but only the life estate therein given to the widow, and the interest given to the daughter Susannah, whatever that may be, but certainly not an interest extending beyond the period of her marriage or death.

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It appears that as to this farm the remainder in fee is left undisposed of by the will.

The testator left many children him surviving, as well as the daughter Susannah, and many of such children are still living.

The widow had and enjoyed her life estate up to the time of her death in February last (1892). At least nothing is said to the contrary of this. The question, and as agreed at the bar, the sole question to be determined here, is, as to the interest or estate given by the will to the daughter Susannah Judge.

Susannah Judge lived with the widow, her mother, upon this farm, from the time of the death of the testator till the death of the widow.

The words of the gift in favour of the daughter Susannah, taken by themselves, would read, "I will that my daughter Susannah Judge shall remain and live on the said place as long as she remains unmarried."

The words of this gift are, however, on the face of the will, in conjunction with the words of the gift of the life estate to the widow, her mother.

When it was contended on behalf of Susannah that an estate in the land during the period that she should remain unmarried was given to her, it was promptly replied that this could not reasonably be, because it would conflict with the life estate given to the widow. Susannah is yet unmarried and is thirty-seven years old.

In *Fulton* v. *Cummings*, 34 U. C. R. 331, the testator had devised all his real property to his son. The words of the gift were: "I give and bequeath to my son William, all the real property that I shall die seized or possessed of." Then after a gift of personal property to his wife, the words of the will were: "My will is that my wife shall be allowed to live on the said property during the term of her natural life," p. 332. The son brought ejectment and Wilson, J., and Morrison, J., were of the opinion that the clause in favour of the testator's wife gave her a life estate in the land, and this apparently notwithstanding the gift in fee to the son. Wilson, J., said, "I think the defendant,

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the mother of the plaintiff, is entitled to the sole possession of the land during her life, or to possess it in common with the plaintiff for that period," p. 337.

Richards, C. J., was of opinion that at most the clause in her favour in the will gave her a right to apply in equity to restrain the plaintiff from ejecting her.

The judgment was affirmed in the Court of Appeal.

The judgment delivered by Chief Justice Draper did not place the titles of the son and mother upon any distinct ground, further than that the son had failed to shew that he had the right to eject the widow. Blake, V. C., however, sitting in appeal, stated his opinion to be that the correct reading of the will was "I give an estate in fee to my son William, and out of that I carve an estate for life in favour of my widow," p. 343. Effect was given to both of the gifts according to the views of all the Judges.

In the present case the gift to the daughter Susannah is clear; it is the right to remain and live on the place as long as she is unmarried. Whatever inconvenience there may have been in the enjoyment of this gift in full during the life of the widow to whom the life estate was given, Susannah has survived the widow, is still unmarried and has this gift in her hands. She is able to say that she has the right to remain and live on the place as long as she remains unmarried, and this I cannot think means anything less than the right to occupy the place during that period. It may be said to be a right to occupy the place for life because it is in her power to make it so by remaining unmarried for life.

In *Mannox* v. *Greener*, L. R. 14 Eq. 456 it was held that the "free occupancy" of a house for life, entitled the one who had the right either to reside in it or let it during her life, and I fail to perceive any difference between a house and a farm in this respect.

Counsel referred to the case of *Parker* v. *Parker*, 1 New Rep. 508 (1863) in which it was held by Kindersley, V.C., that under the words of the gift whereby the property was given to trustees in trust (*inter alia*), to permit the testator's sons and the survivors and survivor of them to

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reside in the premises, they or he keeping them repaired and insured, and upon the death of the survivor upon trust, to convey, etc., the sons had a right to reside in the house without paying rent, but if they did not reside there they would have no right to the rent and profits, etc., etc. The point made was that the learned Vice-Chancellor said: "If the testator had intended the sons to take a life interest it would have been easy for him to have said so," and referred to the difference between the words of the gift in favour of the sons, and the words of the clause by which the testator gave a life estate to a daughter in another house.

The words of that gift and the words of the gift to Susannah in the present case are quite different. Apart from this the reasoning of the learned Vice-Chancellor cannot have any application here, for the gift here is so long as the daughter shall remain unmarried. The testator did not know, and cannot be supposed to have known how long his daughter would remain unmarried. He did not intend the gift to be to her for life in any event.

In *Fulton* v. *Cummings*, the right to live on the property during the term of the natural life was held to be a life estate. In the present case Susannah has the right to live on the property as long as she remains unmarried, and I can see no good reason against saying that she has an estate in the property for the duration of that period, and I am of the opinion that she is entitled to the use of the property as she may choose to use it for that period, be it long or short. It would perhaps be more prudent for her to adhere to the words of the gift by actually living on the property and making use of it, and in that way enjoying the benefits of it during the period. Upon Susannah's marriage or death the property, so far as I can see will go to the heirs of the testator being, probably, guided on its way, by the provisions of the Devolution of Estates Act.

I think the foregoing answers all that I am called upon to answer.

Costs to all parties out of the estate. Trustees costs to the executors.

G. A. B.

[CHANCERY DIVISION.]

HETT V. JANZEN.

Negligence—Landlord and tenant—Covenant by tenant to repair—Non-repair during lease and yearly tenancy—Non-liability of landlord.

Where a lessee continues in possession as a yearly tenant after the expiry of a lease containing a covenant by him to repair, a similar obligation will be implied; and the landlord, if ignorant of a defect arising from non-repair during the currency of the lease, and continuing during the subsequent tenancy, is not liable to a stranger for an injury caused by such neglect, happening during such subsequent tenancy.

Statement. THIS was an action brought by Elizabeth Hett against Henry L. Janzen for damages caused by her falling through an iron grating on the street in front of a store belonging to the defendant, which grating was put there for the purpose of lighting a cellar, and was out of repair.

The action was tried at the Berlin Assizes on April 8th, 1892, before ARMOUR, C. J., without a jury.

King, Q. C., for the plaintiff.
Laidlaw, Q. C., and *A. Millar*, Q. C., for the defendants.

On the trial it appeared that the defendant had, on the 1st of February, 1890, purchased the premises in question subject to a lease for five years, which did not expire until subsequent to his purchase, viz., on the 7th of December, 1890; and that, after the expiry of the lease, the same tenants had continued in possession, paying rent, etc., as if under the lease. The accident to the plaintiff happened on 26th of April, 1891. The lease contained a covenant by the tenant to repair.

ARMOUR, C. J., at the close of the case:

I think the case must be dismissed. I will, however, assess the damages in case the plaintiff is right in point of law. The break in the grating by which it became out of repair happened since the lease, and the tenant was bound to repair under the lease. I must dismiss the action. I assess the damages at $500. Statement.

From this judgment the plaintiff appealed to the Divisional Court, and the appeal was argued on the 8th June, 1892, before BOYD, C., and ROBERTSON and MEREDITH, JJ.

King, Q. C., for the plaintiff. There was a reletting of the premises in December, 1890, creating a new tenancy to which the covenant to repair did not apply, and the defendant is liable as reversioner: *Sandford* v. *Clarke*, 21 Q. B. D. 398. The landlord is responsible for an injury to a stranger caused by a nuisance where premises at the time of letting or reletting, are in a dangerous state: *Todd* v. *Flight*, 9 C. B. N. S. 377; *Nelson* v. *The Liverpool Brewery Co.*, 2 C. P. D. 311. Even where a nuisance is not in existence at the commencement of the tenancy, if the landlord relet the premises, or, having the opportunity to determine, as in the present case, omit to do so, allowing the nuisance to continue, he is liable: *The King against Pedley*, 1 A. & E. 822. This view was adopted in *Gandy* v. *Jubber*, 5 B. & S. 78. Although this last decision was reversed in the Exchequer Chamber (9 B. & S., 15), it appears that the tenancy from year to year in question there, was one determinable by the act of the defendant. The third count of declaration (See p. 78 of 5 B. & S.) was held bad because it was not alleged that the grating was defective at the time of letting. In the present case the evidence shews that it was. The Exchequer Chamber judges also refer to a tenancy from year to year, created after the expiration of a lease, as in the present case, and they do not decide that the same law of liability is applicable to a tenancy so created. (See p. 18 of 9 B. & S.) After the lease expired and the tenants remained in possession, paying rent as before, they may have become tenants from year to year on the same terms as those contained in the expired lease, so far as these are applicable to a yearly tenancy; but this is a question of

Argument. fact rather than of law: *The Mayor, etc., of Thetford* v. *Tyler*, 8 Q. B. 95. Here the defendant Janzen recognized his own liability to repair by not requesting the tenant to repair, and by repairing at his own expense after the accident. There was an implied obligation on him to repair, and there was no liability, express or implied, on the tenant. Tenants from year to year are only bound to keep the premises "wind and water tight": *Auworth* v. *Johnson*, 5 C. & P. 239, and foot note; *Leach* v. *Thomas*, 7 C. & P. 327; and the cases shew that this expression ought to be construed strictly in favour of tenants. Tenants from year to year are only obliged to repair the consequences of their own acts: *per* Lord Kenyon in *Ferguson* v. *Black*. See *Horsefall* v. *Mather*, cited in C. & P. cases, *supra*; it has always been held that they are not liable for general repairs: *per* Gibbs, C. J., in Holt's N. P. C. 7; and they are not bound to rebuild or replace: *Wise* v. *Metcalfe*, 10 B. & C. 299. As to extent of tenants' implied liability, see Woodfall's Landlord and Tenant (14th ed.), 617-18. I refer also to *Taylor* v. *New York* cited in Smith on Negligence, Bl. ed. 32, as in 4 E. D. Smith, 559.

Laidlaw, Q. C., and *Millar*, Q. C., for defendant. No duty to repair rested upon defendant. The grating in question was upon and a part of the highway; it was furnished by a former owner and put in by the road master of the town, and the duty of maintaining it afterwards rested solely upon the municipality. The liability to repair attaches to the public user, not to the private individual: Beven's Principles of the law of Negligence, 1027. When the defendant purchased, the premises were held by tenants under a lease in which they covenanted to repair, and after the expiry of the term they continued to occupy on the same terms, and paid rent, thus becoming yearly tenants. Defendant never had possession, nor held otherwise than as reversioner: *Pretty* v. *Bickmore*, L. R. 8 C. P. 401; *Gwinnell* v. *Eamer*, L. R. 10 C. P. 658. *Todd* v. *Flight*, cited for plaintiff, is reviewed in Shirley's L. C., 4th ed., p. 365. In *Gandy* v. *Jubber*, 5 B. & S. 78, and 9 B. &

S. 15, the obligation to repair was on the landlord, and *Sandford* v. *Clarke*, 21 Q. B. D. 398, does not aid the plaintiff. The place must be notoriously out of repair to the knowledge of the owner; constructive notice is not sufficient. There was no notice here: *Barham* v. *The Ipswich Dock Commissioners*, 54 L. T. N. S. 23.

Argument.

King, Q.C., in reply. The evidence shews that the grating, although put there by the corporation roadmaster at the request of the original owners, belonged to the owner, was bought and paid for by him, and was placed there solely for his use and convenience. *Pretty* v. *Bickmore* and *Gwinnell* v. *Eamer* are distinguishable from the present case.

June 28th, 1892. BOYD, C.:—

When the premises became out of repair in this case it was during the currency of a five years' lease. The tenants continued in possession after the end of the term at the same rent, and the fair and proper implication is that they held over as yearly tenants, on the terms of their former tenancy in respect of the covenant to repair: *Hyatt* v. *Griffiths*, 17 Q. B. at p. 509 (Patteson, J.).

There was, therefore, a continuing obligation on the tenants to make safe the place in question, assuming that it is a part of the demised premises, and that duty did not devolve at any time on the landlord. By the terms of the old lease the tenants were under obligation to leave the premises in repair, and by the implied agreement in the new term from year to year they engaged themselves to make repairs, so that there really is no opening for obligation on the landlord to make good this broken grating which caused injury to the plaintiff.

Lopes, J., for the Court, succinctly states the rule of law in *Nelson* v. *The Liverpool Brewery Co.*, 2 C. P. D. at p. 313, thus: "There are only two ways in which landlords or owners can be made liable, in the case of an injury to a stranger by the defective repair of premises let to a tenant; the occupier, and the occupier alone, being *primâ facie* liable: first, in the case of a contract by the landlord to do

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Boyd, C.

repairs where the tenant can sue him for not repairing; secondly, in the case of misfeasance by the landlord—as, for instance, where he lets premises in a ruinous condition."

The weight of authority shews, I think, that the landlord must *know* of the ruinous or dangerous condition of his premises so as to be guilty of the wrongful non-repair which led to the damage. The inquiry is as between him and the occupier who is blameworthy in regard to the want of repair; in this case, plainly, it was the tenant: *Ponsford* v. *Abbott*, 1 Ca. & Ell. 225. There is no evidence that the fact of the grating being broken was made known to, or was known by, the landlord in or before the moment of time which separated the end of the five years' tenancy and the beginning of the yearly tenancy which followed.

In *Gwinnell* v. *Eamer*, L. R. 10 C. P. at p. 661, Brett, J., says: "If the landlord at the time of the demise knows of the defect, and does nothing to cause it to be remedied, he may be liable too. But I doubt very much whether, if the burthen of repair is cast upon the tenant, the duty of the landlord does not altogether cease." Such seems to be the law as decided in *Pretty* v. *Bickmore*, L. R. 8 C. P. 401.

The essential point of distinction in *Gandy* v. *Jubber*, 5 B. & S. 78, and 9 B. & S. 15, is that there the landlord did not, in letting the defective premises, provide for the tenant making the repairs. The same element distinguishes *Sandford* v. *Clarke*, 21 Q. B. D. 398, from the present action: that was a case of weekly tenancy, where no obligation was cast upon the tenant to repair; that duty resting solely with the landlord; as between him and the tenant, he alone was blameworthy, but the case does not appear to have gone far enough to deal with other aspects affecting the defendant's liability.

I conclude, therefore, in the same way as the learned Chief Justice that the plaintiff has no right of action against this defendant. The judgment should be affirmed.

ROBERTSON, J., concurred.

Judgment.

Meredith, J.

MEREDITH, J.:—

That the plaintiff sustained severe injuries, through the actionable negligence of some one, for which she was entitled to some compensation in damages, was made plain at the trial.

But the difficulty is whether the defendant is proven to be the person liable. It is to be regretted if it be that the plaintiff has been pursuing the wrong party; and the more so, if whilst looking to him, the parties really guilty of the wrong and answerable in damages have escaped liability by lapse of time.

The testimony upon this part of the case is unfortunately very meagre. It is a pity that it was not less directed to the fact of the injury, about which there could be no great doubt, and more towards the question of the defendant's connection with the cause of it. And in these days of freedom of pleading, and as to parties and alternative relief, it is a matter of surprise that the plaintiff did not claim from and in time commence proceedings against all who might be liable.

But the one question now to be dealt with is whether the plaintiff made out at the trial a case against this defendant, and I am obliged to say that in my opinion she did not, and that therefore the trial judge was right in dismissing the action.

The cause of the injury was the defect in a public highway; the onus of proof of the defendant's liability was upon the plaintiff, and she was bound to show with reasonable clearness why or how he should be answerable for that which apparently was vested in the municipal corporation and under their control, and was part of the highway which, by statute, they were bound to keep in repair.

The whole of the testimony upon this most important part of the plaintiff's case amounts to this: that long before the defendant had anything whatever to do with the building, in May, 1886, the roadmaster of the corporation in making the sidewalk put in the grating in question, it being supplied by or for the then owner of the building; the purpose of it being to admit light through the sidewalk into the building. But there is no evidence showing any area or other opening from the building into the highway; or why or how the light is required or admitted; nor any encroachment upon or interference with the highway in any respect.

It seems difficult, upon this evidence, to perceive how the defendant because of his present ownership of the building, and the fact that the purpose of the grating is to let light into some part of it merely, can have any property in the grating or any power or control over it; nor how it is any the less the property of the corporation over which they alone have control, and which they are bound to repair.

It is not difficult to understand why the corporation should thus accommodate large taxpayers; but it is difficult to understand why the abutting owner should be bound to repair and be answerable for damages arising from want of repair when the corporation does not exact an agreement to do so or indemnity against liability by reason of it, but merely the first cost of the grating.

The defendant's case is strengthened by the fact that he acquired no right or title to the building until March, 1890. He never had anything to say about or to do with the grating or maintaining it. He purchased no right to it nor any easement through it. There was nothing so far as the evidence goes to prevent the corporation removing it and closing the opening in the sidewalk which it filled; nor anything to shew any claim to or interference with it by any of the owners of the building from the time it was put in until the accident. It seems to have been a fixed, permanent part of the sidewalk; and the defendant was unaware of the defect in it until after the accident. The fact that after that he repaired it goes for little; one would not be surprised at a stranger doing that.

Some of the propositions laid down by Erle, C. J., in delivering the judgment of the Court in *Robbins* v. *Jones*,

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15 C. B. N. S. 221, are very pertinent—upon this branch of the case.

The case cannot be looked upon as one of a grant of an easement where the grantee would be bound to repair: there was no grant, even if in law there would be power to grant.

It seems, therefore, to me that the case need not turn so much upon the point mainly argued, whether the tenant or the landlord would be liable; though that is a point which, to say the least of it, the plaintiff would, in all the circumstances of this case, have great difficulty in meeting.

The statement of facts in the report of *Sandford* v. *Clarke*, 21 Q. B. D. 398, seems to me incomplete: knowledge by the landlord of the defect in such a case seems essential to the right of action against him: *McCallum* v. *Hutchinson*, 7 C. P. 508; *The Queen* v. *Osler*, 32 U. C. R. 324; *Ward* v. *Caledon*, 19 A. R. 69; *Gwinnell* v. *Eamer*, L. R. 10 C. P. 658; *Nelson* v. *The Liverpool Brewery Co.*, 2 C. P. D. 311; *Saxby* v. *Manchester, etc., Co.*, L. R. 4 C. P. 198; *Todd* v. *Flight*, 9 C. B. N. S. 377; *The King* v. *Pedley*, 1 A. & E. 822; *Bishop* v. *The Trustees of the Bedford Charity*, 1 E. & E. 697; *Tarry* v. *Ashton*, 1 Q. B. D. 314.

In some cases a nuisance would necessarily arise from the use of the property, in the very purposes for which it was let: cases of plain misfeasance.

The error in *Sandford* v. *Clarke*, of assuming that notice was not necessary to terminate a tenancy from week to week, has been pointed out in some of the text-books. That, however, is not very material here, as no notice to quit was necessary at the end of the term of five years.

It cannot, in my opinion, be said that the plaintiff was not lawfully and properly using the highway at the time of the accident. The case of *Portland* v. *Griffiths*, 11 S. C. R. 333, goes very far; but not so far, in my opinion, as to stand in the way of a recovery by the plaintiff in the circumstances of the case, whilst *Gwinnell* v. *Eamer* (*supra*) goes further than necessary to sustain the contention that

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Meredith, J.

she was in the lawful and proper use of the highway at the time of the accident.

Under all the circumstances of the case it would appear to me, that justice would be best done by granting a new trial upon payment of the costs of the last trial and of this motion, with liberty to add parties and amend as the plaintiff may be advised; the action to be deemed for all purposes to be commenced against the added parties at the time of adding them; and that if a new trial be not desired upon such terms, the motion should be dismissed with costs.

G. A. B.

[CHANCERY DIVISION.]

RANDALL ET AL. V. DOPP ET AL.

Fraudulent conveyance—Settlement by debtor and other members of family—Valuable consideration.

A person, having entered into business, joined with his brother and sisters in a settlement, the effect of which was to transfer all their undivided interest in their father's estate to trustees for the benefit of their mother, and subsequently became insolvent:—

Held, on the evidence that there was no fraudulent intent, and *per* BOYD, C., and ARMOUR, C. J., that the agreement to execute, and the execution by the other members of the family was a valuable consideration for the settlement.

Statement.

THIS was an appeal from a judgment of ARMOUR, C. J., in an action brought by the firm of Randall & Ross against Samuel Dopp and his mother, Adeline Dopp, to set aside a settlement made by Samuel Dopp and his brother and sisters in favour of their mother, as voluntary and fraudulent and void against creditors.

The action was tried at the Berlin Assizes on April 9th, 1892, before ARMOUR, C. J., without a jury.

Argument.

Cassels, Q. C., and *Rowe*, for the plaintiffs.
E. P. Clement, for the defendant Adeline Dopp.
No one appeared for Samuel Dopp.

The evidence shewed that Samuel Dopp and his brother and sisters were each entitled under the will of their father to a one-eighth share of his estate, which was in their mother's hands as executrix, and that all those who were of age, about January, 1887, entered into an agreement or settlement by which all their respective shares were transferred to trustees (of whom he was one) for the maintenance and support of their mother, with power to encroach on the principal for her use and benefit. This settlement was made about two months after he had entered into the business of hotel-keeper, in which he subsequently failed after carrying it on for three years. The plaintiffs became judgment creditors after he had been sold out, and not being able to realize anything by execution, were appointed receivers of his share of his father's estate, and brought this action. There was evidence of a debt being still due, which was due at the date of the settlement.

The learned trial Judge subsequently gave the following judgment:

April 22, 1892. ARMOUR, C. J.:—

In my opinion this action must be dismissed with costs. I find that there was no intention whatever on the part of the defendant, Samuel Dopp, in entering into the agreement sought to be impeached, to hinder, delay, defeat or defraud his creditors, and I am unable to infer any such intention from the fact of this agreement having been entered into, and from the circumstances under which it was entered into.

I am of the opinion that this agreement cannot be treated as a voluntary agreement, but must be treated as an agreement for valuable consideration.

Judgment.

Armour, C.J.

The consideration for each of the parties entitled under the will of the father, George Dopp, entering into this agreement was the entering into the same by the others entitled, and that this constitutes a valuable consideration cannot, I think, be denied.

And the agreement provides not only for the postponement of their right to receive the money to which they were so entitled, and for the relinquishment in favour of the defendant, Adeline Dopp, of the interest accruing thereon during the period of such postponement, but it also provides for the use of a portion of the moneys for the support and maintenance of the defendant, Adeline Dopp: See *Currie* v. *Misa*, L. R. 10 Ex., at p. 162; *Pott* v. *Todhunter*, 2 Coll. 76; *Bain* v. *Malcolm*, 13 O. R. 444.

From this judgment the plaintiffs appealed to the Divisional Court and the appeal was argued on June 7th and 8th, 1892, before BOYD, C., and MEREDITH, J.

John Rowe, for the plaintiffs. The evidence shews the defendant, Samuel Dopp, was not in a position to pay all his liabilities, and his interest in his father's estate was the only property he had. There was no fair interchange of interest, and he had no right to divest himself of his property to the prejudice of his creditors. [MEREDITH, J. Is it not now a question of intention?] He got no benefit, so the intention to defeat creditors must be presumed; but it is not necessary to shew intention if the result is to defraud creditors. I refer to *Freeman* v. *Pope*, L. R. 9 Eq. 206; L. R. 5 Ch. 538; *Irwin* v. *Freeman*, 13 Gr. 465; *Davidson* v. *McGuire*, 7 A. R. 98; May on Fraudulent and Voluntary Dispositions of Property, pp. 35, 243, 248, 264, 272, 276, *et seq.*; *Doe d. Baverstock* v. *Rolfe*, 8 A. & E. 650; *Tarleton* v. *Liddell*, 17 Q. B. 390, 4 D. & S. 538; *Penhall* v. *Elwin*, 1 Sm. & Giff. 258. This was not a family settlement, such as has been supported in some cases: *Baldwin* v. *Kingston*, 18 A. R. at p. 97, judgment of Osler, J.A., there being no disputed right or compromise: Bump on

Argument.

Fraudulent Conveyances, 3rd ed., 295; *Rosher* v. *Williams*, L. R. 20 Eq. 210; *In re Foster and Lister*, 6 Ch. D. 87. There is no evidence that the execution of the settlement by the brother and sisters was the consideration for Samuel's execution. It was purely voluntary, as Samuel got no benefit under it.

E. P. Clement for the defendant, Adeline Dopp. The plaintiffs' action is defective. The trustees should be made parties: *Thomas* v. *Torrance*, 1 Ch. Chamb. 46. The settlement would be good without the brother and sisters joining. Under the late cases it is a question of intention, and the trial Judge has found that against the plaintiffs: *Carr* v. *Corfield*, 20 O. R. 218; *Ex p. Mercer, In re Wise*, 17 Q. B. D. 290. Samuel Dopp had the right to relinquish his legacy and no creditor could complain: *Bain* v. *Malcolm*, 13 O. R. 444. The other members of the family having joined in the settlement constitutes a valuable consideration: *In re Johnson, Golden* v. *Gillam*, 20 Ch. D. 389; Kerr on Fraud and Mistake, 2nd ed., 197.

Rowe, in reply. In *Bain* v. *Malcolm* the party never had the property.

June 28th, 1892. Boyd, C.:—

Four adult members of the Dopp family agree to convey their interests (each in value about $600) in the estate of their father for the benefit and maintenance of their mother during her life with power to encroach on the *corpus*, if necessary for her support. This is carried out by a joint conveyance of January 7th, 1887, to three trustees, of whom the defendant, the debtor, is one.

The conveyance of the defendant Samuel's interest is attacked by this action as fraudulent and void as against the plaintiffs, who are creditors subsequent to the above settlement. The only prior creditor was secured by chattel mortgage, and it is not clearly proved that the security was at the date of this conveyance insufficient; but, as I regard the transaction, that is not of moment.

Judgment.

Boyd, C.

The attack is on the ground that the property of the defendant was removed out of the reach of creditors by a voluntary conveyance, and that the consideration, if meritorious, was not valuable, so as to support it against creditors.

The Chief Justice has absolved the defendant from the charge of fraud, and has found in favour of the settlement. I agree with this result, because the combination of the members of the family to produce this result had the effect *inter se* of importing a legal obligation of each to the others, of completing and sustaining what was agreed on, after one had acted in divesting himself of his share of the estate. If the three, other than the defendant, had conveyed, they could have compelled him to do his part or answer in damages for failure.

His conveying was therefore the result of a legal claim on the part of the others, so that he was not doing merely a generous thing to his mother, but a just thing, so far as his co-grantors were concerned. Their claim against his share to have it reach its destination and stay there for the mother's benefit is superior to the general claim of subsequent creditors to reach it by execution.

That what was done here amounts to valuable consideration—though no direct benefit goes to the defendant—is established by the case of *Bolton* v. *Madden*, L.R. 9 Q.B. 55; *Kiely* v. *Smyth*, 27 Gr. at p. 230; *Anderson* v. *Kilborn*, 22 Gr. at p. 396. See also *Myers* v. *The Duke of Leinster*, 7 Ir. Eq. R. 146, according to which case there may be a declaration that, subject to the provisions of the deed of settlement, the plaintiffs are entitled to have the interest of Samuel applied to satisfy the claims of creditors. Otherwise the judgment should be affirmed with costs.

MEREDITH, J.:—

The substantial result of this motion is determined by the judgment just pronounced, and I am glad that the learned Chancellor and the learned Chief Justice have felt able to support the transaction; for, apart from the right of creditors, it was a very just and commendable one. The widow and mother, to whose exertions the acquisition of the property was doubtless in a considerable measure attributable, left, under the husband and father's will, insufficiently provided for, was, by such of the children as were of age, out of their shares under the will, amply provided for. An act of moral justice and of moral duty, if in it there were no intent to give that to the mother which rightly should go to creditors, to be generous without being just. But I am bound to confess that if the case had been tried before me I would have fallen into what I must now deem the error of giving effect to the plaintiff's claim.

We have the case of a son who, for many years, living at home with his mother, and so in the enjoyment of his own share of the property in a measure, had not thought of this act of justice or generosity, but who soon after entering upon his first business venture, and taking the risk and incurring the liabilities of a partner in the business of keeping a farmer's hotel, joins in a conveyance which takes away so largely, and gives the power to himself and the other trustees for the mother to take away altogether, the only means he had of meeting his engagements should his venture fail. A young man without any other means, who was obliged to borrow from his mother $100 to enable him to go into the business, but for whom she refused to endorse.

From the beginning of the business until its complete failure, some three and a-half years afterward, he was under heavy liabilities, and one would imagine, from the price paid by him for the concern and that which it brought eventually, never at any time in a position to pay his debts, and always in a very hazardous business, looking at his capacity, or rather incapacity, to carry it on.

It is surely fair, as a general rule, to attribute to parties an intention to do that which is the result of their actions. If the case at the trial presented anything like that which it does upon the reporter's notes of the trial, I would have

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Meredith, J.

had no hesitation in imputing to the son, his brother-in-law, Long, and the mother an intention to safeguard the son's share of the estate against his creditors and against the risks of the business upon which he had entered, and which, it was said, has proved the undoing of him in more ways than financially.

If the gift had been to the mother for life only the case would not be so strong: creditors could realize upon the share subject to her life estate. It was put, however, in such a shape that the trustees, of whom as I said before the son is one, could disappoint creditors altogether.

The question seems to me to be in all cases of this kind one of fact; the intent of the parties, the purpose of the transaction. Where valuable consideration is given, the intent to defeat hinder or delay creditors must exist in the grantee as well as the grantor, and of course the proof must be strong; yet, in all cases, it must be, as the Acts say, the intent—a question of fact: see *Godfrey* v. *Poole*, 13 App. Cas. 497.

And it seems to me that care should now be taken lest the tide which flowed so far in favour of creditors, culminating in *Spirett* v. *Willows*, 3 D. J. & S. 293—and going quite as far in this province until recently, does not ebb against them beyond what will leave the Acts as great a safeguard in their favour as they were intended to be; that care should be taken not to apply fully to every case all that may be said in a strong or hard one: See *Ex p. Mercer—In re Wise*, 17 Q. B. D. 290. *Ex p. Taylor—In re Goldsmid*, 18 Q. B. D. 295; *In re Hutchinson. Ex p. Ball*, W. N. (1886) 211 and (1887) 21; *In re Mills. Ex p. Official Receiver*, W. N. (1888) 24; *Ashley* v. *Brown*, 17 A. R. 500; *Carr* v. *Corfield*, 20 O. R. 218; *Hope* v. *Grant*, 20 O. R. 623; *Molson's Bank* v. *Halter*, 18 S. C. R. 88; *Stephens* v. *McArthur*, 19 S. C. R. 446; *Johnson* v. *Hope*, 17 A. R. 10.

The fact that other children and devisees by the same deed gave to the mother the like interest in their shares is one to be taken into consideration, as a matter of evi-

Judgment.

Meredith, J.

dence, upon the question of intent; but, in my opinion, nothing more. I fail to find anything in the evidence to support the contention that the execution by all was a condition in the transaction, or the consideration for the execution by each. The evidence discloses an ordinary case of gift by several, of their several shares, by the one deed. If there were grounds for this contention the defendants should have pleaded it, and the other parties to the deed should have been made parties to the action if they desired to make, or support, any such claim. It seems to me, too, to be entirely a misapplication of the term to speak of the transaction as a family settlement. The son took nothing, he gave everything he possessed. So far as the evidence shows, it was simply a gift by the son to the mother.

No one denies that a sufficient consideration to support a conveyance or a contract may pass from, or be the act of, a third person. But, with great respect, I cannot think the cases referred to, and the principles there applied, at all applicable to this case as disclosed in the evidence adduced at the trial: see *Davidson* v. *Maguire*, 7 A. R. 98.

But, as I before said, the question is one of fact, and my opinion of the facts must defer to that of the learned trial Judge who was so much better able to deal with them, and who had so much better opportunity for dealing with them, endorsed, as it is, by that of the learned Chancellor.

I therefore agree in the result, which would be the same, according to the practice here, if I dissented—the dismissal of the motion; but my views are strong enough against the defendants to prevent my agreeing to give any costs of this motion, and therefore there can be no order as to the costs of it.

The case was one, in my opinion, justifying, if not inviting, a legal investigation of the transaction by the creditors, and costs having been given against them by the trial Judge, they should not pay them here.

Motion dismissed without costs.

G. A. B.

[CHANCERY DIVISION.]

ORR ET AL. V. DAVIE.

Lien—Mechanics' lien—53 Vic. c. 37 (O.)—Amendment of claim—Jurisdiction of master—Extension of time for service of appointment—Procedure.

The Master or Official Referee in a proceeding under 53 Vic. ch 37 (O.), "An Act to simplify the Procedure for enforcing Mechanics' Liens," should be judicially satisfied that the facts stated before him are sufficient to manifest a valid claim; but if any one element is omitted he has general power of permitting an amendment if the facts and circumstances warrant it, *e. g.*, as in this case, to permit an amendment of the claim shewing when the work was done or materials furnished.

The distinction between the requisites of a claim under the amending Act and one under section 16 of the original Act R. S. O. ch. 126 pointed out.

A Master or Referee has power to extend the time for prosecuting the proceedings where the certificate and appointment has not been served within the time named in section 6 of the Act.

Statement. THIS was an appeal from a judgment of the Master-in-Ordinary in a lien proceeding under 53 Vic. ch. 37 (O.), brought by Messrs. Orr Bros. against George Davie.

It appeared that the plaintiffs filed a statement of claim and obtained a certificate from the Master under secs. 2 and 3 of 53 Vic. ch. 37 (O.), but in the statement of claim the time at which the work was performed was not specially mentioned, the same being then in progress. The certificate of the Master was issued on January 7th, 1892, and the time appointed therein for the enquiry under section 5, was January 28th. This certificate was duly registered in the proper registry office, but was not served as provided for by section 6. Some time after application was made to the Master for an appointment fixing another time to make the enquiry, which he granted *quantum valeat*, and it was duly served; but on the day fixed a motion was made by the defendant, upon notice previously given, to discharge the lien on the ground that the certificate was not served in time.

May 2, 1892. THE MASTER-IN-ORDINARY.—The only date proved before me and specified in the statement of

Master in Ordinary.

claim as indicating when the work was done, or materials were delivered, is "October, 1891." *

Assuming this to be the proper date, I must find that this action, commenced on the 7th January last, being an action commenced without previous registration of a mechanic's lien, was not commenced within the statutory thirty days.

Then as to the objection taken that the certificate was not served in time. The jurisdiction of the Master under the Act of 1890 [53 Vic. ch. 37 (O.)], is special and statutory and with statutory directions as to time, procedure and jurisdiction, and may be said to come to such judicial

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* The following is the statement of claim ;

In the High Court of Justice.
Queen's Bench Division.
Between ORR BROS.,
Plaintiffs,
and
GEORGE DAVIE,
Defendant.

Statement of claim of the above named Orr Bros., against the above named George Davie.

GEORGE DAVIE
Dr. to
ORR BROS.

1891.			
October.—	To amount of Contract for erection of house and stable on part of lot 19 plan D. 25, Toronto		$1357 00
	To 1 yd. coursing at 6.00		6 00
	To 1,800 brick at 12 per M		21 60
	To cement for copings		5 00
	To 21,500 brick in stable at 13 per M		279 50
	To 2,000 A. N. brick at 50 cts.		1 00
	To 24 yds. excavating for stable at 40 per yd.		9 60
	Total		$1679 70
1891.	*Cr.*		
Nov. 28.—	By cash	$500 00	
Jan. 4.—	By amount of work yet to be done	124 00	
	Total		624 00
	To balance due		$1055 70

Master in Ordinary.

officer instead of a judgment of reference controlled by the rules of Court as to time, procedure and jurisdiction.

In both classes of cases the judicial officer is bound to follow the statutory directions and the rules applicable to the cases before him. He could not, I apprehend, under a judgment of reference call to his aid the statutory rules presented by the Act of 1890, as to time, procedure, or jurisdiction, for the rules of Court and provisions of R. S. O. ch. 126, must, in such a case, be his guide—conversely, under his statutory jurisdiction, he can call to his aid only such rules of Court as the statute has imported into his special jurisdiction.

The statute directs that "a time and place" shall be appointed by the certificate for the proceedings authorized by section 5, and by section 6 it is directed that "a copy of such certificate and appointment shall be served on the owner and all other proper parties, at least ten days before the day named therein for taking the first proceeding thereunder."

This clause is framed in imperative language and fixes a statutory limit of time for the service of the certificate and appointment without providing, as in sections 11 and 12, for any power in the Master to extend that limit of time.

It has been held in respect of these statutory limits of time that where the legislature has fixed a time for doing an act, it would be preposterous for the Courts to countenance laches beyond the period that had been conferred by Act of Parliament: *Smith* v. *Clay*, 3 Bro. C. C. 639n. and that where a statute directs a claim to be made within a certain specified time, the right will be forfeited by an omission to assert the right within a given time: *Doe d. Watson* v. *Jefferson*, 2 Bing. 118; see also *Onions* v. *Bowdler*, 5 C. B. 74; *Regina ex rel. White* v. *Roach*, 18 U. C. R. 226, and *In re The East London R. W. Co., Oliver's Case*, 24 Q. B. D. 507, at pp. 511, 512, 515.

The Glengarry Case *Purcell* v. *Kennedy*, 14 S. C. R. 453, is to the same effect, and Taschereau, J., in commenting

Master in Ordinary.

upon the statutory limitation of time said, at p. 477, "This is a clear, positive enactment * *. To say that it is merely directory, is to read it out of the statute. If the parties are at liberty by simply not proceeding to tacitly consent that the trial should be held two, three, four years afterwards, or even not at all, the clear intention of the legislature is set at naught."

The last section of the Act of 1890 directs that it shall be read as part of The Mechanics' Lien Act (R. S. O. ch. 126), but "subject to the provisions of this Act," and in *Aldridge* v. *Hurst*, 1 C. P. D. 410, similar words were held as making it clear that the special jurisdiction conferred by an Act upon a court could not be held to import the jurisdiction of such court in ordinary cases.

Under these authorities I must hold that the service of the certificate and appointment was not made within the statutory limit of time, and that the subsequent service, after the time had expired, was invalid.

From this judgment the plaintiffs appealed, and the appeal was, by direction of ROBERTSON, J., argued in the Divisional Court, on June 4th, 1892, before BOYD, C., and ROBERTSON and MEREDITH, JJ.

C. J. Holman, for the appeal. The first appointment was not served within the time limited, but that is no reason why the plaintiffs should lose their right. The Master holds that he is not bound by the ordinary practice of the Court, as his is a limited statutory jurisdiction. I contend this is an ordinary action pending: *R. Bickerton & Co.* v. *Dakin*, 20 O. R. 695. Section 8 of the Act 53 Vic. ch. 37 (O.), says it is an action. That statute was passed to simplify the practice instead of obstructing claimants. See also *Secord* v. *Trum*, 21 O. R. 174.

Macklem, contra. The Master was right. The lien had expired when the last appointment was issued. I refer to *Doyle* v. *Kaufman*, 3 Q. B. D. 7; *Hewett* v. *Barr* [1891], 1 Q. B. 98; *Maude* v. *Lowley*, L. R. 9 C. P., at p. 171; *Wallis* v. *Skain*, 21 O. R. 532.

Argument. *Holman*, in reply. *Wallis* v. *Skain*, does not apply. That case was decided under R. S. O. ch. 126, sec. 16, where an omission was made of a requisite specially called for by the statute.

June 28, 1892. BOYD, C.:—

Under 53 Vic. ch. 37 (O.), the Master issues a certificate upon a verified statement of claim of a mechanic's lien being filed in his office, and the registration of this certificate in the proper registry office operates as the commencement of an action (secs. 2, 3, 4 and 38), and inferentially operates as the registration of a lien affecting the land which can only be got rid of by vacating the lien, or dismissing the action for want of prosecution, or otherwise (secs. 17, 18, 27).

This Act does not provide the form of the statement of claim, nor does it require expressly such component parts as in a claim of lien which is directly registered under section 16 of "The Mechanics' Lien Act," R. S. O. ch. 126.

No doubt the Master, before granting his certificate, should be judicially satisfied that the facts stated and proved before him are sufficient to manifest a valid claim upon the land sought to be affected. But if any one element is omitted, he has general power of permitting an amendment if the facts and circumstances warrant it.

Here the original statement did not shew that the last work was done, or the last materials were furnished, within thirty days before the application to the Master; but such was the fact, as now appears by affidavits filed.

This omission, therefore, was a thing curable, and though essential, its manifestation in the first instance is not made essential, as would be the case under section 16.

But in another aspect of the case these proceedings are warranted under section 22 of the chief Act, as modified by the Act to simplify proceedings.

If there is no prior registration, it is enough if proceed-

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Boyd, C.

ings in Court to realize the lien are begun within thirty days after the last work done, or materials furnished, and a certificate of these proceedings is registered. This course was in effect taken here within the thirty days the application was made, which resulted in the granting and registration of the Master's certificate as in an action. There was jurisdiction in fact—the application for relief was within the thirty days, and though the Master might have declined to act till this fact respecting the time had been verified by affidavit, he could not properly vacate the proceedings afterwards, if in truth it was made to appear that the proceeding was instituted before him within the prescribed period: See *Satchwell* v. *Clarke*, 36 Sol. J., p. 521.

The date of the Master's certificate under section 3 is January 7th, 1892, and it is sworn that the plaintiff did his last work in the end of December. Upon this appearing, the Master should not have dismissed the action.

He should also have entertained the application to extend the time for prosecuting the reference, if service had not been made for any valid reason within the period originally limited by his appointment under section 5; I should think it almost a matter of course to extend the period for service unless the Master was satisfied that the proceeding under the special Act was frivolous or an abuse of the process of the Court.

All the ordinary rules of procedure in the conduct of contested litigation are to be read into the Act which was intended to simplify, but not to introduce new rules of practice, which would be diversified according to the arbitrary discretion of each individual officer. The "ordinary procedure" in actions in the High Court is, generally speaking, applicable to cases under the Mechanics' Lien Act, R. S. O. ch. 126, sec. 29: *Secord* v. *Trum*, 20 O. R. 174; *R. Bickerton & Co.* v. *Dakin*, *ib.*, 192 and 695.

As at present advised, I do not see that any amendment is required in the statement of claim. It is open for the defendant to contest the fact as to the completion of the

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Boyd, C.

work within the thirty days' limit, or to set up any other ground to invalidate the lien. But the lien *de facto* exists by the registration of the Master's certificate, and it exists *de jure* by the doing of the work and the taking proceedings in the Court to recover therefor against the land within the thirty days. Better had this all appeared on the face of the proceedings at first; but that omission does not work irretrievable mischief if the jurisdiction under the Act really exists.

The whole matter should be restored to the Master, that he may work out the rights of the parties upon the merits, with costs of appeal in any event to the appellants.

MEREDITH, J.:—

However well the Master might have refused to issue a certificate upon the statement of claim and affidavit verifying it in question, he ought not to have assumed afterwards, contrary to the fact as it now appears, that the work had been completed and the materials furnished more than thirty days before the issue and registration of his certificate. It was not a case for assuming anything; the fact should have been ascertained.

Then if the next ground upon which the Master has deprived these plaintiffs of their lien is to be sustained we must read into the Act a provision that the lien shall cease to exist if—no matter what the cause of it—the plaintiff should fail to serve "the owner and all other proper parties" with a copy of the certificate and appointment at least ten days before the day which the Master may have first named for enquiring into the claim and taking all necessary accounts; a proposition for which there is no warrant in the legislation, and leading to such absurd consequences as to need no extended refutation.

Upon these two grounds only the Master has turned the plaintiffs out of Court and deprived them of the benefit of the legislation in their favour; in this he has obviously erred upon each ground, and his rulings should be reversed.

But it was urged that the order in question can be sustained upon a ground not referred to in the Master's reasons but apparent upon the material before us; that, upon the authority of *Wallis* v. *Skain*, 21 O. R. 532, the lien was lost by reason of a fatal defect in the statement of claim: but the judgment in that case in no way helps the defendants.

Judgment.

Meredith, J.

There the defect was the omission of something which, it was said, the Act expressly required the lien-holder to state in the claim of the lien which he was bound to prepare and register; the Act expressly providing that every lien which had not been *duly registered under the provisions of the Act* should cease to exist at the expiration of the time limit provided in such cases.

Here there is no express provision as to the form or contents of the statement of claim; it is not registered; nor is the existence of the lien in any way hinged upon it; but a certificate is to be issued by the Master, and that certificate is to be registered: and here the certificate was issued in accordance with the form provided in the Act and was duly registered within the time limit.

The learned Master seems to have overlooked at least two things: (1) That the Act was passed in aid, not in hindrance, of mechanics' liens; and to simplify, not complicate, the procedure for the enforcement of them; and (2) such cases as *R. Bickerton & Co.* v. *Dakin*, 20 O. R. 192 and 695, where a construction of the Act, quite at variance with the views he has expressed in this case, might have been found—a construction which the officers of the Court should follow, and to which they should give full effect.

ROBERTSON, J.:—

I concur in the judgments just delivered, being still of the same opinion as I was when the case came before me on appeal: I am, however, more satisfied in being supported by the full Court.

G. A. B.

[CHANCERY DIVISION.]

Re Robinson, McDonell v. Robinson.

Will—Legacy—Interest.

A testatrix by her will directed that a legacy should be paid out of the proceeds of the sale of lands, and that the lands should be sold at any time within two years after her death:—

***Held*, that interest upon the legacy should be allowed from the day when the two years expired; or, if the lands were sooner sold, from the date of sale.**

Statement. On the 10th October, 1892, the plaintiff made a summary application before Boyd, C., in Chambers, for an order for the administration of the estate of the late Charlotte M. Robinson. The defendant, the administrator with the will annexed, offered on the return of the motion to pay the plaintiff's legacy. An order was thereupon pronounced dismissing the application upon the undertaking of the defendant to pay the legacy. On settling the minutes of the order a question arose as to the date from which interest was to be allowed. The will directed that certain lands should be sold "at any time within two years after my decease," and that the proceeds to be derived therefrom should be applied in payment of the plaintiff's legacy, among others. The testatrix died on the 12th March, 1890.

Counsel spoke to the minutes before Boyd, C., on the 13th October, 1892.

Masten, for the plaintiff. Interest should be allowed from the 12th March, 1891, a year after the death of the testatrix: *Re Olive, Olive* v. *Westerman*, 50 L. T. N. S. 355; *Toomey* v. *Tracey*, 4 O. R. 708; *Smith* v. *Seaton*, 17 Gr. 397.

Frank Denton, for the defendant. Interest is payable only after the fund is got in: *Lord* v. *Lord*, L. R. 2 Ch. 782; *Elwin* v. *Elwin*, 8 Ves. at p. 553.

Judgment.

Boyd, C.

October 14th, 1892. BOYD, C.:—

The legacy of $1,000 is directed to be paid out of the proceeds of the sale of lands, and these lands are directed to be sold at any time within two years after the death of the testatrix, so as to raise a fund for the payment. The testatrix died 12th March, 1890; the two years' limit for sale expired in March, 1892; and from that date let interest be allowed on the legacy; or, if the lands were sooner sold, the interest may run from the date of sale: *Buxton* v. *Buxton*, C. P. Coop. 97; *Thomas* v. *Attorney-General*, 2 Y. & C. Eq. Ex. 525.

G. A. B.

[CHANCERY DIVISION.]

JENNINGS V. WILLIS.

Lien—Mechanics' lien—"Payments" by owner—R. S. O. ch. 126, sec. 9.

The word "payment" in sec. 9 of the Mechanicss' Lien Act, R. S. O. ch. 126, covers the giving of a bill or promissory note; or payments made by the owner at the instance or by the direction of the contractor to those who supply materials to him; or tri-partite arrangements by which an order is given by the contractor on the owner for the payment of the material-man out of the fund, which, when accepted, fixes the owner with direct liability to pay for the materials.

Statement.

THIS was an action to enforce a mechanic's lien for $260 for bricks supplied on a building on George street, in the city of Toronto, and was brought by Thomas Jennings against Samuel J. Wylie the owner of the property, and Thomas Walker, the contractor.

After allowing certain payments made on account by Wylie, the amount found to be remaining unpaid by him upon the contract, was $577.07, which was duly paid into Court.

In the course of proceedings it was proved that Walker had given Wylie an order to pay the plaintiff Jennings the amount found due to him for bricks delivered or to be delivered; and Wylie, thereupon, signed an agreement

Statement. to pay Jennings for the bricks, and on this agreement the Master in Ordinary, before whom these proceedings were conducted, held that Wylie was personally liable to Jennings for his account, viz: the $260 above mentioned, and gave a personal judgment against Wylie therefor, with costs.

It also appeared that during the progress of the work, and sometime before the commencement of these proceedings, the Christie Lime and Stone Company, added as parties defendant, supplied material, and threatened to file a lien, and proceed to recover what was due to them. Whereupon Walker gave Wylie an order to pay the Christie Lime and Stone Company the amount of their account; and Wylie then made an arrangement with them whereby he gave them his promissory note for $203.09, (being eighty-five per cent. of their account) which note was dated February 6th, 1892, and was payable forty-two days after date. The note, however, had not been paid prior to this action, which commenced on March 18th, 1892, or prior to the taking of the account therein on April 8th, following. At the time of the giving of the note, the Christie Lime and Stone Company agreed not to file a lien until its maturity. They, however, duly proved their claim before the Master in these proceedings.

On the settling of the Master's report, Wylie contended that the amount of the claim of the plaintiff Jennings, viz., $260, and the amount of the above note given by him to the Christie Lime and Stone Company, should be allowed to him in finding the amount due, and it was then agreed between all parties to these proceedings, that the finding the amount due in the report and the payment by Wylie thereunder, should not in any way prejudice his contention in this respect; and the Master expressly reserved the question to be decided upon the motion for payment out.

By his order for payment out, however, dated June 8th, 1892, the Master held against this contention of the defendant Wylie, and directed distribution of the $577.07 in

Statement.

Court, as follows: firstly, in payment of costs; secondly, in payment of wage earners; and thirdly, among the lien holders *pari passu*. The defendant Wylie now appealed from this order to the Judge in Chambers, upon the ground that the Master should have held him entitled to have the amount of the judgment recovered against him by Jennings, and the amount of the note above mentioned, paid in full to Jennings and the Christie Lime and Stone Company, respectively, out of the $577.07 paid into Court by him.

The appeal was argued before BOYD. C., on June 13th, 1892.

R. McKay, for the appellant. The Master should not have held that the giving of a bill or note was not payment, though given, as here, in response to the order of the contractor acted on by the owner: Byles on Bills, 15th ed., p. 373; *The National Savings Bank Association* v. *Tranah*, L. R. 2 C. P. 556; *Belshaw* v. *Bush*, 11 C. B. 191; *Price* v. *Price*, 16 M. & W. 232; *Emblin* v. *Dartnell*, 1 Dowl. & L. 591; *Ex parte Matthew*, 12 Q. B. D. 506.

Kilmer, for the Christie Lime and Stone Company, referred to Phillips on Mechanics' Liens, 2nd ed., p. 112; *Bank of British North America* v. *Gibson*, 21 O. R. 613; *The St. Louis National Stock Yards* v. *O'Reilly*, 85 Ill. 546.

D. M. Robertson, for the plaintiff.

F. E. Hodgins, for the defendants, Harris & Co. The note given to the Christie Lime and Stone Company, was not an equitable assignment of the fund, and should not diminish the amount: *Hall* v. *Prittie*, 17 A. R. 306. There was no payment here: *Lang* v. *Gibson*, 21 C. L. J. 74; *Bullock* v. *Horn*, 44 Ohio, 420; *Grissell's Case*, L. R. 1 Ch. 528; *Sykes' Case*, L. R. 13 Eq. 255; *Forhan* v. *Lalonde*, 27 Gr. 600.

June 15th, 1892. BOYD, C.:—

"Payments," as used in section 9 of the Lien Act, R. S. O. ch. 126, is not a technical word but one in popular use. It

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Boyd, C.

should not be limited to the case of actual payments in cash by the owner into the hands of the contractor. It may well cover payments made by the owner at the instance or by the direction of the contractor to those who supply materials to him; it may well cover tri-partite arrangements by which an order is given by the contractor on the owner for the payment of the material-man out of the fund, and this, when accepted, fixing the owner with direct liability to pay for the materials. Such was the substance of the transaction between the owner and the plaintiffs as supplying bricks to the contractor for this building. There was that which amounted to an equitable assignment of part of the money coming to the contractor when earned; and it appears to me a harsh and unjust reading of the Act to force the owner to pay this sum twice. In my opinion he is entitled to deduct the amount of this order out of the balance found due on the footing of the contract, no suspicion of fraud or collusion attaching to the original transaction, and no notice in writing of any sub-lien being given before the incoming of this liability.

So in like manner payment may well extend to the case of payment by the giving of a bill or promissory note, as was done at the instance of the contractor to the other material-men, the Christie Lime and Stone Company. See cases collected on the general subject of payment: *sub voce* in Stroud's Judicial Dictionary, and Byles on Bills, 15th ed., 373; *Turney* v. *Dodwell*, 3 E. & B. 141.

The manifest justice of this construction of the statute, is recognized and adopted in analogous circumstances in the American Courts, and decisions approved in the text, may be found in Phillips on Mechanics' Liens, 2nd ed., sec. 62.

I vary the direction of the Master as to the manner of distribution of the fund, so as to have these two amounts paid in full out of the fund, and let the balance be divided rateably.

It is not a case for costs.

A. H. F. L.

[CHANCERY DIVISION.]

REGGIN V. MANES.

Lien—Mechanics' Lien Act—"Owner"—Ten per cent.—Money furnished to complete buildings after contractor's failure—R. S. O. c. 126, sec. 2, sub-s. 3—Ib. sec. 9.

An agreement to purchase property, under which buildings are to be erected thereon by the seller, and which has been acted on by the parties, although not binding under the Statute of Frauds if pleaded, constitutes the person agreeing to buy an "owner" within sub-section 3 of section 2 of the Mechanics' Lien Act:—

Semble, if not an owner under such an agreement, then by virtue of the Registry Act no unregistered lien of which he had not notice prior to the registry of the deed to him could prevail against him.

A payment in excess of the contract price made to complete a building, owing to the failure of the contractor, should be deducted from the contract price, and the ten per cent. under section 9 of the Mechanics' Lien Act is to be calculated on the balance of the contract price after such deduction.

Re Cornish, 6 O. R. 259, followed.

THIS was a mechanic's lien proceeding under 53 Vic. c. 37 (O.), wherein John Reggin claiming to be a sub-contractor of the defendants Manes and Booth, who were contractors with Richard Hearn, sought to establish and enforce a mechanic's lien against the lands in question, belonging to Richard Hearn. Statement.

The official Referee, before whom the matter was, by his report dated April 26th, 1892, disallowed the plaintiff's lien, but found a number of registered lien-holders entitled to liens, and in the 8th paragraph of his report stated as follows:—

"Upon the evidence adduced before me, I find that the defendants Manes and Booth were the owners of the lands in question herein, when they contracted with the lien-holders, whose liens have been allowed as above; that the liens attached on the property in question; that the defendant Hearn purchased said lands from the defendants Manes and Booth with notice of the said liens, and that any title now in said defendant Hearn is subject thereto."

The defendant Hearn appealed from this report upon the grounds that the Referee was wrong in deciding that he purchased the lands in question subject to the liens of

Statement. the defendants or any of them, or had any notice of such liens, many of the defendants having no claim whatever for work done upon or materials furnished to Manes and Booth, the contractors for the house, at the time he purchased: that he contracted for the purchase of the said lands and house in February, 1891; this contract was carried out and a conveyance made to him by deed, dated May 23rd, 1891, and registered June 16th, 1891; and no liens were filed until October 13th, 1891; that Manes and Booth failed to complete their contract; and he (Hearn) *bonâ fide* paid them all, and more than they were entitled to receive in respect of work done before he had notice of any liens; and he was obliged to employ others to complete their agreement at an expense of $438 more than he agreed to pay for the lands and house complete.

The facts of the case as found by the learned Judge are set out in his judgment.

The appeal was argued on June 2nd and 4th, 1892, before FERGUSON, J.

G. Kerr, for the appellant. As to the question of the computation of the ten per cent. I refer to *Briggs* v. *Lee*, 27 Gr. 464; *Goddard* v. *Coulson*, 10 A.R. 1. By virtue of the Registry Act, Hearn obtained priority over the lien-holders: *McVean* v. *Tiffin*, 13 A. R. 1; *Wanty* v. *Robins*, 15 O. R. 474, *Reinhart* v. *Shutt*, 15 O. R. 325. Hearn cannot be held to have had notice of the liens merely because he knew Manes and Booth were weak, and that the work was being done; *Richards* v. *Chamberlain*, 25 Gr. 402. Hearn must be treated as the owner of the land from the beginning. *McNamara* v. *Kirkland*, 18 A. R. 271, was quite a different case to this. There there was knowledge of the existence of the lien. Hearn had no notice till August 8th, 1891. He is only bound to account for the ten per cent.

Moss, Q.C., for Stephen and Lennox, sub-contractors, defendants in the action. Hearn has not in his notice of

Argument.

motion admitted any sum at all to be due. He was not owner till he got his deed of May 23rd, 1891. But he had notice of the claims. See *Wanty* v. *Robins*, 15 O. R. 474; *Re Cornish*, 6 O. R. 259.

Hoyles, Q. C., for material-men, lien-holders. Hearn's payments were not made in good faith: Holmsted's Mechanics' Lien Act, p. 40. He was owner from February 13th, 1891, the date of the original agreement. He acted in a way to induce us to put our work and labour into the house.

June 18th, 1892. FERGUSON, J.:—

This is an appeal from a report of the learned Referee in a mechanics' lien matter pending before him. After having heard elaborated arguments of counsel, and perused all the evidence and the documents, I am of the opinion that the Referee is in error. I am of the opinion that Dr. Hearn was "owner" within the meaning of the Mechanics' Lien Acts from the beginning; that is, from a period prior to the commencement of the work in respect of which the liens are claimed; and that he did not *first* become "owner" at the time of the execution of the conveyance to him on the 23rd day of May, 1891, by Manes and Booth. I think it is clearly an error to say that he purchased then with knowledge of and subject to the claims for liens of mechanics and others.

Sub-section 3 of section 2 of the Act R. S. O. ch. 126, provides that "owner" shall extend to and include a person having any estate or interest in the lands upon or in respect of which work is done, or materials or machinery are placed or furnished, at whose request and upon whose credit or on whose behalf or with whose privity or consent, or for whose direct benefit any such work is done, etc., and all persons claiming under him, whose rights are acquired after the work in respect of which the lien is claimed, is commenced, etc.

On February 13th, 1891, an agreement was entered into between Manes and Booth (who had purchased the

Judgment.

Ferguson, J.

building lot on what are said to be builder's or contractor's terms), and Dr. Hearn, and, as a part of this agreement, they were to construct the buildings in question for him. Manes and Booth had at this time an interest in this land, and by that agreement an interest was imparted to Dr. Hearn. Then looking at the "tender," as it is called, for the work, the plans of the same, what is said of the specifications, the manner in which the work was done, the conduct of the parties from the beginning of it in respect of the work, and the advances made by Dr. Hearn, for which, or some of which, he took temporary security, there can, I think, be no doubt that the work was done for him at his request and upon his credit and under a contract with him from the commencement. I think it is plain that Dr. Hearn was the "owner," and Manes and Booth the "contractors."

Even if it be assumed that the agreement was not such as to be good in the face of a pleading setting up the Statute of Frauds; this, I think, would not, in the circumstances, make any real difference. The parties went on in pursuance of the agreement—in a slovenly way, it must be conceded—and none of them disputed or denied the validity of the agreement. At a particular juncture (the time at which a conveyance was made by Manes and Booth to Dr. Hearn), another and further agreement was entered into with the same object and this first one destroyed. This, however, did not, as I think, make any difference as to the position of the parties, whilst the first agreement had its existence. This conveyance was made on the 23rd day of May, 1891, and no question was raised as to Dr Hearn being the owner within the meaning of the Act from this time forward. He was, in my view, as I have said "owner" within the meaning of the Act from the commencement.

Then allowing in favour of Dr. Hearn, the $500 difference in the amount of the mortgage upon the property that he got—which, I think, on the evidence should be allowed him as a payment to Manes and Booth; it is shown, I think, that he paid his contractors the full contract price without any notice or knowledge of the existence of a lien in favour of any mechanic, etc.

It was said in argument that he knew that the work was being done, and materials furnished; that he had some knowledge of the circumstances of his contractors, and that he should have ascertained what the actual facts were in this respect. He swears that he had not notice or knowledge of any such claims, and that he was told by the contractors that all the men were being paid. He had advanced money for the purpose of paying them and thought it was so applied. He made his last payment about the first of August (except a sum of $60 or thereabouts that he afterwards paid a painter, and as I understand the evidence, this was for work that was then to be done, and which was not done afterwards as expected) and he had no notice of any claim for money unpaid by his contractors till the 8th day of the same month of August. As to Dr. Hearn being affected with notice of claims by reason of his seeing the work done and materials furnished, I refer to the language of the learned Judge in *Richards* v. *Chamberlain*, 25 Gr. 402, quoted in *McVean* v. *Tiffin*, 13 A. R. 1 at p. 5. None of the liens in question were registered till the 15th day of September, 1891.

On the evidence I think it plain that Dr. Hearn, who was in my opinion, as I have said, the "owner" from the commencement, paid in good faith to the contractors the whole or about the whole of the contract price without any notice in writing or otherwise, or knowledge of the claims of mechanics, etc., for unpaid money in respect of which liens on the property are now claimed.

The contractors, however, although they got the contract price as I have said, did not complete the building, and the evidence shews, I think, clearly enough, that $438 was necessarily and reasonably expended afterwards by Dr. Hearn to finish what the contractors should have done.

The payments made by Dr. Hearn up to ninety per centum of the proper sum operated, as I think, in the circumstances,

Judgment.

Ferguson, J.

as a discharge *pro tanto* of liens created by the Act. It was his misfortune to have paid more than this; and the question now arises as to what is the sum upon which the ten per centum, which did not operate as such discharge, is to be computed.

It was contended, the contention being, as I understood, based upon the remarks of Mr. Justice Patterson in *Goddard* v. *Coulson*, 10 A. R. at p. 9, that Dr. Hearn has the right to subtract this $438 from the amount of the ten per centum (about $608) and only account to the lien-holders for the difference, say $170. This, however, was not decided in that case; nor does it appear that that case was precisely like the present one. Possibly I do not gather the full meaning of the case *Goddard* v. *Coulson*. So far, however, as the sum upon which the ten per cent is to be computed has concern I do not see that I am in a position to depart from what was decided in *Re Cornish*, 6 O. R. 259, and according to this the $438, should be deducted from the contract price, which is $6,080. This would be, as I understand the figures, ten per centum upon $5,642.

If, however, it were held that Dr. Hearn was not "owner" within the meaning of the Act, until he received his conveyance on May 23rd, 1891, then he registered this on June 16th, 1891, long before the registration of any lien, he having, as I have before said, no notice of the existence of any lien; and all liens prior to that time would, as I understand the authorities, be defeated as against him by the operation of the Registry Acts, and so far as I can see, his property would be subject only to liens arising after that period. But, as already stated, he was, in my opinion, "owner" from the commencement of the work on the buildings.

I have not gone through the lengthy details of the case arising upon the peculiar contract and dealings; nor do I think it necessary that I should do so.

The case must, I think, go back to the learned Referee. Perhaps, upon the altered view, the proofs of some of the

Judgment.

Ferguson, J.

claims will require reconsideration, I do not know how this may be.

Mention was made of the matter of the costs, but, I think it too soon to decide anything as to costs, excepting as to the costs of this appeal which will be to the appellant.

Appeal allowed with costs.

A. H. F. L.

[CHANCERY DIVISION.]

REDDICK V. THE TRADERS' BANK OF CANADA.

County Courts—Prohibition—Jurisdiction—Action for surplus after mortgage.

A County Court has jurisdiction, whatever the amount of a mortgagee's claim at the time of the exercise of a power of sale, to entertain an action for the recovery of an alleged surplus derived from the sale and not exceeding $200, although the existence of the surplus is denied.

Statement.

THE plaintiff commenced an action in the County Court of the county of Hastings, and in his statement of claim set out that the Traders' Bank of Canada had sold the farm of one James Tulloch under a power of sale contained in certain mortgages, for $6,200; that from the proceeds of such sale they received more than sufficient to satisfy their mortgage claims, and had a surplus in their hands, amounting to $193.25, which he claimed under an assignment from James Tulloch.

The defendants in their defence denied that they had any such surplus, and said that if a proper account were taken of what was due to them at the time of the sale, it would be found that there was still a balance due.

On June 6th, 1892, the defendants moved before FERGUSON, J., for a prohibition to the County Court Judge on the ground of want of jurisdiction, the action being in substance an action for taking an account of the sum due

Statement. under the mortgages in question, and for payment of such surplus as should be found due, and an amount of over $6,200 being claimed by the bank as having been due to them under the mortgages at the time of the sale proceedings.

A. H. F. Lefroy, for the defendants.
C. J. Holman, for the plaintiff.

June 7th, 1892. FERGUSON, J.:—

The motion is for a writ of prohibition on the ground that the County Court has not jurisdiction.

The defendants are mortgagees who have sold the lands mortgaged by virtue of powers of sale in the mortgages. These mortgages were two in number, and were, so far as appears here, in the ordinary and well-known form. The plaintiff says that the defendants have in their hands a sum of money ($193.25), less than two hundred dollars of the moneys arising upon the sale, after satisfying all principal, interest and costs in respect of these mortgages, and for this sum the action is brought.

The plaintiff is the assignee of the mortgagor, and it was not questioned that, for all purposes here, he stands in the mortgagor's position, and entitled to sue in his own name.

The defendants' contention on this motion is that the relief which the plaintiff is seeking is of an equitable character, and that the County Court has now no equitable jurisdiction. I do not think this contention can or should be sustained.

The defendants, if it be assumed that there is such a balance of money in their hands, have the money, as I think, as money received to the use of the mortgagor or his assign, the plaintiff: *Boulton* v. *Rowland*, 4 O. R., at p. 722; referred to in *Beatty* v. *O'Connor*, 5 O. R., at p. 748, by the Chancellor, and the authorities referred to in the latter case by the Chancellor.

Judgment.

Ferguson, J.

Money received by the defendants to the use of the plaintiff was always recoverable by the plaintiff in *indebitatus assumpsit*, under what was called the common counts for money had and received to the plaintiff's use, in a Court of common law. The action to recover such money was a common law action without any equitable interference in aid of the plaintiff.

It has been said that this was the only trust wholly cognizable in a Court of common law. Assuming, then, this to be so, and the claim being less than $200, there seems to be no sufficient reason for saying the County Court has not jurisdiction under the 19th section of the County Courts' Act, R. S. O. ch 47.

The case *Morton* v. *Hamilton Provident and Loan Society*, 10 P. R. 636, and 11 P. R. 82, was relied on by the defendants. In that case, however, the amount of the plaintiff's claim exceeded $200, and the result must have been the same in any view of the nature of the relief sought, and besides it was a matter of different scales of costs that was determined only.

Another case relied on was *Sherwood* v. *Cline*, 17 O. R. 30, but I humbly think that the case has no bearing whatever upon the question before me here.

I am of the opinion that, for the reasons above, the County Court has jurisdiction, and that this application must be refused with costs.

Application refused with costs.

The defendants now moved before the Divisional Court by way of appeal from this decision, and in their notice of motion set up the grounds taken before FERGUSON, J., and also, that the relief claimed in the action in question was purely of an equitable nature, and the action not a common law action, whereas the County Courts have no equitable jurisdiction.

A. H. F. Lefroy, for the defendants. We do not admit any surplus in our hands, or any debt due. This distinguishes

Judgment.

Ferguson, J.

this case from *McKay* v. *Mitchell and Trust and Loan Co.*, 6 U. C. L. J. 61. See Leith's Real Prop. Stats., p. 378. *Smith* v. *Trust and Loan Co.*, 22 U. C. R. 525, is directly in our favour. See also Smith's Manual of Common Law, sec. 1057, p. 466; Chitty on Contracts, 12th ed., p. 75. So far as it has a bearing, *Boulton* v. *Rowland*, 4 O. R. 720, is in our favour. A power of sale in a mortgage is merely a power to sell the equity of redemption, and the moneys stand in the place of the equity of redemption: *Wright* v. *Rose*, 2 Sim. & St. 323. The right to exercise the power of sale only arises after default, and after default a mortgagor's rights are purely equitable. But the County Court has no equitable jurisdiction: *Whidden* v. *Jackson*, 18 A. R. 439, 442. As to the amount involved here being over $6,200, I refer to *McGillicuddy* v. *Griffin*, 20 Gr. 81.

C. J. Holman, for the plaintiff. This is only a money claim and is under $200 and the County Court has jurisdiction: *Allen* v. *The Fairfax Cheese Co.*, 21 O. R. 598; *In re Dixon and Snarr*, 6 P. R. 336; *Bennett* v. *White*, 13 P. R. 149.

June 28th, 1892. BOYD, C.:—

In *Beatty* v. *O'Connor*, 5 O. R. at p. 748, I quoted the expression of Jessel, M. R., in defining the status of a mortgagee with surplus of moneys derived from the sale of the property on hand as that of a "bare trustee." That same expression was taken up in a later case by North, J., who says "he is not a trustee in the ordinary sense," and he continues thus: "the remark that the mortgagee was a bare trustee merely meant that he had no independent claim of his own": *In re Gregson, Christison* v. *Bolam*, 36 Ch. D. at p. 230. In that case, however, North, J., repeatedly alludes to the mortgagee with such surplus in his hands as one "holding money to the use" of the (in that case) executor of the mortgagor: *Ib.* pp. 226 and 230. It is, he says, clearly money held to the use of the other, and, if so, I infer it may be the subject of an action for

Judgment.

Boyd, C.

money had and received upon the common money counts.

That is abundantly plain in American cases of high repute, of which I note *Cook* v. *Basley*, 123 Mass. 396. Others are collected in Jones on Mortgages, 4th ed., sec. 1940.

The onus is on the plaintiff to shew a surplus in the hands of the defendants,—failing this, he fails in toto. But if he proves that enough has been realized to satisfy the mortgage and all claims of the defendants in respect to the provisions of the statute as to the disposition of moneys arising under the exercise of the power of sale, so as to clear an ultimate balance for the plaintiff,—that is money received to his use for which he should recover even in the County Court. The plaintiff proposes to make good a claim for a specific sum as set forth in section 11 of the statement of claim. Upon the face of the proceedings therefore, and before the matters of fact have been investigated in the usual way, there is no ground for awarding prohition to the County Court as of an equitable action whereof it cannot take cognizance.

I think the appeal should be dismissed with costs in the action to the plaintiff in any event: *Pears* v. *Wilson*, 6 Exch. 833; *Edwards* v. *Bates*, 7 M. & G. 590; *Pardoe* v. *Price*, 16 M. & W. at p. 458; and *Edwards* v. *Lowndes*, 1 E. & B. 81; *Chatterton* v. *Watney*, 16 Ch. D. 378, and 17 *ib.* 259, affirmed. (*a*)

MEREDITH, J.:—

It is difficult to understand the necessity for all of the provisions contained in sections 34 to 39, inclusive, of the County Courts' Act, R. S. O. ch. 47, if those Courts have jurisdiction only in common law matters; they seem to indicate provision for something more than such matters of an equitable character as might arise, for instance, under the provisions of the Common Law Procedure Act in a common law Court where the jurisdiction is confined to purely common law actions.

(*a*) See *Charles* v. *Jones*, 25 Chy. Div. 544.

Judgment.

Meredith, J.

A solution of the difficulty is apparent when the provisions of the Administration of Justice Act, 36 Vic. ch. 8, are recalled to mind.

Under the 2nd section of that Act any person having a purely money demand might proceed to recover it by action at law, although the right to recover might be an equitable one only; subject to the discretionary power of the Court, conferred by the Act, to transfer equity matters to the Court of Chancery when the ends of justice so required.

The provisions for such transfer are contained in sections 9, 10 and 34.

In the same Act the provisions for references by common law Courts to officers of the Court of Chancery were first made: see sections 11, 12, 13 and 14.

And by section 15 the provisions respecting such transferring and referring of actions are shown to be applicable to County Courts as well as to the Superior Courts of common law.

That Act was carried into the Revised Statutes of Ontario, 1877, under the title of "The Administration of Justice Act," ch. 49, and the sections referred to are there, 4 and 23, 24 and 25, and 26, 27, 28 and 29, and 30, respectively. They were not carried into the County Courts' Act (ch. 43) in that revision.

In the revision of 1887 these provisions, in so far as they affected the Superior Courts of common law, were, of course, treated as unnecessary in conveyance of the Judicature Acts and the Rules; but, with the exception of section 2 of the Act of 1873—section 4 of the Act in the revision of 1877—were brought into the County Courts' Act (ch. 47), and are the sections of that Act to which I first referred.

The one section not carried into that Act seems to have been treated as if its full force and effect had been carried into and preserved by the Judicature Act.

It therefore seems to me that, by the Administration of Justice Acts, jurisdiction in equitable cases, where the claim was purely a money demand, was conferred upon County

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Meredith, J.

Courts, and that it has not been lost—though the revision of 1887 has not left the matter as plain as it was before: that the words "all personal actions" include personal actions of an equitable character where the claim is "a purely money demand," as well as common law actions; according with the current of legislation which flows towards increasing rather than curtailing the jurisdiction of the inferior Courts: see secs. 21, 22, 33, 42 and 53 of R. S. O. 1887, ch. 47.

Assuming, then, that the applicant's contention is right, that no action at common law would lie, "for money payable by the defendants to the plaintiff for money received by the defendants for the use of the plaintiff," nor upon the covenant, to recover these surplus moneys, claimed to have been received under the statutable power of sale contained in the Act respecting Short Forms of Mortgages, there would yet be jurisdiction here, if the equitable right sought to be enforced be a purely money demand; for the amount claimed is under $200, in a personal action.

That it is of such a character seems to be settled: see *Green* v. *Hamilton Provident Loan Co.*, 31 C. P. 574, at p. 580; also *Re Mead* v. *Creary*, 32 C. P. 1.

As the amount claimed does not exceed $200, there is nothing in the objection that that sum is but an unsettled balance of the purchase money which is said to have been more than $6,000. Where the amount claimed does not exceed $200, there is no limit, as in the Division Court, to the amount of accounts which may be investigated: it is immaterial what the amount of the unsettled account may be: *Bennett* v. *White*, 13 P. R. 149. When the claim exceeds $200, but does not exceed $400, the manner of reduction necessarily becomes important: *Furnival* v. *Saunders*, 26 U. C. R. 119; *Re Dixon and Snarr*, 6 P. R. 336; *Sherwood* v. *Cline*, 17 O.R. 30; *Robb* v. *Murray*, 16 A.R. 503.

ROBERTSON, J., concurred.

A. H. F. L.

See *Hutson* v. *Valliers*, 19 A. R. 154.—REP.

[COMMON PLEAS DIVISION.]

REGINA V. FEARMAN

Intoxicating liquors—"The Liquor License Act"—Evidence of license inspector and defendant—Admissibility—Indian reserve.

For an offence under "The Liquor License Act," R. S. O. ch. 194, the license inspector, who lays the information, is a competent witness.

An objection that the conviction, which was for selling liquor without a license at the village of M., in the township of O., should have negatived that the place where the offence was committed was in an Indian reserve, which it was alleged formed part of such township, was overruled, as there was nothing to shew the fact alleged, and under section 1 of R. S. O. ch. 5, there was *primâ facie* jurisdiction.

Statement.

THIS was a motion by way of appeal from an order of the Chief Justice of this Division, refusing an order for a writ of *certiorari* herein.

The defendant was convicted, on the 20th of February 1892, by James Grace and W. J. Shaw, two Justices of the Peace for the county of Brant, for an infraction of section 50 of "The Liquor License Act," R. S. O. ch. 194, by unlawfully keeping liquor for the purpose of sale, etc., without a license at the village of Middleport, in the township of Onondaga, in the county of Brant; and was fined twenty dollars and costs.

The grounds taken were:

1. That the evidence of the informant (the license inspector) was improperly received, as it was alleged he had a pecuniary interest in the result—an interest in the penalty; 2. The magistrates refused to receive the evidence of the defendant, tendered on his own behalf. 3. That the offence (if any) was committed in the township of Onondaga, a part of which township, it is alleged, comprises the reserve of the Six Nation Indians; and as "The Liquor License Act" is not in force in the reservation, the conviction should have negatived the offence having been committed therein.

In Easter Sittings (May 23rd, 1892), before ROSE and MACMAHON, JJ., *DuVernet* supported the motion. The

Argument.

evidence of the informant, the license inspector, should not have been received, as he was interested. This case was tried after the decision in *Regina* v. *Bittle*, 21 O. R. 605, and though the magistrate refused to receive the evidence of the defendant, he admitted the evidence of the informant. The question as to the admissibility of the evidence of an informant was first taken in *Regina* v. *Strachan*, 20 C. P. 182, a case under the License Act of 1868, 32 Vic. ch. 32 (O.), but was overruled because there was an express provision in section 25 making the prosecutor or complainant a competent witness; but there is no such provision in the present Act. The case of *Rex* v. *Stone*, 2 Lord Raym. 1445, shews that the evidence of an informant, as being interested, is not receivable. See also Gilbert on Ev., 6th ed., 110-111; Phillips on Ev., 10th ed., pp. 46-7. The informant here is interested, as he is liable for the costs of the prosecution: secs. 45, 46. Section 5 of the Dominion Act, 51 Vic. ch. 45, does not apply. The defendant was a competent witness. Sec. 1 of 55 Vic. ch. 14 (O.), which is substituted for sec. 9 of R. S. O. ch. 61, makes his evidence admissible. The next objection is that the Local Option Act was not in force, and so there could be no license, and thus a conviction for selling without a license would be bad. The defendant endeavoured to prove this at the trial, but the Court would not allow the evidence to be put in. The next objection is that the offence, if any, was committed in the township of Onondaga, which comprises the Six Nation Indian Reserve, and the fact of the offence having been committed there should have been negatived. The onus is on the magistrate to shew he had jurisdiction: *Regina* v. *DuQuette*, 9 P. R. 29.

Langton, Q. C., contra. Sec. 9 of R. S. O. ch. 74, The Ontario Procedure Act, read in connection with 51 Vic. ch. 45, sec. 5 (D.), makes the informant a competent witness. "The Evidence Act," R. S. O. ch. 61, sec. 2, has, however, put an end to all question as to the admissibility of evidence on the ground of interest, as it expressly provides that no person is to be thereafter excluded from giving

Argument. evidence from any alleged incapacity by reason of interest. The 32 Vic. ch. 32, sec. 25 (O.), has never been repealed, and was left out in the revision as being expressly provided for by "The Evidence Act." An informant never was disqualified merely by reason of his being an informant, but only when he was interested. Here the license inspector has no interest. Under the Act he has no pecuniary interest in the penalty, as no portion of it goes to him, and he is indemnified against costs. The case of *Rex* v. *Stone* is more fully reported in Burn's Justice of the Peace, 30th ed., at p. 1141, and it appears the evidence of the informant there was excluded because he was the only witness and was suing for a pecuniary reward. The defendant's evidence was not admissible. The 55 Vic. ch. 14 (O.), does not apply, as it was passed after the conviction was made. There was nothing to shew that the Local Option Act was in force, and the objection is not taken in the order *nisi*, and should not be entertained. Then, as to the objection as to the Indian Reserve being in the township, and not negativing the sale having taken place there. This was held untenable in *Regina* v. *Whiting*, not reported.

June 25th, 1892. MACMAHON, J.:—

I do not consider the question so much discussed during the argument as to whether 51 Vic. ch. 45, sec. 5 (D.), is introduced into the said Act by virtue of R. S. O. ch. 74, sec. 9, as I am clearly of opinion that the license inspector has no pecuniary interest in the result of the prosecution.

Under section 45 of "The Liquor License Act," R. S. O. ch. 194, any penalty in money recovered where the inspector is prosecutor shall be paid by the convicting justice to him, to be by him paid to "The License Fund Account." And in any case where an inspector has prosecuted, and has been unable to obtain the amount of the costs, the same is to be made good out of such license fund. And

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MacMahon, J.

where he has prosecuted and failed to obtain a conviction, he shall be indemnified against costs out of the license fund, should the justice before whom the complaint is made certify that such officer had reasonable and probable cause for preferring such complaint. And, by section 90, the council of every municipality is required to set apart not less than one-third part of such fines or penalties received by the municipality for a fund to secure the prosecutions for infractions of the Act.

The reason why the law prohibited a conviction being had on the uncorroborated evidence of an informer is stated in the case referred to by Mr. Du Vernet of *Rex* v. *Stone*, 2 Lord Raym. 1545, Burn's Justice of the Peace, 30th ed., 1141: "It is said that where a statute appoints a conviction to be on the *oath of one witness*, this ought not to be by the single oath of the informer; for, if the same person were allowed to be both prosecutor and witness, it would induce profligate persons to commit perjury for the sake of the reward."

The rule is thus stated in Phillips on Evidence, 10th ed., 47: "In cases of summary convictions, where a penalty is imposed by statute and the whole or in part is given to the informer, who becomes entitled to receive it immediately upon the conviction, the informer was considered an incompetent witness, unless he was made competent by statute."

The license inspector has no pecuniary interest in any part of the penalty. No portion of it goes to benefit him. All fines and penalties are paid into the "License Fund Account," which is used for the purpose of carrying out and enforcing the Act.

The inspector may lay the information for an infraction of the Act, and to that extent he is an informer. But the statute absolutely prohibits his having any interest in the penalty; and it is on the ground of interest that the evidence of informers was excluded.

There is no reward to be obtained by the inspector, and therefore no reason for excluding his evidence. I should, therefore, have held the inspector was a competent witness

Judgment

MacMahon, J.

irrespective of R. S. O. ch. 74, until my attention was drawn to the statute by the judgment of my learned brother Rose, and I agree with him in holding it is, in its features, wide enough to render competent as a witness a person interested in a penalty. The second ground is disposed of by *Regina* v. *Hart*, 20 O. R. 611, and *Regina* v. *Bittle*, 21 O. R. 605.

The third ground taken was considered by me in *Regina* v. *Whitney* (not reported), where I said: "By R. S. O. ch. 5, sec. 1, the township of Onondaga is within and forms part of the county of Brant for municipal purposes. That township also, for the purposes of representation in the House of Commons, forms part of the south riding of the county of Brant, R. S. C. ch. 6, sec. 2, par. 24.

Although it was said in argument that part of the township of Onondaga is included within the Six Nation Reserve, there is nothing before us shewing this. Even had there been evidence shewing that the Indian Reserve formed part of the township of Onondaga, it would not have been necessary to the validity of the conviction that it should contain an averment negativing the commission of the offence in that part of the township. We must assume that the magistrates, in hearing a complaint for an infraction of the Liquor License Act, were trying a case within that part of their territorial jurisdiction where the Act was in force until the contrary was shewn.

Had it been shewn that the alleged offence was committed within the Indian reservation, there could not have been a conviction under the Liquor License Act, as the offence would only have been punishable under the Indian Act, as amended by 51 Vic. ch. 22, sec. 4, (D.).

All the grounds fail, and the motion must be dismissed with costs.

ROSE, J.:—

Only two grounds of appeal were taken by the notice.

1st. That the informant was improperly allowed to give evidence in this matter.

Judgment.

Rose, J.

2nd. That the defendant was not permitted to give evidence.

Mr. Du Vernet, on the argument, took a further ground not taken in the notice of appeal, and which, therefore, as it seems to me, we should not consider, as it is purely technical, and there is no reason for interfering in this case on the merits.

As to the first ground, I think Mr. Langton's argument must be given effect to: viz., that section 2 of R. S. O. ch. 61, applies. This section is most general in its terms, and provides that: "No person offered as a witness shall hereafter be excluded, by reason of any alleged incapacity from crime or interest, from giving evidence * * before any person having * * authority to hear, receive and examine evidence."

And this is a reason, I think, as urged by Mr. Langton, why in the revision of 1877, ch. 181, sec. 66, the words, "and no person shall be rendered incompetent as a witness by reason of his being interested in any portion of the penalty sought to be recovered," disappeared from section 47 of 37 Vic. ch. 32.

This ground, therefore, in my opinion, fails irrespective of the question of whether the inspector could be held to be an interested witness; which has been considered by my learned brother MacMahon, but upon which I have formed no opinion.

There is nothing in the second ground taken. The conviction was in February, 1892, and the amending Act, 55 Vic. ch. 14, sec. 1, (O.), was not passed until April following.

See *Regina* v. *Hart*, 20 O. R. 611; *Regina* v. *Bittle*, 21 O. R. 605.

I agree that the motion must be dismissed with costs.

Since writing the above, my learned brother MacMahon tells me that some motions for *certiorari* are pending awaiting the decision in this case of a ground of objection to the conviction that it did not shew that the offence was not committed on the Indian Reserve, and therefore out of

Judgment

Rose, J.

the jurisdiction of the magistrate. It is sufficient for this case to say that there is nothing before us to shew that any portion of the township is Indian Reserve. The offence is said to have been committed in Middleport, in Onondaga Township. Section 1 of R. S. O. ch. 5, *primâ facie* establishes jurisdiction, and, if evidence were offered, no doubt it would appear that Middleport is not in the Indian Reserve.

[COMMON PLEAS DIVISION.]

THE QUEEN v. BUTLER.

Municipal corporations—Police commissioners—Licensing omnibuses—Restriction to owners—R. S. O. ch. 184, sec. 436.

Sec. 436 of the Municipal Act, R. S. O. ch. 184, empowers the police commissioners of a city to regulate and license the owners of omnibuses, etc. The commissioners of a city passed a by-law enacting that no person or persons should drive or own any omnibus without being licensed to do so:—

Held, that the authority conferred on the commissioners was to license owners, and not drivers; and therefore a conviction of a driver for driving without a license, was bad, and must be quashed.

Statement.

THIS was a motion to quash the conviction of the defendant, whereby he was convicted "for that he, the said John Butler, did on the 5th April, 1892, at the city of Ottawa, unlawfully drive an omnibus, used for hire for the carriage of passengers from one place to another within the said city of Ottawa, without being licensed so to do, contrary to the by-law of the Board of Commissioners of Police."

The grounds of the motion were:

1. That the said John Butler, being the driver only of the vehicle in question, should not have been convicted of the offence charged. 2. That section 4 of the by-law is *ultra vires* of the said Board. 3. That the vehicle in question is the property of the Ottawa City Passenger Railway, incorporated by Act of Parliament, enabling the said com-

pany to use these vehicles. 4. That the said John Butler, as driver of the said vehicle, was protected under the charter of incorporation of the said company. 5. That the said by-law refers to persons only, and not to corporations. Statement.

The omnibus in question was the property of the company, and the defendant was merely in their employment as a driver.

In Easter Sittings, June 2nd, 1892, before GALT, C. J., ROSE, and MACMAHON, JJ.:—

Ryckman, supported the motion. The defendant was not the owner of the vehicle, but merely the driver. Under sec. 436 of the Municipal Act, R. S. O., ch. 184, power is given to the Police Commissioners to pass by-laws to regulate and license owners of vehicles, etc., but no power is given to interfere with the driver. The 4th section of the by-law is therefore *ultra vires* of the board inasmuch as it attempts to control drivers. [It is not necessary to give the argument on the other objections raised, as the judgments do not turn on them.]

Langton, Q. C., contra. The words of sec. 436 of the Act are wide enough to include a driver, and therefore the by-law is within the authority of the commissioners. Unless they had control of the driver, it would be extremely difficult to enforce the by-law.

June 25, 1892. GALT, C. J.:—

By section 10 of the by-law, there is a fee of $10 chargeable for each omnibus; but this has reference to the owner, not the driver.

By section 4 (under which this conviction took place) it is enacted: "That no person or persons shall drive or own "any coach, omnibus," etc., "without being licensed so to do."

It appears to me that, having reference to the tenth section, the license referred to has regard to persons either

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owning or hiring for their own use an omnibus, and not to a person who is employed simply as a driver.

It was held expressly by the Court of Queen's Bench, in the case of *Regina* v. *Reeves*, 1 O. R. 490, under the provisions of section 415 of R. S. O., 1877, ch. 174, which are the same as section 436 of R. S. O., 1887, ch. 184, that "the power given to the Board of Police Commissioners, by section 415, is only to regulate and license the *owners* of the several kinds of vehicles used for hire, and the rates of fare to be taken. No mention whatever is made of drivers, and it would seem to be a clear excess of authority on the part of the Police Commissioners to require a driver of such vehicle to take out a certificate and pay a fee therefor."

The motion must be absolute to quash the conviction with costs.

MACMAHON, J.:—

The 4th section of by-law No. 14, which, it is alleged, is *ultra vires* of the Board of Police Commissioners provides: "That no person or persons shall drive or own any coach, omnibus, cab * * used for hire for the carriage of passengers * * without being licensed so to do," etc.

This simply means that an omnibus used for hire shall not be driven unless it has been previously licensed. The section of the by-law has no reference to, nor does it require, the driver to be licensed, which was the vice of the by-law in *Regina* v. *Reeves*, 1 O. R. 490.

In *Regina* v. *Reeves*, the cab which Reeves was driving was not his own, but it had been regularly licensed, and Reeves was convicted under a by-law which required the "driver of any licensed vehicle for the conveyance of passengers for hire" to obtain a certificate, for which he was required to pay the sum of two dollars. While, in the present case, Butler was driving an omnibus for which no license had been procured by the owners thereof—the Ottawa Street Railway Company. And the conviction is,

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MacMahon, J.

"for that he, the said John Butler, did on the 5th of April, 1892, at the city of Ottawa, drive an omnibus used for hire for the carriage of passengers * * without being licensed so to do," etc. Clearly a conviction for driving an unlicensed omnibus.

Then, is it within the power of the Board of Commissioners to pass a by-law by which the driver of an unlicensed cab or omnibus, of which he is not the owner, may be made guilty of an offence? Or is the power of the commissioners restricted so that the owners only can be made answerable?

The 436th section of the Municipal Act provides: "The board of commissioners of police shall, in cities * * regulate and license the owners of livery stables and of horses, cabs, * * omnibuses and other vehicles used for hire, and shall establish the rates of fare to be taken by the owners or drivers of such vehicles," etc.

As the Act authorizes the commissioners to regulate and license the owners of omnibuses, etc., then, under a by-law founded on the Act, the owner who uses his omnibus for hire must be the person upon whom the penalty can be inflicted.

Although the 4th section of the by-law makes the driver of an unlicensed omnibus liable to the penalty, this is in direct conflict with the 100th section, which provides: "That any person or persons who, by himself, herself, or his or her driver, shall be guilty of any infraction or breach of this by-law, * * shall, upon conviction therefor before the police magistrate, * * forfeit and pay such fine as the said police magistrate * * shall inflict, of not less than one dollar or more than fifty dollars, together with the costs," etc. So that, although there be but one offence committed—viz., the use of an unlicensed omnibus for hire—two persons may be liable for the penalty, namely: the owner may be held liable under section 100 for an infraction of the by-law, whether such infraction was committed by himself or his driver; and the driver may be made liable, under section 4, as the driver of an unlicensed omnibus.

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MacMahon, J.

The Act did not empower the commissioners to pass a by-law inflicting a penalty on the driver of an unlicensed omnibus, unless such driver was the owner thereof.

It was urged that to hold that the 4th section of the by-law is *ultra vires* of the commissioners would be opposed to the judgment in *Regina* v. *Gurr*, 21 O. R. 499. The point we are called upon to consider in the present case was not even mooted in Gurr's Case. In that case Gurr, the driver, was summoned for an infraction of the cab by-law, but Mr. Brown, the owner of the cab, intervened, and the case was made a test case. The only point raised by Brown's counsel before the police magistrate, and when the case was before the Divisional Court, being "whether a person having a livery license can stand with his carriage for hire on his own property at places in the city other than where his stable is." See p. 500.

In cases where an omnibus is rented from a person who has not obtained a license, and the person so renting uses the omnibus for hire for the carriage of passengers, he would, in such case, be regarded as the owner, *qua* the by-law, and liable to the penalty for an infraction thereof: *Regina* v. *Boyd*, 18 O. R. 485. See also *Hughes* v. *Sutherland*, 7 Q. B. D. 167, and cases referred to in Stroud's Judicial Dictionary under title "Owner."

As the conviction must be quashed on the ground stated, we do not consider the other question raised as to the right of the street railway company to use omnibuses to carry passengers on certain streets in the city of Ottawa on which they are empowered to lay railway tracks.

We think the appellant is entitled to his costs.

ROSE, J.:—

The conviction was for driving an omnibus used for hire, etc., without being licensed.

The Municipal Act does not authorize the passing of a by-law requiring a driver not being an owner to take out a license. Therefore, if this conviction is founded upon a

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Rose, J.

by-law, it must fall, as such by-law would be *ultra vires.* If not founded upon a by-law, *a fortiori* it must be invalid.

My reading of the by-law is, that the driver is required to take out a license: "That no person * * shall drive * * without being licensed so to do." Such a provision is, in my opinion, *ultra vires*, not being confined to owners.

I agree, therefore, that the conviction should be quashed and with costs.

[COMMON PLEAS DIVISION.]

REGINA V. RAWSON.

Auction and auctioneer—Assignee of estate of insolvent—By-law under Municipal Act R. S. O. ch. 184, sec. 495—Selling estate of insolvent by auction—Conviction.

A by-law of a county municipality passed under sub-section 2 of section 495 of the Municipal Act, R. S. O. ch. 184, enacted, that it should not be lawful for any person or persons to act as auctioneers, or to sell or put up for sale any goods" etc., "by public auction" unless duly licensed :—

Held, that the agent of an assignee of an insolvent estate selling without a license the stock-in-trade of an insolvent who had carried on business in the county, was rightly convicted of a breach of the by-law, although it was the only occasion he had so acted in the municipality.

Statement.

THIS was a motion calling upon C. H. Ross, police magistrate for the county of Simcoe, and A. W. Beardsley, the complainant, to shew cause why a conviction, made by the police magistrate, dated the 28th of December, 1891, whereby the defendant was convicted, for that he did on the 10th of December, in the said county of Simcoe, unlawfully act as auctioneer by putting up for sale and selling goods, wares, etc., contrary to the provisions of by-law No. 451 of the county of Simcoe, not being duly licensed therefor.

The whole of the evidence upon which the conviction was founded, was given by the defendant. He stated: "I am the defendant. I acted as agent for E. R. C. Clarkson,

Statement. trustee, at the sale in question. There was an assignment for the benefit of creditors to E. R. C. Clarkson, and I claim the right to sell by auction. I sold the goods on the premises of the assignor. The assignor carried on a general store and also works several farms. I make a practice of thus selling."

There was also an admission by the defendant that he sold by public auction, an advertisement of the sale being put in. The county by-law, 451, was also admitted.

It provided: "That it shall not be lawful for any person or persons to act as auctioneers or to sell or put up for sale, or attempt to sell any goods" etc., "by public auction," etc., "or otherwise to act or assume to act as an auctioneer within the county of Simcoe, unless duly licensed in that behalf."

The prosecution admitted the assignment to Clarkson, and that Rawson was the agent of the trustee under the assignment.

In Easter Sittings, May 18th, 1892, of the Divisional Court composed of GALT, C. J., ROSE, and MACMAHON, JJ., *Shepley*, Q. C., supported the motion. The defendant was merely the agent of Clarkson the official assignee. He cannot be deemed to be an auctioneer, but a transient trader, and comes within sub-sec. 9 of the sec. 489 of the Municipal Act R. S. O. ch. 184, as amended by 51 Vic. ch. 28, sec. 23 (O.). This section clearly gives the assignee power to sell by auction, and therefore *ex necessitate*, he is excluded from the provisions of sec. 495, sub-sec. 2, of the Act, which deals with auctioneers. The next point is, that even assuming that sec. 495 did apply, the defendant did not come within the definition of an auctioneer as this was merely an isolated transaction; a single act of selling is not sufficient to bring the defendant within the section. He must carry on the business of an auctioneer: *Regina* v. *Andrews*, 25 U. C. R. 196; *Rex* v. *Little*, 1 Burr. 610; *Rex* v. *Buckle*, 4 East 346; *Johnson* v. *Hudson*, 11 East 180. Then the legislature having given the power to

Argument.

license, such power does not authorize the municipality to impose a special tax for revenue purposes; all they can do is to impose a fee of $1.00 for a certificate: secs. 285-6; Dillon on Municipal Corporations, 4th ed. 357-361.

Pepler, Q. C., contra. Secs. 489, sub-sec. 9 as amended, and sec. 495, sub-sec. 2 are quite distinct. The former aims at transient traders while the latter refers to auctioneers; and moreover the by-laws under section 489 must be passed by the council of a township, city or town, while under sec. 495 the power is given to the county, or city, or town separated from the county for municipal purposes. The use of the word auctioneer in sec. 489, merely authorizes sale by auction if licensed for such purpose. An auctioneer is a person who sells goods by auction or public sale as opposed to private sale: Brown's Law Dictionary; Abbott's Law Dictionary, Anderson's Law Dictionary; Am. & Eng. Cyclopœdia of Law, under titles of Auction and Auctioneer; Fisher's Digest, vol. vi. p. 982; *Rex* v. *Taylor*, McClel. 362; 13 Price 636; *City of Gorham* v. *Keens*, 63 Ind. 468. The section covers isolated transactions as well as a general carrying on of the business. The cases relied on by the other side merely lay down that an isolated act does not make a person a trader; but this is a very different matter from acting as auctioneer. Then as to imposing fee. There is clearly power given to tax for revenue purposes. Sec. 286 only applies to monopolies: *Pidgeon* v. *Recorder's Court, etc. and City of Montreal*, 17 S. C. R. 495; *Re Neely and Owen Sound*, 37 U. C. R. 289; *Ex parte Frank*, 52 Cal. 606; Dillon on Municipal Corporations, secs. 357 p. 426.

June 25, 1892. MACMAHON, J.:—

By section 495 of the Municipal Act, the council of any county, city, or town separated from the county for municipal purposes may pass by-laws for the following purposes (sub-section 2): "For licensing," etc., "auctioneers

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MacMahon, J.

and other persons selling or putting up for sale goods," etc., "by public auction," etc.

Section 489, sub-sec. 9, of the Act (as amended by the addition of a sub-section [9 *a*], by 51 Vic. ch. 28, sec. 23 (O.), empowers the council of every township, city, town or incorporated village, to pass by-laws for licensing, etc., transient traders, or requiring transient traders and others who occupy premises in the municipality for temporary periods, and whose names have not been entered on the assessment roll, etc., and who may offer goods or merchandise of any description for sale by auction or in any other manner conducted by themselves, or by a licensed auctioneer, or by their agent or otherwise, etc., "but no such by-law shall affect, apply to, or restrict the sale of the stock of an insolvent estate which is being sold or disposed of within the" (*county* sub-sec. 9) (*municipality* sub-sec. 9 *a*) "in which the insolvent carried on business therewith, at the time of the issue of the writ of attachment or the execution of an assignment."

The legislature by prohibiting a municipal council from applying the provisions of any by-law relating to transient traders so as to affect sales of the estates of insolvent debtors when sold within the county (or municipality) in which the insolvent carried on business, left such estates in the same position they were in prior to the insolvency, Such estates, not being affected by any such by-law, whatever method the insolvent might, before his insolvency, have adopted for the sale of his estate, it was argued the like methods his assignee or trustee might adopt; and if the insolvent could have sold without an auctioneer's license, the assignee may do likewise; and if the assignee, so also the assignee's clerk or agent.

An auction is a public sale of land or goods at public auction to the highest bidder.

"Auctioneer, is a person who conducts an auction. May refer to a person who sells his own goods as well as one who sells the goods of another at public auction"—*Anderson's Dictionary of Law*. "A person authorized or licensed

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by law to sell lands or goods by public auction; one who sells at auction"—*Black's Law Dictionary.* And in *Bouvier's Law Dictionary,* 10th ed., he is described as "One who conducts a public sale or auction: (1) A person authorized by law to sell the goods of others at public sale; (2) He is the agent of both parties, the seller and buyer." In *Kenworthy* v. *Schofield,* 2 B. & C. at p. 947, Bayley, J., said: "It has been decided in many cases that in sales of land by auction, the auctioneer is agent for both vendor and vendee." See also *Emmerson* v. *Heelis,* 2 Taunt. 38, per Lord Mansfield.

In order to constitute the auctioneer the agent of both vendor and purchaser, he must be acting in such capacity at a public sale. The rule does not apply where the auctioneer sells the goods of his principal at private sale, for then he is the agent of the vendor alone: *Mews* v. *Carr,* 1 H. & N. 484; Benjamin on Sales, 3rd ed., sec. 268.

One of the parties to a contract cannot sign the name of the other as his agent so as to bind him within the 17th section of the Statute of Frauds; the signature as agent must be by a third person: *Sharman* v. *Brandt,* L. R. 6 Q. B. 720.

The enactment in section 495 is very wide. It provides that a by-law may be passed for licensing auctioneers and other persons selling or putting up for sale goods, etc., by public auction, etc.; and the by-law provides: "That it shall not be lawful for any person or persons to act as auctioneers, or to sell or put up for sale, or attempt to sell any goods, etc., by public auction, etc., or otherwise to act or assume to act as an auctioneer within the county of Simcoe, unless duly licensed in that behalf."

The fee for an auctioneer's license is the sum of twenty dollars.

The statute clearly gives the power exercised by the county council of Simcoe, *i. e.,* that if any person or persons sell, or put up for sale, goods by public auction without having obtained a license, he or they shall be liable to the penalty provided in the by-law.

Judgment.

MacMahon, J.

Taking the very words of the Act, "any other persons," and of the by-law, "any person or persons," would clearly prohibit the owner of goods from putting them up for sale by auction without a license; and, if so, neither could his assignee.

It is clear, however, beyond question, that the defendant could not sell by public auction without having obtained a license.

It was urged that a single act of selling goods would not make the defendant liable for contravening the by-law; and *Regina* v. *Andrews*, 25 U. C. R. 196, was cited where it was held that a conviction under the Pawnbrokers' Act was not sustained in one transaction alone. So in *Regina* v. *Little*, 1 Burr. 610, it was held that a single act of selling a parcel of handkerchiefs to a particular person, is not proof that the person so selling was a hawker, pedlar or petty chapman. But on a conviction for selling by auction without a license, Lord Mansfield, after referring to *Regina* v. *Little*, said: "This case is very different from that of a hawker and pedlar; going about and selling is necessary to make a man a hawker and pedlar; but here a single act was enough to bring a man within the statute." Paley on Convictions, 6th ed., 220.

The defendant said he made a practice of thus selling by auction, although it is not stated he had made a practice of so doing in the county of Simcoe.

The motion must be dismissed; and it is, I think, a case in which the complainant should have his costs.

ROSE, J.:—

I agree that the motion fails.

Section 489, sub-sec. 9, of R. S. O. ch. 184 does not apply: first, because it does not profess in terms to cover the ground taken by section 495, sub-sec. 2; and, second, because in this case the regulation complained of is of the council of the county, whereas under section 489, the county is not empowered to pass any by-law.

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Rose, J.

Section 489 does not give any license to sell by auction, but merely deals with the different modes of sale, *i. e.*, by auction or private sale; and if by auction, by a licensed auctioneer. I have not carefully considered the meaning of "or otherwise," for I view the words as descriptive merely, and not as confirming any right not otherwise enjoyed.

Section 495, sub-sec. 2, does in terms apply to persons selling by public auction, whether they may be strictly called auctioneers or not; and, as pointed out by my learned brother, covers the case of one selling as the defendant did.

One sale by auction may not constitute a man an auctioneer, and yet one sale by auction would be a violation of a by-law prohibiting any person selling by auction.

I cannot follow Mr. Shepley in his argument as to the by-law being invalid, as in fact taxing and not licensing. I can say nothing more than that it seems to me to be strictly within the power given to fix the sum to be paid for the license to sell by auction.

GALT, C. J., concurred.

[COMMON PLEAS DIVISION].

LAWSON V. MCGEOCH ET AL.

Bankruptcy and insolvency—Chattel mortgage, validity of—Prior agreement therefor—Intent to prefer—Rebuttable presumption—R. S. O. ch. 124, 54 Vic. ch. 20 (O.).

A chattel mortgage given in pursuance of a previous agreement therefor to cover an antecedent debt and advance made at the time of the agreement, both the mortgagor and mortgagee believing the former to be solvent when the mortgage was actually made, was impeached within the sixty days provided for by sec. 2, sub-sec. (*a*) of 54 Vic. ch. 20 (O.), amending the R. S. O. ch. 124:—

Held, that the mortgage was valid.

The presumption of an intent to prefer as to transactions coming within the 54 Vic. ch. 20 (O.), impeached within the sixty days, is not an irrebuttable one, but the onus of shewing that no such intent existed is cast on the person supporting the transaction.

Statement. THIS was an action brought by the plaintiff, who sued on behalf of himself and the other creditors of the defendant, McGeoch, to set aside a chattel mortgage made by the latter to his co-defendant, Clements.

The action was tried at Milton, at the Spring Assizes of 1892, without a jury, before FALCONBRIDGE, J., who found in favour of the plaintiff.

A motion was made by the defendants to set aside the judgment, and to have the judgment entered in their favour.

In Easter Sittings, May 31st, 1892, before a Divisional Court, composed of GALT, C. J., ROSE and MACMAHON, JJ., *Shilton* supported the motion. The case does not come within 54 Vic. ch. 20 (O.), amending sec. 2 of R. S. O. ch. 124. The learned Judge at the trial, thought he was bound by *Porteus* v. *Cole*, 19 A. R. 111. The case comes within section 3, sub-section 4 of ch. 124. The chattel mortgage was given by the debtor under the *bonâ fide* belief that the advance would pay his debts in full. Moreover, the mortgage relates back to the time the agreement for the advance was made, and it is the same in effect as if the mortgage was made on that day: *Allan* v. *Clarkson*, 17

Gr. 570. The presumption raised by the statute is a rebuttable one. Argument.

Kappelle, contra. There is no question but that the plaintiff was a creditor, and that the defendant McGeoch was insolvent, and the learned Judge found that there was no present *bonâ fide* advance, or any agreement as alleged proved. The alleged agreement, even if proved, would not be sufficient to sustain the mortgage. Where insolvency is proved, the presumption raised by the statute is an irrebuttable one: *Brayley* v. *Ellis*, 1 O. R. 119; 9 A. R. 565; *River Stave Co.* v. *Sill*, 12 O. R. 557.

June 25, 1892. GALT, C. J.:—

This is a motion by Mr. Shilton on behalf of the defendants to set aside a judgment of Falconbridge, J., in favour of the plaintiff, who sues on behalf of himself and the other creditors of McGeoch, setting aside a chattel mortgage given by him to his co-defendant.

The facts in this case are undisputed. There was a law suit pending between Lawson and McGeoch respecting specific performance of an agreement to purchase a lot of land; which suit was coming on for trial at Milton on 25th September, 1891.

[The learned Judge here set out the evidence of the defendant McGeoch, which was to the effect that about one-half of the money secured by the mortgage had been advanced before 21st September, 1891; that on that day the balance was paid to him on the express understanding that a chattel mortgage would be given. At that time he was engaged at the Assizes about his law suit, and was unable to carry out his promise. The execution of the mortgage was delayed from one cause and another until 6th January, 1892, although more than once urged by the mortgagee to give it. The money advanced was used in paying the costs of the law suit and some small debts. He alleged that at that time he did not know he was insolvent, and the mortgagee denied that he was aware of it. The learned Judge then continued:]

Judgment.

Galt, C.J.

I have set forth this evidence (of which there is no contradiction) so as to ascertain whether this case should be decided in accordance with the judgment of Osler, J., in *Cole* v. *Porteous*, 19 A. R. 111, or of this Division in *McRoberts* v. *Steinhoff*, 11 O. R. 369.

The learned Judge based his judgment on the former. In *Cole* v. *Porteous* the facts, as stated in the judgment, are: "The claimant's title is a chattel mortgage made to her by her husband on the 4th May, 1891, on the morning of the day on which the creditor recovered judgment against him. The *bona fides* of the debt, to secure which it was given, is not disputed, but it is contended that the mortgage is void against the execution creditor under the Assignment and Preferences' Act R. S. O. 124, sec. 2, and the amending Act 54 Vic. ch. 20."

By the express provisions of 54 Vic. ch. 20, sec. 2, under which *Cole* v. *Porteous* was decided, such amendments as were thereby made, are subject to the third section of R. S. O. ch. 124.

The question for our decision is, does this case come within that section. The case of *McRoberts* v. *Steinhoff* was decided in 1886, at which time ch. 26 of 48 Vic. (O.) was in force; the third section of which is, so far as this case is concerned, the same as section 3 of R. S. O. ch. 124, and it was held that a mortgage given in accordance with a former provision was valid; the present is a very much stronger case in favour of the mortgagee; the mortgagor, at the time when he gave the mortgage, did not know he was insolvent; whereas, in the other, he gave the mortgage because he knew he was insolvent; and as to the knowledge of the mortgagee, at the time the mortgage was actually given, of the solvency of the mortgagor he said, in answer to the question: "Had you any knowledge at all when the chattel mortgage was given, that any report or judgment had been made adverse to McGeoch? I had not—not the slightest."

This evidence was uncontradicted. In the present case we find the mortgagor, at the time when he undertook to

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Galt, C.J.

give the mortgage in consideration of a present advance of $395, believed himself to be solvent; and the mortgagee, at the time he accepted it, believed him to be in that state.

In my opinion this motion should be granted, and the action dismissed with costs.

Rose, J.:—

I agree that there is no evidence of an intent on the part of the mortgagor to give the mortgagee an unjust preference, nor any evidence of an intent on the part of the mortgagee to obtain one—unless the presumption under 54 Vic. ch. 20 is *presumptio juris et de jure*, and irrebuttable; and so, apart from that statute, the transaction is valid under *Robins* v. *Clark*, 45 U. C. R. 362; *McRoberts* v. *Steinhoff*, 11 O. R. 369. See also *Cole* v. *Porteous*, 19 A. R. 111-112.

This brings us face to face with the decision in *Cole* v. *Porteous*. It is clear upon the authorities.—See *Campbell* v. *Barrie*, 31 U. C. R. 279, and *Davidson* v. *Ross*, 24 Gr. 22—that all presumptions declared by statute are not irrebuttable or incontrovertible. Whether such a presumption can be rebutted or not, must be determined, having regard to the subject dealt with, and the fair and proper intendment of the language used with reference to the context.

It is further stated that the tendency of modern decisions has not been to consider presumptions as irrebuttable, but to restrict rather than to extend their number: Best on Presumptions, sec. 18, cited in *Campbell* v. *Barrie*, 31 U. C. R. 279 at p. 292.

I am unable to read this statute as apparently did Osler, J. A., in *Cole* v. *Porteous*.

It is manifest that under R. S. O. ch. 124, as amended by the 54 Vic. ch. 20 (O.), an intent to give a creditor an unjust preference is a necessary ingredient to render an impeached transaction void. Certain transactions are excepted from the operation of the section to which I will again refer, but as to all embraced they are valid unless

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ose, J.

and until it is made to appear that the intent existed. Then came decisions which said that such intent was rebutted if it was shewn that the act done was under pressure, and not voluntary. Thereupon the 54 Vic. ch. 20 was passed, which declared that when certain facts were shewn to exist, the intent must be presumed whether the Act was done "voluntarily or under pressure."

In other words, as to all transactions embraced within the amending Act, if any one of them has the effect of giving a creditor a preference (I do not stop to consider the meaning of "preference"), and it shall be attacked within sixty days, then it shall be presumed to have been with the intent to give an unjust preference, and to be an unjust preference whether voluntary or under pressure.

It is not said that it shall be void, nor that the preference shall be an unjust preference, but simply that the intent necessary to avoid the transaction shall be presumed; that is, the onus of establishing that no such preference existed shall be on the defendant.

The benefit or effect of such an enactment appears in *Delion* v. *Zuber*,* in which we have this day given judgment.

If the other construction be correct, and this transaction cannot stand, then equally invalid would be a mortgage given, say six months, after the money was advanced, when it was the intention of the parties to have the mortgage executed on the occasion of the handing over of the money, but the execution of which was delayed by the sudden and continued illness of the mortgagor.

Take the case in question. The mortgagor required the money; obtained it on a promise to secure both it and a prior indebtedness; believed that he was solvent—the mortgagee also believed him to be solvent; and without any *mala fides* the execution of the mortgage is delayed until within sixty days of the beginning of these proceedings, when it is given without any intent to give an unjust preference, or indeed any preference, but simply to implement an agreement made in good faith.

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* Not reported.

Judgment.

Rose, J.

I should require the plainest and most unequivocal language requiring me to declare such a transaction to be void, before I could assent to the plaintiff's claim herein.

River Stave Co. v. *Sill*, 12 O. R. 557, at p. 569, was cited to shew that no mortgage could be supported by reason of an antecedent contract. Of course, if the transaction came within the exceptions contained in the third section of ch. 124, it would not be void; but because it is not within such an exception does not make it void unless it is tainted by the forbidden intent; and so, if I am correct in what I have before said, a mortgage may be supported by an antecedent contract, if not affected by any of the prohibited acts or intention.

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

Since writing the above, I have conferred with my brother Osler, who points out that in *Cole* v. *Porteous*, he was dealing expressly with a case where there was no antecedent agreement (see pp. 112-113), and that he did not intend to say, and in his opinion did not say, that the statute applied to a transaction founded upon an antecedent agreement, which must be governed by such cases as *Clarkson* v. *Sterling*, 15 A. R. 234, and the other cases to which I have referred.

MacMahon, J. :—

I agree in the result reached by the other members of the Court.

[COMMON PLEAS DIVISION.]

REGINA V. RHODES.

Criminal law—Forgery—Interest of witness—R. S. C. ch. 174, sec. 218—Construction of.

On the trial of an indictment for uttering a forged note evidence was given by a person who had no interest therein of the note being forged. The wife of the person on whose behalf the note was received, and who, when receiving it, was in attendance in her husband's shop as his agent, proved the uttering.

Per MACMAHON, J.—The note having been proved to be forged by a person having no interest, the question as to corroboration of the wife's evidence, on the ground of interest, did not arise under sec. 218 of the Criminal Procedure Act, R. S. C., ch. 174.

Per ROSE, J.—The wife had no interest in the forged document; her interest, if any, was to prove its genuineness; but in any event there was abundant evidence of corroboration.

Statement. THIS was a case stated for the opinion of the Justices of this Division by Mr. Justice FALCONBRIDGE.

The prisoner was tried on an indictment charging her in one count with having forged, and in another count with having uttered a one-dollar note of the Dominion of Canada. The prisoner was acquitted on the count of forgery, but convicted on the count for uttering.

The questions reserved were:

"1st. Is it necessary that the evidence of Julia Hulse, a witness called by the Crown, should be corroborated by other evidence to support the conviction? And, if so, was there sufficient evidence to support a conviction for uttering?

"2nd. The note alleged to be forged and uttered was a one-dollar note of the Dominion of Canada. * * Her Majesty's Receiver-General was not called as a witness. One Granville Elliott, employed in the Receiver-General's office in Toronto, was called as a witness on the part of the Crown. Can the conviction be sustained without calling the Receiver-General as a witness? And does the evidence of Granville Elliott require corroboration to support the said conviction?"

The evidence of Granville Elliott shewed that the note was a forgery. Statement.

In Easter Sittings, June 3, 1892, the case was argued before ROSE and MACMAHON, JJ.

Murdoch, for the prisoner. There are two questions raised by the case. 1. Whether it was necessary to call evidence to corroborate the evidence of Julia Hulse; and 2. Whether the evidence called in corroboration was sufficient. The evidence of Julia Hulse should have been corroborated as she was interested, and there was no evidence of corroboration. The evidence of Granville Elliott, also, should have been corroborated, as he also was interested, as the Receiver-General's Department had to redeem the note; and, further, the Receiver-General should himself have been called as a witness. He referred to *Regina* v. *Hagerman*, 15 O. R. 598; *Regina* v. *Bannerman*, 43 U. C. R. 547; *Regina* v. *Giles*, 6 C. P. 84; *Regina* v. *Selby*, 16 O. R. 255.

J. R. Cartwright, Q. C., contra. The Receiver-General had no interest whatever in the note. He is merely the agent of the Government to pay out or redeem such notes when required. Neither had Julia Hulse any interest. Her interest, if any, was to make the note good, not bad; and further, to constitute interest it must be something arising on the face of the instrument: *Regina* v. *Hagerman*, 15 O. R. 598: *Rex* v. *Newlands*, 1 Leach 311. The evidence, however, of Granville Elliott, is conclusive on the fact of the note being forged.

June 25th, 1892. MACMAHON, J.:—

Counsel for the prisoner abandoned the questions of law contained in the reservation in the second paragraph.

The only question, therefore, left for our consideration was that formulated in the first paragraph of the reserved case.

Judgment.

MacMahon, J.

Sec. 218 of the Criminal Procedure Act (R. S. C., ch. 174), provides: "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."

The jury have found on the evidence of Granville Elliott that the note was forged.

What was given in evidence against the prisoner was the Dominion note in question. It was necessary to the conviction of the prisoner that there should be proof that the note was forged. The forgery of the note was proved by the evidence of Granville Elliott, a person having no interest therein. And once when the "deed, writing, instrument or other matter given in evidence," is proved to be a forgery by a person having no interest therein, the question as to corroboration under section 218 cannot arise. The forgery having thus been established to the satisfaction of the jury, the only other questions for their consideration were the identity of the accused with the person said to have uttered the note so forged, and her guilty knowledge.

We were referred to the case of *Regina* v. *Giles*, 6 C. P. 84, as shewing that corroboration was required of the evidence of the person to whom the forged instrument was uttered. But that case affords no ground for counsel's contention. In that case there was a count for forging an order for the delivery of goods, and a count for uttering such order.

Draper, C. J., said, at p. 88: "The question in this respect" (as to corroboration) "is the same in both counts; for there is the same, and no other proof, to go to the jury on either count to shew the order forged."

The evidence to establish the forgery in that case was by the person whose name was alleged to have been forged

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MacMahon, J.

whose denial was complete; adding, as a circumstance, that he could not write. The only other witness was that of the person who advanced the goods on the faith of the order being genuine. He did not know that Akenhead (the person whose name was alleged to be forged) could not write, or he would not have accepted the order. He believed it genuine until some months after, when Akenhead denied it. There was not by that witness any corroboration of Akenhead, the person interested in the instrument given in evidence at the trial. And, for want of such corroborative evidence required by the statute in proof of the order being forged, the prisoner could not be convicted.

Richard Hulse was the owner of the grocery, and Julia Hulse, his wife, was, while in attendance in the shop, acting only as her husband's agent—a fact which was overlooked during the argument.

As to the "interest of a witness" in cases of forgery, see *Newland's Case*, 1 Leach (4th ed.), 311, at p. 314, and *Regina* v. *Hagerman*, 15 O. R. 598.

There must be judgment for the Crown on the case reserved.

Rose, J.:—

I am of opinion that the evidence of Mrs. Julia Hulse did not require corroboration:

1st. For the reason pointed out by my learned brother that in fact she was not at all interested in the document forged, and

2nd. Because, as urged by Mr. Cartwright, her interest, if any, was to prove that the document was genuine, and not a forgery. No advantage could possibly accrue to her or her husband by proof of the invalidity of the note.

But even if corroboration had been necessary, it seems to me there was abundant corroborative testimony.

[COMMON PLEAS DIVISION.]

KENNIN ET AL. V. MACDONALD ET AL.

Solicitor and client—Lien for costs—Taking note and leaving country—Waiver of lien—Replevin—Damages—Form of replevin bond.

The plaintiff, a solicitor, claiming on defendant's papers a lien for costs, settled with him, taking a note therefor payable on demand. He then went to the United States, leaving the note and papers with another solicitor as his agent. The defendant, stating that he required the papers, or some of them, for use in his business, brought replevin proceedings in the Division Court, giving a bond to prosecute the suit with effect and without delay, or to return the property replevied and to pay the damages sustained by the issuing of the writ, and there was a breach of the bond in not prosecuting the suit with effect. Under the replevin the defendant only procured some of the papers and which were tendered back to the plaintiff and refused, the defendant stating that they were of no value, the agent having retained the valuable ones. In an action on the bond by plaintiff to recover the amount of the note as damages he had sustained by the replevin:—

Held, per BOYD, C., that even if any lien existed, which was questionable, by reason of the taking of the note and departure from the country, it was not displaced by the replevin suit; but, in any event, the plaintiff had failed to prove any actual damage; and though there might be judgment for nominal damages and costs, there would be a set-off of the defendant's costs of trial; and the action was dismissed without costs.

Under the Division Court Act, R. S. O. ch. 51, sec. 266, the whole matter could have been litigated in the Division Court.

Quære as to the amount of damages recoverable.

The fact of the conditions of the bond being in the alternative instead of the conjunctive remarked on.

On appeal to the Divisional Court the judgment was affirmed.

Statement. THIS action was tried at Toronto, on 28th January, 1892, before BOYD, C.

The action was brought on a replevin bond for damages sustained by the plaintiffs for breach of the condition of the bond, in not prosecuting the replevin action with effect, and not paying the damage sustained by the plaintiffs, etc.

In January, 1891, the defendant Macdonald instituted a replevin action in the Division Court against the plaintiff Millar, in which he sought to replevy certain legal documents on which the plaintiff Millar claimed a lien, as and of the plaintiff Kennin, for certain costs alleged to be due to the latter.

Statement.

A bond was given, dated 23rd of January, 1891, executed by the defendant Macdonald, and the defendants I. B. Johnston and W. B. Johnston, to the bailiff of the Court, conditioned that if the defendant Macdonald should prosecute his suit "with effect and without delay," or "if he should return the said property" replevied, and "pay such damages as should be sustained by the issuing of the writ of replevin," etc., the said bond should be null and void, otherwise to remain in full force and effect.

The replevin suit was not proceeded with, and judgment by default was pronounced against the defendant Macdonald.

The plaintiffs claimed that the damages sustained were $225, the amount of the note.

The following is the judgment delivered by the learned Chancellor, in which the other material facts appear:

BOYD, C.:—

Assuming the relation of solicitor and client between the plaintiff Kennin and defendant Macdonald, the former having departed from the city in December, 1890, for Chicago, left a mass of papers in the possession of Mr. Millar, upon which a lien is claimed by the solicitor for the amount of the promissory note for $225, this being the amount settled upon for his costs upon general solicitor's work performed for the defendant. The defendant Macdonald thereupon applied for a writ of replevin in the Division Court, based on an affidavit in which he stated that he required to use the said papers, or some of them, in his business and transactions, and might suffer great loss unless he got immediate possession of them. The papers, he stated further, consisted of suit papers and legal documents, letters, and a letter-book containing copies of letters in reference to his business, which he required to see and use in his business. He estimates the value of the papers at $5.00 in that affidavit.

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Boyd, C.

The writ issued, and directed to be replevied the property described in the claim annexed thereto.

The claim annexed thus describes what is sought: "Papers in a certain suit of Johnston and others against John Fisken and Company; papers in other suits and actions at law; certain deeds and mortgages; certain letter-books, and legal papers and documents."

The bailiff, upon execution of this writ, proceeded to the office of Millar, when there was a sifting of papers once or twice by Millar, who withheld what Macdonald now alleges in his evidence to be those which were alone of any value to him; but Millar is unable to state specifically what was withheld by him.

The bailiff's return to the writ states that he replevied and delivered to the defendant Macdonald the goods mentioned in the writ, that is to say, "The papers consisting of suit papers and legal documents and letters, as by said writ commanded." Whatever papers the bailiff did get were put in a bundle and examined in the office of Mr. Wallbridge; and, as Macdonald swears, those he wanted, not being there, the whole was tied up again deposited in a vault, and afterwards produced in a bag, and tendered before action to the solicitor. Macdonald swears that no use was made of these papers, and that they were practically waste paper. He is corroborated as to the handling and tender of the bundle by Mr. Wallbridge.

There is no evidence against this view of the transaction. To me it is evident that there was no proper identification of what papers were delivered on the replevin; and there is now nothing to shew that they were of the value of five dollars. Probably Macdonald expected to get important papers, and to minimize the real value of what he expected to secure; but I have no evidence that what he did get by the writ was of any value to him or the solicitor Kennin.

But it is argued that I should assume that the damages are the amount of the note, $225, because the client would have been compelled to pay that before his solicitor could

Judgment

Boyd, C.

be required to give up any of the papers, though it might turn out that the papers were worthless; still the client thought they were of value, and to secure them would have paid the note. This is a mere speculative inference, one which is not a basis for giving substantial damages upon.

According to evidence, which seems to preponderate, the papers of value are still in the hands of the plaintiff or Mr. Millar, on which the right of lien would remain, and upon the tender of the bag full the lien might have been restored to them, if it was worth while. That offer of the bag full is still open; but probably they are not worth store room. The replevin suit not having been prosecuted, and judgment by default having been pronounced, the effect was to entitle the solicitor to a return of the papers or their value.

This tender was made, as I have said, before action and refused. Now the lien, if it existed, was not displaced by the delivery in the replevin.

As said by Ellenborough, C. J., in *Wilson* v. *Kymer*, 1 M. & S. 157: "I should hold that if goods are taken out of the hands of the party by operation of law, he shall not be prejudiced by it, but the law will retain his lien for him," p. 163.

The restoration of the papers to the solicitor, would have revived his retaining lien, and he would be as before in that respect. These papers should now be handed over to him if he so desires. So, in another point of view, if the replevin was a manœuvre to get the papers, the failure to prosecute it in effect restored the papers to the rightful custody of the solicitor, and the temporary deprivation by a subterfuge would work no harm to the lien; *Dicas* v. *Stockley*, 7 C.& P. 587; *Wallace* v. *Woodgate*, R. & M. 193; 1 C. & P. 575.

Again, the law is not at all clear in the plaintiff's favour that there was the right to retain till the note was paid. First of all, he removed from the country to Chicago, and during his absence the papers were needed, but his ser-

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Boyd, C.

vices could not be had; he had virtually discharged himself; and in these circumstances the Court would not allow the client to be embarrassed further than the necessity required. When he would be ordered to produce the papers, or allow copies to be made, it would be without prejudice to his lien; *Rutledge* v. *Rutledge*, 2 Ir. Eq. R. 290 (1840); *Re Boughton*, 23 Ch. D. 169; *Re Galland*, 31 Ch. D. 296; and *Fowler* v. *Fowler*, 50 L. J. N. S. Ch. 686.

And again, I am by no means satisfied that a valid lien did exist, having regard to a late decision in England by the Court of Appeal, in which the Court approved of the principle laid down by Leach, V. C., in *Robarts* v. *Jeffreys*, 8 L. J. O. S. Ch. 140. Leach, V. C., held that the taking of a promissory note by a solicitor from a client, payable on demand, for the amount of costs claimed for professional services, caused a waiver of his lien on the ground that such a note bears interest from the time of the demand, and the demand might have been made forthwith, so that he takes a security for his bill of costs, which in fact gives him interest thereon, to which he is not otherwise entitled.

This case was acted on as valid law by the Court of Appeal, for in *Re Taylor* [1891], 1 Ch. 590, that Court lays stress on the fact that it is the case of a solicitor dealing with his client, wherein the latter should be informed in an intelligible manner of his rights and liabilities, and if the right of lien is not expressly reserved upon the taking of a security, the inference ought to be against its continuance. It is also cited for the same result on the ground that the solicitor has a new demand against his client, in Stokes on Liens, p. 79.

This much upon the evidence and merits of the transaction. But there are many other things which call for observation. The writ of replevin should not have been ordered or executed, owing to the vague, indefinite claim for papers made by the applicant: *Jones* v. *Cook*, 2 P. R. 396.

The condition of the bond taken was not in accordance with the statute. It should be in the conjunctive to prose-

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Boyd, C.

cute with effect and to return the property and pay damages sustained by the issuing of the writ, but it is in the alternative (to prosecute or to return). There being a breach of the condition to prosecute with effect, and this bond being subject to the provisions of 8 & 9 Wm. III. ch. 11, sec. 8 (by virtue of the Provincial Act of 1876, 32 Vic. ch. 7, sec. 8), judgment for the plaintiff might be entered for the penalty and costs, with one shilling nominal damages; and judgment for defendants for the costs occasioned by this trial to be set off; but the better course will be to give no costs.

Again, it was competent to have litigated this whole matter in the Division Court, under section 266 of the Division Court Act (R. S. O. ch. 51), though the penalty was $250, but no one took the objection by pleading or otherwise. Had a valid lien been proved, I would have been unwilling to reach the result that the proper measure of damages was the amount of that lien, having regard to the form of the replevin and present state of the decisions on the scope and meaning of the words therein used as to the "damages resulting from the issuing of the writ."

There is a notable divergence of opinion among the Judges and Courts as to what extent and character of compensation may be recovered under the special damage clause in replevin bonds which was first authorized by statute 23 Vic. ch. 45, sec. 5, (1860). The form of bond, there appended is given in R. S. O. (1877), ch. 53, sec. 11, namely, Form 2, at p. 739; so that the condition is for the plaintiff to prosecute his suit with effect and without delay, and to make return of the property, if a return be adjudged; and also to pay such damages as the defendant shall sustain by the issuing of the writ of replevin, if the plaintiff fails to recover judgment. These provisions now stand as Con. Rule 1103, and Form 208.

In 1863 the Courts of Law first adverted to the effect of the Act in *Thompson* v. *Kaye*, 13 C. P. 251, where it was intimated that the jury was to pass upon the damages, though merely to answer the value of the property as paid into Court.

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Boyd, C.

The next year (1864) the Court of Common Pleas following the same rule in *Burn* v. *Bletcher*, 14 C. P. 415, attached importance to the new clause as extending the right of recovery. But, in 1865, the Queen's Bench in *Bletcher* v. *Burn*, 24 U. C. R. 259, first actually decided that the statute was not intended to give a new right to damages.

Draper, C. J., speaking for the Court, appears to have receded from the position that was taken by him in *Thompson* v. *Kaye*, and said, at p. 265: "So important a change as giving to the obligee a right to recover damages for the use of or depreciation of the value in the thing replevied and afterwards adjudged to be but not restored to him, in addition to the value of the thing itself at the time of the replevy, would surely be more distinctly expressed than by the words, 'such damages as the defendant shall sustain by the *issuing* of the writ.'"

It is remarkable that in *Bletcher* v. *Burn*, 9 Gr. 425, Vankoughnet, C., in 1862, took a diametrically opposite view of this decision of the Queen's Bench, saying, that the damages given by the statute "will include the earnings * * made by the use of the vessel."

These words cannot mean the mere formal damages and costs awarded for defendant at law with a return of the property. But this case appears not to have been brought before the Common Law Judges, so a difference of judicial view arises as to the scope of this provision in *Williams* v. *Crow*, 10 A. R. 301, where the most liberal interpretation is advocated by Burton, J. A., (p. 311), and the more restricted meaning by Osler, J. A., at p. 324.

The legislature next interfered for the protection of persons in peaceable possession of property, which is taken from them by replevin (in cases other than distress and damage feasant), by passing the enactment to be found in 48 Vic. ch. 13, sec. 8 (now Con. Rule 1104), by which the bond taken is to provide for the full indemnification of the defendant as to loss, deterioration, extra costs and like.

But the more extensive words are not used in the pres-

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Boyd, C.

ent case, even if they would have reached the difficulty. That is, was not the real question in the replevin "lien or no lien"? If no lien, detention of possession by the replevisor; if a lien, restoration of the papers to the solicitor—value of the lien not being reached at all. However, all these roads lead to the main result: and for the reasons given the action is dismissed without costs.

The plaintiffs moved, on notice, to set aside the judgment entered for the defendants, and to have the judgment entered in his favour for the $225, the amount of his claim. The defendants also moved to vary the judgment by allowing them the costs of the action.

In Easter sittings, May 17th, 1892, before a Divisional Court composed of ROSE and MACMAHON, J.J., *H. J. Scott*, Q. C., supported the plaintiffs' motion, and shewed cause to the defendants'. He referred to *Re Taylor, Stileman & Underwood* (1891), 1 Ch. D. 590; Cobbey on Replevin, sec. 1338, *et seq.*; Con. Rule 1104.

E. A. Macdonald, in person, contra.

Wallbridge for the defendants, the Johnstons, contra, referred to Stokes on Liens, p. 74; Holmsted and Langton's Jud. Acts, 470.

June 25th, 1892. ROSE, J.:—

When the plaintiff Kennin went to Chicago, thus discharging himself from the office of solicitor for the defendant Macdonald—if he ever was in very truth his solicitor—and placed the papers in the hands of Millar, he must be held bound by Millar's acts. When, therefore, Millar sifted the papers, retaining certain of them, and was unable to shew to the learned trial Judge's satisfaction what papers in fact had been withheld, and consequently was unable to prove their value, it follows that there was no evidence of the real value to the defendant Macdonald of the papers delivered, nor any evidence that the papers retained were not, as

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Rose, J.

deposed to by that defendant, those which he desired to inspect.

That being so, it seems to me that Mr. Scott's argument that the value of the papers delivered must be assumed to be substantial fails, for it is not made to appear that the defendant Macdonald would have paid anything for a partial inspection.

By the act of the agent of the plaintiff Kennin, the proof of the value of the papers delivered has been rendered impracticable, if not impossible, and therefore, at the most, assuming the plaintiff Kennin's right to recover, the damages could not be assessed at more than a nominal sum.

This in conjunction with the fact of the plaintiff Kennin having left the country, and thus by his own act having deprived the defendant Macdonald of his assistance, establishes the equity of the conclusion arrived at by the learned Chancellor, and saves me from the necessity of considering the other questions raised; for whatever conclusion I might come to with respect to them, in no case should I think it necessary to vary substantially the result arrived at by the learned Chancellor.

I agree, therefore, that the motion should be dismissed on the terms stated by my learned brother.

MacMahon, J.:—

I have only a word to add to the judgment of the learned Chancellor, and that is, that the plaintiff Kennin suffered no damage whatever; as the plaintiff Millar, by sifting out the papers, took care that none of the documents which might prove of any benefit to the defendant Macdonald, should answer to the replevin. The papers which reached the replevisor through the writ were wholly valueless to him.

I think both motions should be dismissed; the plaintiff's with costs of the motion, the defendants' without costs.

[COMMON PLEAS DIVISION.]

McLaughlin v. Hammill.

Interpleader—Claim for rent—Right of sheriff to interplead—Con. Rule 1141.

The express statutory provision giving sheriffs the right to interplead where a claim against the goods seized is made by a landlord for rent, was omitted in the Revised Statutes of 1887, it being stated in the appendix thereto that it was *superseded* by Con. Rule 1141, which provides that the sheriff, etc., may interplead where a claim is made, etc., to any money, goods, or chattels, etc., taken in execution, etc., by any person other than the person against whom the process issued:—

Held, that the right to interplead, where a claim for rent is made, still exists.

Statement.

This was an appeal from the judgment of MacMahon, J., refusing to set aside an order made by the learned Judge of the County Court of the county of Simcoe, refusing an interpleader order at the instance of the sheriff of that county to test the claim of a landlord, to certain goods and chattels, or to the rent for which such goods and chattels might answer as a distress.

In Easter Sittings, June 1st, 1892, *Aylesworth*, Q. C., for the sheriff, supported the motion before a Divisional Court composed of Galt, C. J., and Rose, J., and referred to *Bateman* v. *Farnsworth*, 29 L. J. N. S. Ex. 365; *Locke* v. *McConkey*, 26 C. P. 475; *Thomas* v. *Patent Lionite Co.*, 17 Ch. D. 250; *Ford* v. *Baynton*, 1 Dowl. P. C. 357.

Strathy, Q. C., for the execution creditor, referred to *Hobbs* v. *Ontario Loan and Investment Co.*, 18 S. C. R. 483.

H. S. Osler, for the landlord, referred to Story's Eq. Jur. 2nd Eng. ed., sec. 800, *et seq.*; Wilson's Jud. Acts, 7th ed., p. 429; Ward on Interpleader, 6; Cababè on Interpleader, 2nd ed., p. 34.

June 21, 1892. Rose, J.:—

There was a point taken before us which apparently was not taken before our learned brother, and therefore has not

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Rose, J.

been dealt with by him, upon which I think our judgment must turn.

By 28 Vic. ch. 19, sec. 2, as found in Revised Statutes of Ontario of 1877, ch. 54, sec. 10, there was given to sheriffs the right of interpleader in goods claimed by any landlord for rent. When the statutes were revised in 1887, this clause, with others, disappeared from the statutes, and as we find by appendix p. 2698 R. S. O. 1887, was *superseded* by Con. Rule 1141 (*a*).

In Rule 1141, the words "or by any landlord for rent," do not appear.

From the time therefore of the passing of 28 Vic. until the consolidation in 1887, it was the law of this province that a sheriff might interplead upon a claim made by a landlord for rent. Unless the law has been varied by the revision of the statutes and the consolidation of the Rules, the right to interplead still exists.

It is clear, I think, that it was not intended to repeal section 10, or do away with the claim of the landlord, and, if it has been done away with, it was by inadvertence.

One should therefore strive to place such construction upon the Rule as will continue the old law in force; for we find by sec. 9 of 50 Vic. ch. 2, printed with R. S. O. 1887, that the Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation of the law, as shewn in the said Acts, and part of Acts so repealed, and for which the Revised Statutes are substituted. See also 51 Vic. ch. 2, as to the effect of the Rules.

I think that it is not a strained construction to place upon the Rule to hold that when a landlord makes a claim for

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(*a*) Rule 1141 provides that "relief by way of interpleader may be granted * * (*b*) where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels, lands or tenements, taken or intended to be taken in execution under any process or under an attachment against an absconding debtor, or to the proceeds or value of any such goods or chattels, by any person other than the person against whom the process issued."

Judgment

Rose, J.

rent, and forbids a sheriff to remove the goods upon which distress might be made for such rent, he is making a claim to the goods or chattels taken, or intended to be taken in execution within the words of sub-sec. *b* of Rule 1141, when by the legislation this Rule is declared to supersede the statute, that is the Rule "comes or is placed in the room of" the statute and thus displaces it, rendering it unnecessary, to adopt the definition of "supersede" found in the Imperial Dictionary.

I have not lost sight of the cases referred to upon the statute as it was prior to the introduction of the words giving the right to interplead upon a landlord's claim; but I do not think they apply to the legislation above set out.

I think a proper construction to place upon the Rule is that in the view of the legislating body the Rule stood in the place of the section of the Act, and covered the grounds which that section was intended to cover. I think it would be narrowing the effect of the legislation to hold that this was a repeal of the previous section and the doing away with the right which had been given so many years before, and which continued to exist down to the time of the consolidation. It seems to me that it would require express words of repealing and express language declaring such an intention to justify our holding that such right was taken away. There is no reason in justice or in the nature of the thing why a sheriff should not have the right to interplead.

I think, for the reasons I have given, we must hold that the right has not been taken away, and that the language of Rule 1141 is to be construed as having the same effect as the language of section 10, and that the sheriff is in the case in question entitled to an interpleader order.

My learned brother dealt with the claim recognizing that there had been a misunderstanding between the solicitors as to the effect of prior proceedings. I quite agree that in view of that misunderstanding it is a case in which neither party ought to be bound by what might techni-

Judgment.

Rose, J.

cally be the effect of their conduct, and that the matter ought to be considered open for adjudication.

On the argument the objection was taken as to the time within which this application was made, but was abandoned when we declared our determination to enlarge the time if necessary.

Mr. Strathy asked us to determine the issue as it was a mere question of law, but as the facts were not brought before us on the motion we were not in a position to consider such question. There was no material before us on which we could decide the issue. The chattel mortgage, although produced before us on the argument, was not an exhibit and was not properly before us as far as the material shews.

I think, therefore, that the appeal must be allowed with costs in the cause to be paid by the landlord to the sheriff, and with costs to the execution creditor in the cause in any event.

I may refer to *Spahr* v. *Bean*, 18 O. R. p. 70, upon the construction of the Married Woman's Act, where certain words were omitted in the revision.

GALT, C. J., concurred.

[COMMON PLEAS DIVISION.]

REGINA V. MCGOWAN.

Intoxicating liquors—"The Liquor License Act"—Reeves in unorganized districts—Ex officio justices of the peace—Jurisdiction.

The reeves of municipalities in unorganized districts are, under the legislation relating thereto, *ex officio* justices of the peace in their respective municipalities, with power to try alone, and convict, for offences under "The Liquor License Act," R. S. O. ch. 194.

Statement.

THIS was a motion to quash a conviction of the defendant for selling liquor on Sunday, in contravention of section 54 of "The Liquor License Act," R. S. O. ch. 194.

The conviction was made by James Troke, reeve of the village of Sudbridge, in the district of Parry Sound.

On May 19th, 1892, before GALT, C. J., and ROSE, J., *Hewson* supported the motion.

Langton, Q. C., contra.

June 25th, 1892. GALT, C. J.:—

There were several objections taken, but it is necessary to refer to one only, the second: "That the said conviction was not made by or before two justices of the peace in and for the said county or district, as required by the License Act."

The defendant is an hotel-keeper in the village of Sudbridge, consequently section 55 of "The Liquor License Act," does not apply to him, as that section has reference only to licensed taverns in a city or town. He was therefore convicted under section 54, as Sudbridge is not a city or town, but is an incorporated village under 52 Vic. ch. 72, (O.).

By sec. 96 of "The Liquor License Act," R. S. O., ch. 194, "All prosecutions for the punishment of any offence against any of the provisions of sections 49, 50, 54," or the others therein mentioned, "may take place before any two or more

Judgment.

Galt, C.J.

of Her Majesty's justices of the peace having jurisdiction in the county or district in which the offence is committed."

If this were the only provision, then, beyond question, the objection taken must prevail; but by section 99, "When by this Act it is provided that any prosecution may take place before two or more of Her Majesty's justices of the peace, having jurisdiction in the county or district in which the offence is charged to have been committed, then in case any offence is committed in a township, or in an incorporated or police village, or in an unorganized district, the prosecution may take place, and a conviction or order may be made by one or more of such justices of the peace, instead 'of two or more' of such justices, whenever an appeal lies against such conviction or order to the County Judge."

There was an objection taken when the case was before Mr. Troke as to his authority alone to hear the case; but as he considered he had authority he adjudicated upon it. If, as he believed, he was *ex officio* a justice of the peace, he was right in so doing, otherwise the express provision of the statute would be nugatory. All that it would be necessary for the defendant to do would be to object.

Then as to the contention of Mr. Hewson, that in this case there was no appeal, and therefore section 99 did not authorize the action of a single justice of the peace, I can see no ground whatever. It is true the time within which the appeal must be brought has expired, but that was the defendant's own fault. Delay of a defendant in giving notice of appeal cannot surely set aside a conviction made by a single justice of the peace.

In my opinion the objection fails.

It was moreover strongly urged that Mr. Troke was not a justice of the peace in and for the district of Parry Sound, within which the village of Sudbridge is situate. This is correct; but the offence charged was committed within the village of Sudbridge, of which Mr. Troke is reeve; and by sec. 4 of 52 Vic., ch. 37 (O.), entitled "An Act to amend the

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Acts respecting Municipal Institutions in the outlying Districts," of which Parry Sound is one, "The reeves of the various municipalities *shall* be, *ex officio*, justices of the peace of their respective municipalities, and shall have the like powers within their respective municipalities as are exercised by other justices of the peace in this province."

The conviction must be affirmed, with costs.

Rose, J.:—

This was a motion to quash a conviction under section 54 of "The Liquor License Act," R. S. O. ch. 194.

The question raised was as to the jurisdiction of the justice.

Section 94 provides for an information before any justice of the peace for the county or district.

The magistrate here was reeve of the village of Sudbridge, incorporated by 52 Vic. ch. 72 (O.), by which Act, section 7, the Municipal Acts were made to apply. By virtue of sec. 51 of R. S. O., ch. 185, and sec. 415 of R. S. O., ch. 184, I think the reeve had jurisdiction to take an information under section 94.

By virtue of secs. 96 and 99 of ch. 194, he also had jurisdiction to try the case if an appeal lay from the conviction to the County Judge.

Section 118, as amended by 53 Vic. ch. 56, sec. 14 (O.), gives an appeal in such cases to the Judge of the County Court of the county in which the conviction is made.

Section 99 refers to the organized districts; and looking at sections 39 and 52 of the Unorganized Territory Act, R. S. O., ch. 91, I am of the opinion that an appeal lay from the conviction to either the Judge of the County Court of Simcoe, or to the District Judge of Muskoka and Parry Sound appointed under the provisions of 51 Vic. ch. 13 (O.).

It is not necessary to say to which Judge the appeal lay; but my impression is that such an appeal lies to the District Judge. It is clear that it was intended to give an

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Rose, J.

appeal in certain cases in unorganized districts. See sec. 99 and having regard to the provisions of sec. 52 of R. S. O., ch. 91, it seems to me that it will not be an unduly large construction of the language to hold that "the Judge of the County Court" in such cases includes a district Judge who is declared to have the same powers and duties as a County Judge.

That the parties have not [illegible] the proper steps to appeal, so that no appeal now lies, can of course make no difference.

The motion must be dismissed, with costs.

[COMMON PLEAS DIVISION.]

TRIMBLE V. MILLER.

Division Courts—Amount beyond jurisdiction—Prohibition for excess—Promissory note—What constitutes.

Judgment was recovered in a Division Court for $108.63, being $100 balance due and $8.63 interest on a document signed by defendants, namely: "To G. T., we hereby undertake to pay the executors of the late J. D. K., the sum of $375 on a mortgage they hold against the Royal Hotel property, Streetsville, thereby reducing the amount to $2,000":—

Held, that the document, even if a note, under sec. 82 of the Bills of Exchange Act, 53 Vic. ch. 33 (D.), which was doubtful, only enured to the benefit of the executors and not to G. T.; and therefore the action being merely for breach of contract, the judgment was in excess of the jurisdiction which is limited to $100, but that prohibition would only go for the excess.

Statement.

THIS was a motion by way of appeal from the judgment of GALT, C. J., refusing an order for prohibition.

In Easter Sittings, May 19th, 1892, before a Divisional Court composed of ROSE and MACMAHON, JJ., *Justin* and *Blain* supported the appeal.

Aylesworth, Q. C., contra.

The arguments sufficiently appear from the judgment.

Argument.

The following cases were referred to: *Kinsey* v. *Roche*, 8 P. R. 515; *McCracken* v. *Creswick*, 8 P. R. 501; *Re Widmeyer* v. *McMahon*, 32 C. P. 187; *Re Graham* v. *Tomlinson*, 12 P. R. 367; *McDermid* v. *McDermid*, 15 A. R. 287; *Re Elliott* v. *Biette*, 12 C. L. T. 138, 21 O. R. 595.

June 25th, 1892. ROSE, J.:—

The action was brought against John H. Miller and Archibald Crozier to recover $100 and interest, on the 2nd October, 1890, under an agreement in the words and figures following:—

"STREETSVILLE, October 2nd, 1890.

"To GEORGE TRIMBLE, ESQ.:

"We hereby undertake to pay the executors of the late J. D. King, the sum of $375, on a mortgage they hold against Royal Hotel property, Streetsville, thereby reducing the said mortgage to $2,000.

(Signed) JOHN H. MILLER,
ARCHIBALD CROZIER."

"Witness: THOMAS GRAHAM."

The summons on the face of it claimed $100, "as shewn by the claim herewith;" and on the back was endorsed: "Claim of $100, together with interest thereon." Judgment was given for $108.63, the $8.63 being for interest, and the $100 being the balance of the $375.

Mr. Aylesworth contended that the document was a promissory note within sec. 82 of Bills of Exchange Act, 1890, 53 Vic. ch. 33 (D.), which is as follows: "A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer." Maclaren's Bills and Notes, p. 14.

This document does in terms comply with the definition, for it is a promise made by the defendants to Trimble to pay on demand a sum certain in money to specified persons.

This construction of the section is contrary to all our previous notions of what a promissory note is, and would

Judgment.

Rose, J.

give rise to many difficulties. If the promisee and payee may be different persons, with whom is the contract to pay? To whom is given the right to sue? Who is the holder? Who is the party to transfer by delivery or by endorsement? Would the maker be liable to action at the suit of both? Between what parties would be the consideration?

The next section of the Act provides: "A promissory note is inchoate and incomplete until the delivery thereof to the payee or bearer."

If a promise may be made by one person to another to pay a third, then, under section 83, the document would be incomplete until delivery be made to the payee or bearer, and the promisee could not bring an action upon the document until it reached the hands of the payee or bearer.

Reading the two sections together I have come to the conclusion that it was not intended to vary the law, but that the promise made by one person to another is a promise to pay to such person being specified, or to the order of such person so specified, or to bearer, who would be the person to whom the promise was made.

I admit that by such construction I am not giving effect to the language of section 82 in its fair and literal meaning; and, as it seems to me, I am in effect striking out the words "made by one person to another;" and I am also brought to face the fact that section 3 defining a bill of exchange uses language similar to section 82, as follows: "A bill of exchange is an unconditional order in writing addressed by one person to another * * requiring the person to whom it is addressed to pay * * to, or to the order of, a specified person, or to bearer." There the person to whom the order is addressed is not at all of necessity the person to whom the money is to be paid. I am also not losing sight of the rule of decision laid down by Lord Halsbury in the House of Lords, in *Bank of England* v. *Vagliano Bros.* (1891), A. C. 107, at p. 120, as to the necessity of giving a literal construction to the very words used in the Act; but, in view of the difficulties which have occurred

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Rose, J.

to me, I am unable to say that the document in question is a promissory note, or rather, which is all that is necessary for the purposes of this action, that the document on its face, even if it could be held to be a good promissory note in favour of the executors of the late J. D. King, contains any promise on the face of it to pay to George Trimble, whose executors are the plaintiffs in this action. The document, therefore, upon production does not, in my opinion, shew a cause of action in the plaintiffs without further evidence. It is, therefore, merely evidence of a contract to pay Trimble, or evidence of a contract with Trimble to pay a certain sum of money; and evidence was necessary to shew that there was a breach of that contract for which Trimble or his executors could maintain an action.

The document, on its face, does not provide for payment of interest; payment of interest, therefore, must be awarded as damages for the breach.

The question still remains whether judgment for a sum over $100, including the interest, is beyond the jurisdiction of the Division Court.

Mr. Aylesworth argued that it was not, and relied upon *McCracken* v. *Creswick*, 8 P.R. 501, and *Re Widmeyer* v. *McMahon*, 32 C.P. 187; and further argued that, if not within these cases, it was governed by *Re Graham* v. *Tomlinson*, 12 P. R. 367. I think, however, the case that governs is not either of these, but *McDermid* v. *McDermid*, 15 A. R. 287. I cannot distinguish in principle between that case and the one we are now considering.

The judgment, therefore, is in excess of the jurisdiction.

But Mr. Aylesworth further contended that, even if we come to that conclusion, prohibition should be confined to the excess, citing *Re Elliott* v. *Biette*, 21 O. R. 595. That case goes as far as is necessary to support this contention, for there the learned Chief Justice held that "The interest is clearly severable from the principal money, and the excess of interest in excess of the jurisdiction is clearly severable from that within the jurisdiction, and no practical difficulty

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Rose, J.

stands in the way of a partial prohibition; nor do we think any legal difficulty stands in the way of it," citing certain authorities therein referred to.

The following cases with reference to interest may also be referred to: *Ryley* v. *Master*, *Sheba Gold Mining Co.* v. *Trubshawe* (1892), 1 Q. B. 674; *Wilks* v. *Wood*, same vol., 684. See also *Fitzsimmons* v. *McIntyre*, 5 P. R. 119; *Meek* v. *Scobell*, 4 O. R. 553.

I think, therefore, that partial prohibition may go prohibiting the enforcing of the judgment so far as the excess of $8.37 is concerned.

As there has been a partial failure and partial success, it is not a case for costs; there will therefore be no costs to either party of the motion or appeal.

MACMAHON, J.:—

I have not had time to fully consider the effect of the words "by one person to another," introduced by the Bills of Exchange Act, as forming part of the definition of a promissory note. (*a.*)

I agree with my learned brother Rose that while the instrument sued upon affords evidence of a contract with the plaintiffs' testator to pay a certain sum of money to the executors of J. D. King's estate which, upon a breach, could be enforced by the plaintiffs, they could not sue upon it as a promissory note.

I agree in the result as stated in my learned brother's judgment.

(*a.*) **Mr. JUSTICE MACMAHON since the delivery of above has referred to *Regina* v. *Cormack*, 21 O.R. 213, in which the judgment of Chief Justice Willes in *Colehan* v. *Cooke*, Willes 393, at p. 397, is quoted, shewing that the statute has made no change in the definition of a promissory note.**

[COMMON PLEAS DIVISION.]

REGINA V. TOLAND.

Constitutional law—Procedure in criminal matters—B. N. A. Act, sec. 91, sub-sec. 27—Trial and conviction by police magistrate for forgery—53 Vic. ch. 18, sec. 2 (O.)—Ultra vires.

Procedure in criminal matters, which by the B.N.A. Act, sec. 91, sub-sec. 27, is assigned exclusively to the Parliament of Canada, includes the trial and punishment of the offender; and therefore sec. 2 of 53 Vic. ch. 18 (O.), which authorizes police magistrates to try and convict persons charged with forgery is *ultra vires* of the provincial legislature.

THE defendant was, on the 10th day of May, 1892, convicted by the police magistrate of Toronto of the forgery of a promissory note for $100, and was sentenced to twelve months' imprisonment in the Central Prison. Statement.

The trial of the prisoner took place before the police magistrate, under the authority assumed to have been conferred by 53 Vic. ch. 18, sec. 2 (O.), which provides that: "The Courts of General Sessions of the Peace, the county judges' criminal courts and police or stipendiary magistrates, shall have jurisdiction to try any person for any offence under any of the provisions of sections 28 to 31, both inclusive, of the Revised Statutes of Canada, chapter 165, An Act respecting Forgery."

A *habeas corpus* was issued to the warden of the Central Prison, and a *certiorari* in aid thereof issued to the police magistrate of Toronto, who returned the depositions, conviction and other proceedings.

Upon the return, the motion was directed to stand over until the Minister of Justice for the Dominion and the Attorney-General of the Province should be notified.

This direction having been complied with, *Tytler* moved, on the 28th of June, 1892, for an order discharging the defendant from custody.

Cartwright, Q. C., for the Attorney-General.

No one appeared for the Minister of Justice of the Dominion of Canada.

Judgment.

MacMahon, J.

July 28, 1892. MacMahon, J.:—

Sections from 28 to 31, of the R. S. C., ch. 165, deal with the forging and uttering of bills of exchange, promissory notes; and of receipts, warrants, etc., for the payment of money or for the delivery or transfer of any goods or chattels, etc.; and the making or accepting of a promissory note, bill of exchange, etc., by procuration, without lawful authority; and also obliterating the crossing of cheques, etc.

The foundation for the motion is that the enactment authorizing the police magistrate to try a person charged with forgery was *ultra vires* of the Provincial Legislature.

Since the argument, I procured the manuscript judgment of the late Mr. Justice Henry, delivered in October, 1879, in *Regina* v. *Boucher*, of which a synopsis is given in Cassels' Digest, p. 181.

The prisoner (Boucher) was brought up on a writ of *habeas corpus*, and the question raised there was as to the authority of the Dominion Parliament to pass the statute, 38 Vic. ch. 47, giving power to police and stipendiary magistrates to try in a summary manner—with the consent of the accused—persons charged with any offence which may be tried at any General Sessions of the Peace.

Boucher consented to be tried in a summary manner before the police magistrate of Ottawa, on a charge which might have been tried at the General Sessions.

The question raised in Boucher's case being as to the constitutionality of an Act of the Parliament of Canada in relation to a like subject matter as that I am now called upon to deal with; that case was, therefore, the converse of the case now in hand.

Mr. Justice Henry said, in Boucher's case: "It is under the Dominion Act only that the power in question is given to the police and stipendiary magistrates, and if the Act in question (38 Vic. ch. 47) is *ultra vires*, the convicting magistrate in this case had no power to try or convict the prisoner; but to decide that matter, refer-

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MacMahon, J.

ence to the B. N. A. Act is necessary, as from it alone the Dominion Parliament derived authority to legislate. In considering that Act, it must always be borne in mind that, from its nature and object, the intention was not to leave any subject or matter without the reach of the Parliament of Canada and the local legislatures; and in every subject not given to the local legislatures, it may be fairly and reasonably assumed it was intended it should be dealt with by the Parliament of Canada. The legislature of Ontario could not have conferred such a power on magistrates, touching, as it does, the criminal law and procedure, clearly excluded from its functions. * * To conclude that the Dominion Parliament had not the power in question must, to my mind, include the proposition that no such power exists in either the general or local legislatures. In the face of the opening clause of section 91 of the Imperial Act, I cannot but conclude that if the subject be beyond the reach of the local legislature, it must be enjoyed by the Dominion Parliament. 'It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.'

"Sub-section 27 of section 91 gives to the Parliament of Canada, 'The criminal law, except the constitution of the courts of criminal jurisdiction, but including procedure in criminal matters.' And the section ends thus: 'And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.'

"Sub-section 14 of section 92, as to the subjects given to the local legislatures, is as follows: 'The administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts.'

Judgment.

MacMahon, J.

"No question was or could be raised as to the appointment of the police magistrate who acted in this case. * * The Act now impugned added to his (the police magistrate's) powers by giving him the right, with the consent of the accused, to try certain offences, amongst others, the offence now in question. It is, however, contended the Act is *ultra vires*, and I am asked to consider its provisions as against the 14th sub-section, which gives 'the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction,' to the local legislature. I am at a loss to find how the increase of the functions of a police magistrate can be said to conflict with the right of the local legislatures as to 'provincial courts.' To merely add to the existing duties or functions of a police magistrate does not interfere with constitution, maintenance or organization of the court—if indeed the office can at all be called a court such as is contemplated by the sub-section, which I very much doubt. The power to try for murder or any other crime is derived from the Dominion statutes. The 'procedure' is governed by them. The courts trying such crimes are organized under the local statutes, and no one would contend against the right of the Dominion Parliament to create new offences, to give new powers to the judges, change the mode of trial, or in any other way change the criminal law or 'procedure in criminal cases.' The exercise of such a right would not in any way conflict with the right of legislation of the local legislatures in respect of the constitution, maintenance or organization of the court affected thereby. I can discover no principle which would justify my drawing in this respect a distinction between the courts authorized to try the highest crimes and misdemeanours, and subordinate jurisdictions *in esse*, such as police or stipendiary magistrates authorized to deal with minor offences. If the Dominion Parliament has the power of regulating and controlling the procedure in criminal cases in respect of the superior courts—which no one has yet doubted—the right to do so in regard to inferior tribunals appears to me an irresistible conclusion.

Judgment

MacMahon, J.

Other reasons might be urged for the result at which I have arrived, but as to an application of this kind I think I have given my views sufficiently at length."

During the argument before me it was urged that, as the provincial legislatures having under the authority of sub-section 14 of section 92, the constitution of criminal courts, the mere providing of work for such criminal courts by the Act now attacked was not an interference with "procedure in criminal matters."

The Act in question gives jurisdiction to certain justices therein named to try persons charged with certain statutory felonies created by the Dominion Parliament. Without the jurisdiction thus assumed to have been conferred, the justices named were without authority to try persons for the offences therein mentioned. The trial by the tribunal or justices designated is a corollary or consequence of the jurisdiction conferred. Then why is not the giving authority to try a person for a crime "procedure in criminal matters?" The trial is not connected with the "constitution" nor the "maintenance" and neither has it anything to do with the "organization" of a court.

In Sweet's Law Dictionary, title "law," sec. 8, it is said: "Law is also divided by the Benthamite school into substantive and adjective. Substantive law is that portion of the law which creates rights and obligations, while adjective law provides a method of enforcing and protecting them. In other words, adjective law is the law of procedure."

Enforcing the law against a person charged with the commission of a crime, is by the "trial" of the offender, and his punishment for the offence. This is beyond question, according to my view, criminal procedure, and the statute authorizing such procedure is *ultra vires* of the Provincial Legislature. As said by Maclennan, J. A., in *Regina* v. *Wason*, 17 A. R. 221, at p. 251: "I think the power of legislation over criminal procedure which belongs to parliament is co-extensive with its power over criminal law," etc. That is, the provincial legislatures have no more right to interfere with "procedure in criminal matters"

Judgment.

MacMahon, J.

than they would have with a "statutory crime," simply so called.

Holding the opinion above expressed as to the Act in question, there was, I consider, no jurisdiction in the police magistrate to convict the prisoner, and he must be discharged from custody.

There will be the usual order for protection to the magistrate and other officers.

[CHANCERY DIVISION.]

IN RE HARTE AND THE ONTARIO EXPRESS AND TRANSPORTATION COMPANY.

Company—Winding-up Act—R. S. C. ch. 129, sec. 56—Dominion and Provincial laws—Claim under Quebec law—Civil code of Quebec Art. 1092.

There is nothing in section 56 of the Dominion Winding-up Act which alters or interferes with the *lex loci contractûs* in the case of a claim.

Where a lease of property situate in the Province of Quebec, and entered into there, contained a provision making the same void, at the option of the lessor, on the insolvency of the lessee, and by the law of that Province (Civil Code Art. 1092) on such insolvency the rent yet not exigible, by the terms of the lease, becomes so, a claim for the whole rent, taxes, etc., to the end of the term was, on the insolvency of the lessee company, allowed to the lessors in liquidation proceedings under the Dominion Act.

Statement.

THIS was an appeal by the New York Piano Company, of Montreal, from the Master-in-Ordinary, in respect of a claim made by that company, under circumstances stated in the judgment, in the winding-up proceedings, under R. S. C. ch. 129, and 52 Vic. ch. 32 (D.), of the Ontario Express and Transportation Company instituted by Richard R. Harte and the other creditors of the last named company.

The learned Master gave his reasons in writing as follows:—

June 15th, 1892. THE MASTER-IN-ORDINARY:—

Judgment.

Master in Ordinary.

In this case the Express Company had rented, in May, 1891, certain premises in Montreal from the New York Piano Company, for a term of three years, at $2,700, payable monthly. The landlord company claim, by virtue of Article 1092 of the Quebec Civil Code, that they have a right to prove for the three years' rent, and to be entered on the dividend sheet as creditors for $1,386 overdue rent, to May 1st, 1892, and also for $5,400 for future rent, together with $580 for taxes and $393 for heating, all three being for the unexpired term of two years from the said 1st day of May, 1892.

The 1092nd Article of the Quebec Civil Code is as follows:

"The debtor cannot claim the benefit of the term when he has become bankrupt or insolvent, or has by his own act diminished the security given to his creditor by the contract."

The lease also contains the following provision: "That in case of insolvency of said lessees on making any assignment of their estate, this lease shall *ipso facto* become null and void, if the said lessors deem it proper, after the expiry of the year then current during which such assignment is made, for the remainder of the term thereof without any notice to the assignee, or to any other person or persons whomsoever, provided the said assignment or insolvency is made known within three months before the expiry of the said current year otherwise this lease shall run for another year if the said lessors deem fit."

The article of the Quebec Civil Code has been construed by a Quebec Superior Court in *Menard* v. *Pelletier*, 7 Leg. News 15, where it was held that rent not yet payable according to the terms of the lease, became payable *in præsenti* by reason of the insolvency of the tenant.

The liquidator contends that this Quebec law is not applicable to similar claims of landlords in liquidation proceedings under the Dominion Winding-up Act; and

Judgment.

Master in Ordinary.

that under section 56 of that Act (which is similar to section 158 of the English Act of 1862), the claim being for a debt payable on a contingency or as to the accruing rent, being a claim for a future liability, is not payable *in præsenti*, but only admissible as a proof for something which may in the future ripen into a direct liability.

The question therefore to be considered is whether the Dominion Winding-up Act relating to insolvent companies, interferes with and modifies the rights conferred upon landlords by the local law of Quebec.

In *Cushing* v. *Dupuy*, 5 App. Cas. 409, it was held by the Judicial Committee of the Privy Council that the Parliament of Canada had legislative power to interfere with property and civil rights within the provinces, so far as these latter might be affected by a general law relating to bankruptcy and insolvency. In giving judgment Sir M. E. Smith, said: "It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. * * It is therefore, to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament, the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect them."

Merchants' Bank v. *Smith*, 8 S. C. R. 512, affirms the same doctrine in respect of local and Dominion legislation respecting warehouse receipts and banking.

The English decisions under section 158 of the English Act are thus summarized in Buckley on Joint Stock Companies, p. 355: "Where a creditor has a claim which is admissible as a contingent claim, that ought to be admitted to the catalogue of claims admissible to proof in the wind-

Judgment.

Master in Ordinary.

ing-up. Such a proof is not a proof for anything payable *in præsenti;* but it is admissible as a proof for something which may ripen into a right for present payment.

"And though such claim may be entered for the whole estimated value of the future rent, yet the lessor, having been paid all rent accrued due is entitled to no present right at all as between himself and creditors who have a present claim; and on payment of a dividend it has been held that he is not entitled to have a dividend on the estimated amount set apart to secure the future rent." See also *Re Horsey*, L. R. 5 Eq., 561, and *Re Haytor Granite Co.*, L. R. 1 Ch. 77.

The Article in the Quebec Code seems to contain some similarity to a provision in the local law of Scotland as proved in the case of *Re Gartness Iron Co.*, L. R. 10 Eq. 412, where by that law, if the tenant was in arrear, the landlord was entitled to rank on the estate as a creditor for the capitalised value of the future feu duties payable by the tenant. But in that case the Court in administering the estate in an English jurisdiction, held that the landlord was only entitled to rank as a creditor for the arrears, and that he might enter a claim, but not a proof of such claim, for the capitalized value of the future feu duties.

It is not material to consider whether the Quebec Article expressly dealing as it does with bankruptcy and insolvency can be recognized in this Dominion Court, or whether it is within the powers of the Quebec Legislature to enact. It purports to deal with local cases of bankruptcy and insolvency, and may, according to the decision of the Judicial Committee of the Privy Council in *L'Union St. Jacques de Montreal* v. *Belisle*, L. R. 6 P. C. 31, be locally applicable in cases to which the parliament of Canada has not extended any general law relating to bankruptcy and insolvency. But in regard to incorporated companies, a general law has been made applicable, and the case of *Cushing* v. *Dupuy*, shows that such general law overrides local provisions in insolvency cases.

Judgment.

Master in Ordinary.

Besides in *Trimble* v. *Hill*, 5 App. Cas. 342, the Judicial Committee of the Privy Council has held that where a colonial legislature has passed an Act in the same terms as an Imperial statute, and the latter has been authoritatively construed by a Court of Appeal in England, such construction is binding, and should be adopted by the courts of the colony.

And in the *Central Bank Case, ex parte Confederation Life Association,* I held that a landlord in this province might enter a claim, but could not prove for future rents; nor rank for dividends in respect of them until such future rents had matured into a claim for payment.

The order in this case must be the same.

This appeal was argued on June 30th, 1892, before ROBERTSON, J.

McLaren, Q. C., for the New York Piano Company. We maintain our claim as to rent must be decided in accordance with the terms of our lease, and with the law of Quebec: Civil Code, Art. 1092. The parties are in the same position as if the winding up had taken place in Quebec. Immediately on the company becoming insolvent, the lessors could have distrained for the whole amount of the rent up to the end of the term, so that when the winding-up order was made, there was a debt due and collectable by the lessors. Even in this province accelerated rent is collectable, and by distress, when the lease contains an appropriate clause, but in Quebec it is the common law: *Linton* v. *Imperial Hotel Co.*, 16 A. R. 337; *Baker* v. *Atkinson*, 14 A. R. 409; *Graham* v. *Lamb*, 10 O. R. 248. We deny that section 56 of the Winding-up Act, R. S. C. 129, governs the case. As to the Imperial Companies' Act of 1862, sec. 111 must be read with sec. 158, and it is not correct to say that section 158 is equivalent to section 56 of R. S. C. 129. The Dominion Act does not interfere with the law of each province. Section 70 and 74 of the Insolvent Act of 1875 may be compared: Clarke's Insolvent Act, 1877, p. 214-217. As to the Article of the Code

Argument.

being *intra vires*, it was enacted by the province of Canada in 1863, and there has been no Dominion legislation interfering with it since confederation.

Hoyles, Q. C., for the liquidator. Our company is a Dominion company: 41 Vic. c. 43, (D.) The lease itself here does not provide for acceleration of rent. The Dominion parliament must have intended the rule as to the disposition of the estate of an insolvent company to be the same in each province. See Lindley on Companies, 5th ed., p. 731; *Clarkson* v. *Ontario Bank*, 15 A. R. 191. Section 111 of the Imperial Companies Act, 1862, has nothing to do with section 158, which refers to all kinds of insolvency: *Re Westbourne Grove*, 5 Ch. D. 248.

McLaren, in reply. What Dominion law is there as to rent? By section 56, sub-sec. 2, a law is made as to wages, but there is none as to rent. The provincial law must govern all contracts made in each province. This is not a contingent, but an absolute claim, due and payable before the winding-up order was made.

September 24th, 1892. ROBERTSON, J.

This is an appeal from the order of the Master-in-Ordinary, dated June 15th, 1892, whereby he disallowed a portion of the claim of the New York Piano Company for rent due under and by virtue of a lease made by the New York Piano Company to the Ontario Express and Transportation Company, dated March 11th, 1891, and to set aside such order with costs and to have the said claim allowed in full, etc., on the ground that the order is erroneous and contrary to law and evidence and that the uncontradicted evidence is in favour of allowing said claim in full.

The Express Company had rented in May, 1891, certain premises in Montreal, Province of Quebec, from the New York Piano Company for a term of three years at $2,700 per year, payable monthly. The landlord Company, by virtue of Article 1092, of the Quebec Civil Code, claim

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that they have a right to prove for the three years' rent, and to be entered on the dividend sheet as creditors for $1,386, overdue rent up to 1st May, 1892, and also for $5,400 for rent, together with $580 for taxes, and $393 for heating, all three being for the unexpired term of two years from said 1st day of May, 1892.

The Article 1092 of the Quebec Civil Code is in these words: "The debtor cannot claim the benefit of the term when he has become bankrupt or insolvent, or has by his own act diminished the security given to his creditor by the contract."

The lease in question contains the following provision: "That in case of insolvency of said lessees, or making any assignment of their estate, this lease shall *ipso facto* become null and void, if the said lessors deem it proper, after the expiry of the year then current, during which such assignment is made, for the remainder of the term thereof, without any notice to the assignee, or to any other person or, persons whomsoever; provided the said assignment or insolvency is made known within three months before the expiry of the said current year; otherwise this lease shall run for another year if the said lessors deem fit."

It is not denied that, according to the Civil Code just cited the rent in this case, not yet exigible by the terms of the lease, becomes so by the insolvency of the tenant, though the gage be not diminished. Apart from the decision in *Menard* v. *Pelletier*, 7 Leg. News 15, the expert evidence before the Master makes it quite clear.

The liquidator, however, contends that this Quebec law is not applicable to similar claims of landlords in liquidation proceedings under the Dominion Winding-up Act; and that under section 56 of that Act, the claim being for a debt payable on a contingency, or as to the accruing rent, being a claim for a future liability, is not payable *in prœsenti*, but only admissible as a proof for something which may in future ripen into a direct liability.

The Master-in-Ordinary gave effect to the contention of the liquidator and "ordered that the liquidator do place

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the New York Piano Company, on the dividend sheet in respect of the said rentals, taxes, and heating of the premises, being $1,386.50, up to May 1st, 1892. And that the said New York Piano Company do rank for such further and other charges in respect of rentals, taxes, and heating, as shall accrue due under and by virtue of the lease [illegible] the said premises before final distribution of the assets of the said the Ontario Express and Transportation Company."

After giving the question much consideration I have come to the conclusion that the learned Master has erred. In my judgment the *lex loci contractûs* must prevail. And according to that the lessee having become insolvent, the whole of the rent to the end of the lease, becomes exigible, that is exactible; in other words the lessee loses the benefit of any time which he may have for payment. I don't understand that the lease is at an end by reason of this fact, except at the option of the lessor; the term thereby created still runs on, unless the lessor choses to assume possession, in which case the future rent ceases. In this case the liquidator holds for the benefit of the creditors, as an asset, the unexpired term, the rent having by reason of the insolvency of the lessees, become due and payable *in præsenti.*

I have carefully examined all the cases referred to on the argument before me, as well as the cases collected in Buckley, in section 158 of The Companies' Act, 1862 (Imp.), which is the same as section 56 of the Dominion Act, and no one of them, in my judgment, holds contrary to the law as it strikes me, and as I have expressed it above. In fact no one of these cases is in point. There the decisions were on the construction of the instrument, here it is the local law of Quebec that we have to deal with; the instrument or lease does not express the contingency; it follows from the state of the law, which deprives the lessee of the benefit of the stipulated term for payment by the mere fact of insolvency, independently of the question of diminished security for the rent. In other words, it might be put in this way: The rent of these premises for two

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years is $4,800; but if the lessee will pay that amount in eight equal quarterly payments of $600 each, strictly in advance; that will be a compliance with the terms of the lease as to payment; but in case of default in consequence of his insolvency, then the lessor is entitled to insist upon the whole amount being paid *in præsenti.* Now, if that is the law in Quebec, where this contract was made, and where the premises leased are situate, the mere fact of winding up-proceedings being taken in Ontario, where a different law prevails, cannot in my judgment interfere with the law under which all parties to the contract were bound.

As I understand, the 56th section of the Winding-up Act (Dom.), there is nothing in it which alters or interferes with the *lex loci contractûs* in any way, nor in my judgment did parliament intend to interfere with that law by the enactment in question.

Bacon, V. C., in *In re Gartness Iron Company, ex parte Lord Elphinstone,* 10 Eq. at p. 416, says, in reference to section 158 of the Imperial Act, "that it provides in very plain terms for the preservation of contingent rights when the affairs of the company come to be administered." In this case there was nothing due for rent, and it was held that the lessor could not rank for future rent; but that is not the case here,—by operation of law the whole of the rent has become exigible, it is due and in the same plight as if the whole term had expired, the rent still being in arrear. I cannot see that the cases cited by the learned Master, supports the conclusion he has arrived at, and in my judgment the appeal should be allowed, with costs to be paid out of the estate.

A. H. F. L.

[COMMON PLEAS DIVISION.]

Crane et al. v. Rapple.

Specific performance—Sale of land—Parol contract—Possession—Sale of partner's share.

Land owned by two persons in partnership was sold under a parol contract by one of the partners to a purchaser, under the belief that the copartner would agree in the sale, and the whole would be conveyed, the purchaser being put in possession, but the copartner refused to carry out the sale :—

Held, that the placing of the purchaser in possession was sufficient to prevent the Statute of Frauds being set up as a bar to the proof of the parol contract, and that the purchaser could elect to take the share of the selling partner with an abatement of the purchase money, and judgment for specific performance was given as against him.

Statement. This was an action tried before Boyd, C., at the Brockville Chancery Sittings in November, 1891.

The action was for trespass to certain parts of lots 17 and 18, of the contiguous lots between lots 18 and 19, in the third concession of the township of Elizabethtown, in the county of Leeds.

The defendant, besides pleading "not guilty," and "leave and license," set up a counter claim, alleging that he entered into a verbal agreement for the purchase of the lands for the sum of $2,300, and entered into immediate possession, and made improvements on the lands; and that he had always been ready and willing to carry out his agreement.

The defendant asked that the said agreement might be specifically performed.

Boyd, C. :—

In *Ungley* v. *Ungley*, 5 Ch. D. (C. A.) 887, 890, Jessel, M. R., very succinctly states the law of part performance, thus: "The law is well established that if an intended purchaser is let into possession in pursuance of a parol contract, that is sufficient to prevent the Statute of Frauds being set up as a bar to the proof of the parol contract. The reason is, that possession by a stranger is evidence that there was some contract, and is such cogent evidence as to compel the Court to admit evidence of the terms of the contract in order that justice may be done between the parties."

The Court of Appeal was affirming the judgment of Malins, V. C., as reported in 4 Ch. D. 73, in which he said such possession for an hour only, would be sufficient.

This case was acted on in *Cameron* v. *Spiking*, 25 Gr. 116, where the character of the possession is much considered.

As against the plaintiff Mix, I consider that there is very clear evidence of possession being delivered by him to the defendant, *i. e.*, the defendant went into actual possession with the permission and at the instance of the plaintiff Mix upon the agreement of sale and purchase, the terms of which are so clearly in evidence as not to be contradicted. This possession has since continued, and when taken by the defendant he did not enter as a trespasser.

The land was owned jointly by the plaintiffs, but no contract is proved with the plaintiff Crane. As to his share of the land the defendant is entitled to no relief by way of specific performance. But as to the plaintiff Mix's moiety, the defendant may elect, and has elected to take that with a relative abatement of the purchase money. This course the purchaser may take, even though he knows the state of the title, if he had reason to believe that the whole would be conveyed. Here it was a partnership property—one partner undertakes to sell the whole; settles the price; has the conveyances prepared, and, as he says, takes his chance of his partner executing them. Mix evidently thought that the sale was at a price that could not be bettered, and that his co-partner would readily accede to what he had done. But though this has turned out otherwise, that does not relieve Mix from being ordered now to carry out the transaction, as far as he can.

Hooper v. *Smart*, L. R. 18 Eq. 683, cited, was an instance of a moiety being conveyed where the purchaser was unaware of the imperfection of the title to the whole. But in

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Barker v. *Cox*, 4 Ch. D. 464, the facts more nearly assimilate to those of this case where it was expected that the outstanding part-owner would concur. So in *Naylor* v. *Goodall*, 47 L. J. N. S. Ch. 53, partial relief was not given only because the property was trust property, and the presumption was thus raised that the entirety was in the contemplation of the one executor and trustee who undertook to sell.

But here, during the conversation before action, Mix offered to convey his half, though that attitude is now receded from. I may note also *Horrocks* v. *Rigby*, 9 Ch. D. 180, and *Burrow* v. *Scammell*, 19 Ch. D. 175.

There must be judgment for specific performance against Mix, with costs, and abatement of the price to one-half; and judgment refusing specific performance as to the plaintiff Crane, with costs.

As to the injunction to restrain the defendant trespassing on the premises, that should be dissolved, because the defendant as having bought the interest of the co-owner, has a right to be there, though he has no right to oust the other co-owner.

The costs of this should go to the defendant as against both plaintiffs, to be set off against the costs taxable to Crane against the defendant on the specific performance issues.

The plaintiffs moved on notice to set aside the judgment entered for the defendant and to enter judgment for the plaintiffs.

In Easter Sittings, May 17, 1892, before a Divisional Court composed of GALT, C. J., ROSE and MACMAHON, JJ., *Walter Cassels*, Q. C., supported the motion.

G. H. Watson, Q. C., contra.

June 25, 1892. MACMAHON, J.:—

The evidence is that the plaintiffs were, at the time of the alleged sale of the land in question, in partnership as contractors, builders and brickmakers; and that this land had been purchased with partnership funds for carrying on the brickmaking part of the business.

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The evidence of the defendant and his witnesses as to the material facts of the agreement for sale and purchase, and that he entered into possession with the consent and at the instance of the plaintiff Mix, remain almost wholly uncontradicted. The one point in which Mr. Cassels for the plaintiffs insisted there was a material contradiction, was by the evidence of Mix, that the agreement for sale was conditional on Crane his co-partner assenting thereto. Mix did say, "It was accepted conditionally by me, subject to approval by my partner Mr. Crane; that is, the offer of $2,300."

The learned Chancellor has found against this statement made by Mix; and the evidence in support of the finding is of the strongest possible character.

[The learned Judge then commented on the evidence, coming to the same conclusion as the Chancellor, and continued.]

It is beyond question that Mix desired to get rid of his interest in the farm, and relinquish the brickmaking part of the partnership business, for when Crane objected to sell unless five or ten acres at least were reserved out of the farm of sixty-eight acres, Mix, on the 20th of May, wrote his partner Crane, as follows:

"There is nothing new in relation to the farm deal; Rapple wants the whole or not any. So far as my ideas are concerned, I am so thoroughly disgusted with both farm and brickmaking that I would be almost inclined to sell my interest in it to any one who would be willing to buy; but I do not wish to do anything in this matter that would be entirely against your wishes."

Lord Blackburn in *Maddison* v. *Alderson*, 8 App. Cas. at pp. 467, 489, said: "But there are cases that for the purpose of enforcing a specific performance of a contract for the purchase of an interest in land, a delivery of possession of the land will take the case out of the statute. This is, I think, in effect to construe the 4th section of the Statute of Frauds as if it contained these words, 'or unless possession of the land shall be given and accepted.' Notwithstanding the

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very high authority of those who have decided those cases, I should not hesitate if it was *res integra* in refusing to interpolate such words, or put such a construction on the statute. But it is not *res integra* and I think that the cases are so numerous that this anomaly, if, as I think it is, an anomaly, must be taken as to some extent at least established. If it was originally an error it is now I think *communis error* and so makes the law."

The reasons for and the principle upon which a delivery of possession is regarded as furnishing evidence of part performance of a contract for the sale and purchase of an interest in land is succinctly stated by Sir T. Plumer, in *Morphett* v. *Jones*, 1 Sw. 187, thus: "The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has, therefore, constantly been received as evidence of an antecedent contract, and as sufficient to authorize an enquiry into the terms, the Court regarding what has been done as a consequence of contract or tenure."

In *Ungley* v. *Ungley*, 4 Ch. D. 73 (to which the Chancellor refers in his judgment), Malins, V. C., says that a parol agreement perfected by possession is in the same position as a written agreement. And that possession, if it be for an hour only, is sufficient. The Court of Appeal affirmed this judgment in 5 Ch. D. 887, and (without referring to the case) adopted the reasoning of Sir T. Plumer, in *Morphett* v. *Jones*, adding, at p. 890: "The law is well established that if an intended purchaser is let into possession in pursuance of a parol contract, that is sufficient to prevent the Statute of Frauds being set up as a bar to the proof of the parol contract."

In *Cameron* v. *Spiking*, 25 Gr. 116, possession by the agent of the defendants of the property consisting of a brewery, was considered sufficient part performance to take the case out of the statute.

The evidence of Mix himself makes it clear beyond question that Rapple entered into possession with his sanction and approval, if not at his direct request. The

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acts, therefore, upon which the defendant is relying as part performance, are "unequivocally and in their own nature referable to some such agreement as that alleged" in the defendant's counter claim. See *Cooth* v. *Jackson*, 6 Ves. 38; *Frame* v. *Dawson*, 14 Ves. 386, and *Maddison* v. *Alderson*, 8 App. Cas. 467, at p. 479, per Selborne, Lord Chancellor.

Then, coming to the other point. Crane did not contract. The question therefore for decision is, whether Rapple is entitled to specific performance as to Mix's interest, consisting of partnership property with an abatement? The difficulty presenting itself arises from the defendant's having contracted to purchase the entire fee in the lands, with knowledge that the person with whom he was contracting was only entitled to convey an undivided moiety thereof, the rule in such cases being that: "Where the purchaser knows of the limited interest of the vendor, he will not be able to insist upon a conveyance of such interest with compensation: W. and T. notes to *Seton* v. *Slade* (6th ed.), p. 586. So in *Castle* v. *Wilkinson*, L. R. 5 Ch. 534, where a husband and wife agreed to sell the wife's estate in fee simple, the purchaser being aware that the estate belonged to the wife, and the wife afterwards refused to convey, it was held that the purchaser could not compel the husband to convey his interest and accept an abated price.

However, even in cases where the purchaser is aware of the limited interest of the vendor, but the vendor nevertheless contracts to sell a larger interest than he has to convey, the purchaser may compel the vendor to convey such interest as he is entitled to, with compensation. The decision in *Barker* v. *Cox*, 4 Ch. D. 464, was based on this principle. There, under a marriage settlement, real estate was limited during the life of the wife in trust for her separate use, with remainder to her husband in fee; and the husband contracted to sell the property to a purchaser who had notice of the provisions of the settlement, and the wife refused to convey her life interest. It was held

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that the purchaser was entitled to specific performance to the extent of the husband's reversion in fee, with compensation in respect of the wife's life interest. In the contract, the husband agreed that he would procure a proper assurance of the premises to the purchaser, to be executed by all necessary parties; and the judgment of Bacon, V. C., proceeded upon the ground that the husband, by his contract, represented that he had the means of conveying the entire interest in the land, and as he could not carry out his contract, the purchaser was entitled to a conveyance of the reversion, with compensation.

The Chancellor has found that "one partner undertakes to sell the whole, settles the price, has the conveyances prepared, and, as he says, takes his chance of his partner executing them;" and that, although Mix was mistaken as to his belief as to his co-partner's executing the deed, "that does not relieve Mix from being ordered now to carry out the transaction as far as he can."

That Mix was anxious to dispose of his interest, there is no question: that he was contracting to sell the entire fee in the land—relying, as he stated, on making it right with Crane—is equally clear; and it was on this assumed ability to induce Crane to execute the deeds that Rapple, at his instance, entered into possession.

We must, I think, hold from the findings of fact—which are not seriously in dispute—that Mix was undertaking to get a conveyance of the lands executed by his co-partner, just as much as if such undertaking had been in writing.

There is nothing to prevent a partner from disposing of his interest in the partnership business as he pleases: Parsons on Partnership, sec. 171.

In *Treadwell* v. *Williams*, 9 Bosw. (N. Y.) 649, the head note is: "A conveyance by one member of a solvent firm of his undivided interest in the real estate of the partnership to a stranger, whether made upon a sale or by way of payment of his individual debt, is valid as against the co-partners."

And it has been held that, where there is no special con-

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MacMahon, J.

tract or stipulation to the contrary, a partner may sell or mortgage his interest in the partnership: *Cassels* v. *Stewart*, 6 App. Cas. 63, per Selborne, L. C., at p. 73; and see *Whetham* v. *Davey*, 30 Ch. D. 574; *Re Tamplin and Son*, 6 Times L. R. 206.

Agreeing as I do with the judgment of the learned Chancellor, the result is, that the motion must be dismissed with costs.

ROSE, J.:—

At the close of the argument, it seemed to me that only one question remained for consideration, viz., whether the interest of Mix in the land in question was a saleable interest, the contract for which could be enforced by a decree for specific performance? The matter is somewhat without authority, and must be determined, I think, mainly upon principle.

In the first place, on the facts here, I think it must be assumed that the interest of Mix in this property was a half interest. The presumption in the case of partnership is, that each partner is equally interested in the partnership property. It was not asserted at the trial, nor before us in argument, that the interest of Mix in this property was an uncertain one, and the learned Chancellor has treated it as a half interest; that being so, the interest being certain and determined, there is no difficulty in working out the rights of the parties.

It is beyond question that a partner may sell out his full share or interest in a partnership. The effect of such sale upon the partnership, and the rights acquired by the purchaser, need not be considered. They are dealt with, as far as the English authorities go, in Lindley on Partnership (3rd ed.), pp. 240 and 720.

This contract was not for a sale of a share or interest in a partnership, but for a sale of an asset or a portion of the partnership property.

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Rose, J.

In England land has been dealt with differently from chattels as in reference to mining interests. See Lindley, p. 720; *Bently* v. *Bates*, 4 Y. & C. Ex. 182; *Redmayne* v. *Forster*, L. R. 2 Eq. 467; also *Whetham* v. *Davey*, 30 Ch. D. 574.

In re Tamplin and Son—Ex parte Barnett, 6 Times L. R. p. 206, it was held that where one of two partners executes a bill of sale of partnership property, he is the true owner of his undivided moiety within the meaning of section 5 of the Bills of Sale Act, and the bill of sale is valid as regards that moiety.

In Parsons on Partnership, paragraphs 171 and 172, the subject is also dealt with; and in a note to paragraph 171 will be found the case of *Treadwell* v. *Williams*, 9 Bosworth 649 (N.Y.), referred to. The head note there is, "The conveyance by one member of a solvent firm of his undivided interest in the real estate of the partnership to a stranger, whether made upon a sale, or by way of payment of his individual debt, is valid as against the co-partners * * . If creditors do not object, the purchaser takes a good title, and it does not lie with the other members of the firm to object; or at least, to enable them to do so, they must show that the partnership debts exceed the assets, and that there is need of the property in question to provide for the deficiency and equalize the interests of the partners."

Having regard to these authorities, I am of the opinion that a partner may sell his interest in land belonging to the partnership; at any rate where the firm is solvent and his interest in such asset is certain.

The next question for consideration is whether, if such interest be saleable, such sale may be enforced against the defendant Mix on the facts of this case? Mr. Cassels urged upon us that the contract by the defendant was for the whole of the property; that he refused to take Mix's share, and that the sale was conditional upon the obtaining of the consent of Crane; and that such consent, not having been obtained, there was no contract of sale.

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Rose, J.

I am not prepared to differ from the conclusions arrived at by the Chancellor, which were, I think, supported by evidence. I think there is evidence to support the conclusion that Mix undertook to sell the whole property; settled the price; had the conveyances prepared—taking his chances of his partner executing them, and "believing that his partner would execute them"—gave the defendant possession of the property, relying upon the assent of his partner to the transaction; and therefore it seems to me upon the authorities that, although the defendant knew the facts as found, there is nothing to prevent him now taking Mix's interest in that property with an abatement of the purchase money.

The cases referred to by the learned Chancellor are in point, and in my judgment support the conclusion at which he arrived.

Agreeing, as I do, with the findings of fact of the learned Chancellor, and being of the opinion that the interest is a saleable one, and that on the facts of this case a decree for specific performance was proper, the appeal must be dismissed with costs.

Galt, C. J., concurred.

[QUEEN'S BENCH DIVISION.]

ARDILL ET AL V. CITIZENS' INSURANCE COMPANY.

ARDILL ET AL. V. ÆTNA INSURANCE COMPANY.

Fire insurance—Contract for sale of insured building—Change of title—Change material to the risk—R. S. O. ch. 167.

Where in a contract for the rebuilding of a church, the contractors for the work agreed with the churchwardens to take the old materials at a fixed sum as a first payment on the contract, and before the date fixed for the commencement of the work the church was destroyed by fire, and the contractor before the time for the commencement of the work received from the churchwardens a smaller sum than the amount agreed on as a first payment in place of the materials deliverable to them under the contract:—

Held, that upon the construction of the building contract, the church was to remain the property of the plaintiffs until the date fixed for beginning the work, and that under the statutory conditions, at the time of the fire, there had been no assignment, alienation, sale or transfer, or change of title to the property, or change material to the risk; and that the plaintiffs were therefore entitled to recover from the defendants the amount of the loss.

Statement.

THESE two actions were tried together before MACMAHON, J., without a jury, at St. Catharines Assizes, on the 28th September, 1892.

The actions were brought by the rector and churchwardens of St. James' church in Merritton, to recover upon polices issued by the defendants respectively for the loss of the church building and contents by fire. The church was a frame building and was insured in the Citizens' Company for $1,200, and the contents thereof for $300; and in the Ætna on the building alone for $1,200.

The facts appear in the judgment.

S. H. Blake, Q. C., for the plaintiffs.

Osler, Q. C., and *H. H. Collier*, for the defendants.

October 17, 1892. MACMAHON, J.:—

The policies were in force at the time of the fire which destroyed the church and its contents.

The churchwardens had entered into a contract with

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George Newman and Jabez Newman, which, although bearing date the 2nd March, 1892, was, I find, executed on the 14th March, 1892, for the erection of a brick church in place of the frame one covered by the policies.

The agreement between the churchwardens and the contractors provides: "As a first payment, the following material, consisting of all the new stone now lying on the church property, all sand on the canal bank, lot ten, east side, and the old church building, including all stone and foundations under said building (but not to include chairs, reading desk, organ, communion table, gas fixtures, furnace and piping, carpets, matting, and church bell), at a valuation of $525. * * * * . It is further agreed that the proprietors will give to the contractors full possession of premises and old church building, so as they may be able to commence operations on the first day of April next."

On the night of the 15th March, 1892, there was a meeting of the wardens in the vestry of the church, in which there was a fire, and half an hour after the wardens left the building, a fire took place, supposed to have originated by sparks from the chimney. The church and its contents were a total loss.

The wardens, prior to the 1st April, paid to the Newmans $150 for any loss they might have sustained by the destruction of the church, and they then proved their claims against the insurance companies, in which they state that the whole amount of loss sustained by the destruction of the church is $3,000, and they claim from the Ætna company as its proportion of such loss the sum of $909, and from the Citizens' Company on building and contents $1,195.

The defences relied upon as to the transaction between the wardens and the contractors are, in effect, that under the third statutory condition, R. S. O. ch. 167, a change material to the risk was effected, no notice of which was given to the defendants, and the policy thereby became void; that by the fourth of the said conditions it is provided that if the property is assigned without a written

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MacMahon, J.

permission indorsed thereon by an agent of the company, the policy shall become void; and that by the second condition indorsed upon the policy it was provided that in the event of any sale, transfer, or change of title in the property insured, the liability of the company should thenceforth cease; and they say that by the contract with the Newmans the property became the Newmans' property, and the policy became void; and also that by the fifteenth of the statutory conditions it is provided that if any false statement is made in the statutory declaration, it shall vitiate the claim upon the policy; and that by the eleventh condition indorsed upon the policy it was provided that any wilful misstatement made in support of the claim for loss shall cause the remedies and rights of action of the insured to be forfeited, and that with the declaration sent in by the plaintiffs in support of their claim, it was stated that the actual loss and damage to the plaintiffs by the fire which destroyed the church, under the statement of claim, was $3,000, whereas the actual loss and damage sustained was not more than $200; and that it was also stated in the said declaration that the property insured belonged exclusively to the insured, and that no other person or persons had any interest therein, whereas the said church building had before the fire become the property of the said Newmans, by reason of which false statements the plaintiffs' claim in respect of the said building was vitiated.

By the contract between the wardens and the Newmans, there could be no change material to the risk, as that means some change in the physical condition of the property by an alteration in, or the addition to, or by building some other structure contiguous to, the insured's building, etc.

In considering what is a change or alteration material to the risk, the question depends very materially upon whether it would have raised the rate of premium: May on Insurance, 3rd ed., sec. 223; *Peck* v. *Phœnix Mutual Ins. Co.*, 45 U. C. R. 620; *Gill* v. *Canada Fire and Marine Ins. Co.* 1 O. R. 341.

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MacMahon, J.

There was no assignment, alienation, sale or transfer, or change of title to the property. Until the 1st April the building was still the property of the churchwardens. The Newmans were not to own it or even get possession of it until the 1st of April. The contract between the churchwardens and the Newmans was the same, in effect, as if it contained a clause whereby on commencing to erect the new church, the contractors were entitled to the material in the old one as compensation for its removal. Until that time arrived, the property was the property of the wardens and covered by the policies.

The agreement between the wardens and the contractors was merely executory, and there was no conveyance of the title to the property. In *Masters* v. *Madison County Ins. Co.*, 11 Barb. 624, and in *Kempton* v. *State Ins. Co.*, 62 Iowa 83, it was held that a contract by the insured to convey at a future date is not a breach of the condition against sale. The last case followed *Washington Fire Ins. Co.* v. *Kelly*, 32 Md. 421. See May on Insurance, 3rd ed., sec. 267, and cases there cited; *Bull* v. *North British C. I. Co.*, 15 A. R. 421, at pp. 425-9; *Russ* v. *Mutual Fire Ins. Co.*, 29 U. C. R. 73.

There being no assignment, alienation, or change of title, and the policies being subsisting policies on the insured property, there was no false statement or wilful misstatement made nor any fraud in connection with the proofs of claim by the churchwardens. The adjustment was made by the company's adjuster, and in the correspondence between the agents of the companies and the head offices, the agents stated that the loss sustained by the insured was actually the amount sworn to, and the company's agent, while in the box, stated that, assuming the church to be the property of the insured, they had sustained a loss to the amount sworn to in the proofs of claim.

There will be judgment for the plaintiffs against the Citizens' Insurance Company for $1,195, and against the Ætna Insurance Company for $905, with full costs.

[QUEEN'S BENCH DIVISION.]

STEWART V. ROWSOM ET AL.

Mortgage—Power of sale—Exercise of—Sale of timber only—Notice of sale.

A mortgagee of timbered land, whose mortgage contained the ordinary short form of power of sale authorized by R. S. O. ch. 107, in the exercise of such power sold the timber without the land :—

Held, that the sale as an exercise of the power was void :—

Held, also, that there being an existing interest in the land vested in or claimable by the plaintiff, of which the mortgagee had express notice, the plaintiff was entitled to notice of the sale, and, upon the evidence, that no such notice of sale was given him as he was entitled to under the power.

ACTION to set aside a sale by the defendant Rowsom to the defendant Ackert of the timber standing upon certain land, and to restrain the defendants from cutting the timber upon the land, and for an inquiry as to the depreciation of the land by reason of waste, and for a mortgage account and redemption. Statement.

At the time of the sale the plaintiff's interest in the land was under a written agreement whereby he was entitled to enforce a transfer to him of all the estate in the land of the second mortgagee and the owner of the equity of redemption, the mortgagor; but after the sale, and before action, the second mortgagee and the mortgagor conveyed their interests respectively to the plaintiff. The defendant Rowsom was the assignee of the first mortgage upon the land, and under the power of sale therein, which was in the usual short form, he sold the timber on the land to the defendant Ackert for $400.

The action was tried at Walkerton, before BOYD, C., on the 12th September, 1892.

D. Robertson, for the plaintiff.

H. P. O'Connor, Q. C., for the defendants.

OCTOBER 14, 1892. BOYD, C.:—

Two questions are presented upon the record and evidence: Was the plaintiff entitled to notice of the exercise

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Boyd, C.

of the power of sale? Was the power to sell validly exercised by the sale of the timber without and apart from the land itself? As to both, my opinion favours the plaintiff's right to succeed. Prior to notice being given, the plaintiff had procured a written agreement by way of compromise with the second mortgagee and the owner of the equity of redemption—the mortgagor—whereby he was entitled to enforce a transfer of all their interest to him. Whether this was conditional or absolute does not appear to me material: either way, there was an existing interest in the land vested in or claimable by the plaintiff, of which express notice was given to the first mortgagee, the defendant Rowsom, prior to the notice under which the property was exposed for sale. This interest has become vested in possession in the plaintiff, by the execution of proper conveyances, since the said sale.

Of the time and place of this attempted sale the plaintiff had no written notice, as required by the terms of the power. This fact of notice is the issue presented on the record—not whether he waived service of notice, but whether, in fact, notice was given. No written notice is pretended. There is conflicting evidence as between the plaintiff and the defendants' solicitor as to whether oral notice was given to the plaintiff; but, in the face of the correspondence prior to the day of sale, I prefer to accept as correct, what the plaintiff swears, that he had no information as to when the sale was to be proceeded with. I conclude, therefore, that no such notice was given to the plaintiff as he was entitled to under the power.

But apart from this point of notice, I decide that the power of sale was not lawfully carried out by selling the timber apart from the land. This was a matter of private arrangement next day after the public sale proved abortive. For $400, the defendant Ackert then bought the timber, getting two years for its removal.

This is a novel method of procedure under the power of sale, and not justified by its terms. The expanded meanings attributed to the short forms of covenants, conditions,

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Boyd, C.

and provisoes contained in mortgages made in pursuance of R. S. O. ch. 107, are, generally speaking, survivals of old conveyancing phraseology, which, by judicial construction, or the sanction of conveyancers, have received definite signification. This being ascertained, it will not be lightly departed from in the application of the Revised Statutes. Such construction obtains as to the form of words employed in the statutory power of sale *i.e.*, "to sell * * the said lands, tenements, hereditaments, and premises hereby conveyed * * or any part or parts thereof, with the appurtenances." Substantially the same was the form in the much litigated case of *Cholmeley* v. *Paxton*, or *Cockerell* v. *Cholmeley*, 3 Bing. 207; 10 B. & C. 564; 3 Russ. 565; 1 Cl. & Fin. 61; 1 Russ. & My. 418, thus phrased: "to make sale of * * all or any part or parts of the messuages aforesaid, with the appurtenances either together or in parcels, for such price as to the trustees should seem reasonable."

The various mutations of this remarkable litigation are reviewed by the Master of the Rolls in *Buckley* v. *Howell*, 29 Beav. 546, 553, to which I refer for the particulars. Best, C.J., in 3 Bing., said: "They (the trustees) might sell different parcels of the estate at different times, and make separate conveyances of each parcel so sold; that is the extent of their authority. They cannot sell *part* of a parcel. They must not sell the land without the timber, or the timber without the land on which it grows:" page 213. In the Exchequer Chamber, Bayley, J., said, 10 B. & C. at p. 572: "The power is to sell the estate. The estate, at the time when the sale took place, consisted of land, timber-trees, fruit and other trees, and wood and underwood growing upon it. The trustees were to sell it in the condition in which it was at that time. As the timber-trees were part and parcel of the estate at that period of time, the trustees were not at liberty to divide one part from the other." And Littledale, J., said, at p. 573: "The power is given to the trustees to sell and dispose of the estate. That means to sell and dispose of the estate

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Boyd, C.

with everything on it as it stood at the time. They had no power to make a distinction between the land and the timber growing upon it." Again, Parke, J., said, at p. 574: "It appears to me to be clear, looking at the terms of the power, that the trustees were not authorized to sell the estate without the timber—they must sell both together." The Master of the Rolls in 29 Beav. read this case in all its aspects as in the most solemn manner deciding that it is a bad execution of the power to sell the land and not to sell all that is properly and necessarily connected with it, in the ordinary meaning of the term: page 557. That decision was in respect of the severance of a mine, and he said: "I see no distinction between minerals and timber, in principle they are the same."

Altogether, the legal result may, perhaps, be succinctly thus put: the land may be divided vertically and parcels of it sold; but not horizontally.

Soon after, legislation in England provided for the severance of timber and mines from the land in such sales, *with the sanction of the Court.* See the statutes referred to in Farwell on Powers, pp. 292-3. One of the latest cases is *Re Hirst's Mortgage*, 45 Ch. D. 263 (*cf.* R. S. O. ch. 100, sec. 20).

This same point again arose under the English Conveyancing and Law of Property Act of 1881, of which the provisions relevant to the present inquiry, as embodied in Ontario legislation, are found in R. S. O. ch. 102, Part ii. The Court in *Re Yates*, 38 Ch. D. 112, declined to hold that the Act authorized a sale of fixtures apart from the land. It was urged that by section 6 of the English Act fixtures were to be read into the mortgage, and then the Act enabled any part of what was mortgaged to be sold. That is very much the same as our legislation which by R. S. O. ch. 107 directs that the mortgage shall be construed to include "trees, woods, underwoods," etc. But Cotton, L. J., mentions this ingenious argument only to refute it: p. 119. He goes on to say, "Apart from recent legislation a mortgagee with an ordinary power of sale could not sell mines separately from the surface, any more than a trustee for sale could do so. So a mortgagee with a power of sale could not, in my opinion, sell fixtures separately, unless upon the fair construction of the power it appeared that it was intended to give him authority to do so:" p. 121. Adverting to the distinction I have suggested between vertical and horizontal severance, he says: "Mr. French suggested that if a house was the only subject of a mortgage, this power might be held to authorize selling it in flats. I do not agree with that suggestion. I do not think that the power authorized the mortgagee to break up the state of things which then existed by selling anything apart from the land to which it was affixed." I need not quote further except to extract a passage from the judgment of Lord Justice Bowen, which as a dictum directly supports the present decision. He says, at p. 129: "The provisions as to timber in the 4th clause of the 1st sub-section of section 19 seem to shew that but for the special sub-section it would not have been in the power of a mortgagee to sell the timber of the estate, although the timber would pass as an incident of the land."

But the reasoning and line of approach to the result in this case is all the more noteworthy because it accords with the position taken in the *Cholmeley Cases*, which do not appear to have been cited. So it appears that the dictum of Bowen, L. J., has been anticipated by a concurrence of judicial opinion upon the same matter half a century before.

The sale as upon an exercise of the power is void, but it operates as an act done by the mortgagee towards realization of his security. The account must be taken as against a mortgagee in possession; if the amount obtained from the sale of the timber in lots by the purchaser Ackert is sufficient to clear the mortgage debt, interest, and expenses of sale, the land and rest of the timber will be the property of the plaintiff as upon satisfaction of the mortgage; other-

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wise redemption on the usual terms. Costs of action up to the judgment now pronounced should go to the plaintiff against both defendants. Subsequent costs will abide the result of the account.

As between the co-defendants I do not interfere.

[CHANCERY DIVISION.]

RE THE TRUSTS CORPORATION OF ONTARIO,

AND

MEDLAND ET AL.

Vendor and purchaser—Lands vested in trustee—Executions against cestui que trust—Title.

Lands were conveyed to, and held in the name of, a trustee, at the instance and for the benefit of another, but without any disclosed trust. Writs of *fi. fa.* lands against the *cestui que trust* were placed in the sheriff's hands before his death, but after the conveyance to the trustee. After the death of the *cestui que trust* his administrators sold the lands, and offered to convey the lands with the trustee:—

Held, that the purchaser was not bound to carry out the sale unless the writs were removed or released.

Statement.

THIS was an application under the Vendor and Purchaser Act, R. S. O. ch. 112, in which the vendors, the Trusts Corporation of Ontario, were petitioners, and William A. Medland and Russell Greenwood, purchasers, were respondents.

The petition set out that one Frederick L. Lee held the lands in question in his own name for William A. Lee, at the time of the death of the latter upon an undeclared trust; that on the purchase by Medland and Greenwood from the Trusts Corporation, who were the administrators of the said William A. Lee, it was discovered that writs of *fieri facias* lands against William A. Lee were in the sheriff's hands, which had been placed there after the lands had been acquired by Frederick L. Lee, but before the death of William A. Lee. The vendors offered the purchaser a deed from themselves, and one from Frederick L. Lee, but the purchasers declined to accept them unless the writs of *fi. fa.* were removed or released. **Statement.**

The petition was argued on October 26th, 1892, before ROBERTSON, J.

D. Saunders, for the purchaser. The vendors must remove the writs of *fi. fa.* The execution creditors have a right to sell the lands: Leith's Real Property Statutes, 318, 319. Section 10, Statute of Frauds, 29 Charles II. ch. 3; *Simpson* v. *Smyth*, 1 E. & A., per Robinson, C. J., at p. 44; *Cronn* v. *Chamberlin*, 27 Gr. 551; *Doe d. Laurason* v. *The Canada Company*, 6 O. S. 428; Armour on Titles, 132.

W. D. Gwynne, for the vendors. The *fi. fa.'s* against the *cestui que trust* do not attach. In England a writ of *elegit* would be necessary, and we have no such writ here, and even if we had, none has been issued: Leith's Real Property Statutes, 315. If the debtor's is an equitable interest, a bill in equity is the proper proceeding. When the legal estate in lands are vested in a trustee, the lands cannot be sold under a writ of *fi. fa.* against the *cestui que trust*: Per Robinson, C. J., in *Simpson* v. *Smyth*, 1 E. & A. at pp. 45, 46. The vendors can make a good title under the Devolution of Estates Act, as real property is now treated as personalty: R. S. O. ch. 108, secs. 4 to 9; but now 54 Vic. ch. 18, (O.), secs. 2, 5, and 6 goes further and enables the administrator to sell if the lands are not "specifically charged," and executions do not "specifically charge," certainly not as in this case, against a *cestui que trust*.

Saunders, in reply. No writ of *elegit* is necessary. An equitable interest can be sold under writs of *fi. fa.* lands. The execution creditors have, in any event, an equitable lien: Leith's Real Property Statutes, 318, 319; *Moore* v. *Clark*, 11 Gr. 497, Con. Rule 1008. The Devolution of Estates Act, and 54 Vic. ch. 18 (O.) have not the effect of cutting out the execution creditors in such a case.

Judgment. November 16, 1892. ROBERTSON, J.:—

Robertson, J.

The fifth section of 54 Vic. ch. 18 (O.), makes it quite clear that *bonâ fide* purchasers of real estate from the executors or administrators of a deceased owner in manne. authorized by the Devolution of Estates Act, or this Act, shall be entitled to hold the same freed and discharged from any debts or liabilities of the deceased owner, not specifically charged thereon, otherwise than by his will, etc.

Mr. Saunders, contends that the lands in question are "specifically" charged: there are *fi. fa's.* against the lands of William A. Lee in the hands of the sheriff, but without some other proceeding, these lands, being in the name of Frederick L. Lee, are not charged; that is, the sheriff by virtue of the writs of *fi. fa.* could not sell them. There is nothing to show on the face of the documents giving title that the intestate is in any way interested in them and besides that, in my judgment they are not, even did it appear that the lands were in the name of a trustee for the use of the intestate "specifically" charged.

The placing of a *fi. fa.* lands in the hands of the sheriff, binds, generally, all the lands in his bailiwick belonging to, or in which the execution debtor is interested, but that is not "specifically charging" these lands.

But the "interest" of the execution debtor in any lands, which under the former practice, could not be sold under legal process, but could be rendered available in an action for equitable execution by sale for satisfaction of the debt, can now be sold on application under Con. Rule 1008. If, therefore, the execution debtor was now alive, there is no doubt his interest in the lands in question could be made available under the above mentioned rule.

And section 26 of ch. 64, R. S. O., provides that such "interest" may be seized and sold under a judgment and execution against his executors or administrators in the same manner and under the same process, that the same could be sold under a judgment and execution against

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the deceased if living. There is nothing, therefore, to prevent the execution creditors in this case making an application under Rule 1008, against the administrators here.

Ever since the introduction of the law of England into this country, the placing of a writ of execution against lands in the hands of the sheriff had the effect of binding all the lands of the person against whom the judgment was recovered, in that sheriff's bailiwick: any disposition therefore by the owner, in his life time of these lands was subject to the execution. And to the extent of the value of such lands, the judgment debt became a charge upon them; if, therefore, it was the intention of the legislature to remove this charge, it appears to me reasonable that more apt words should have been used than are found either in the Devolution of Estates Act, or section 5 of ch. 18 of 54 Vic. (O.).

The words "not specifically charged thereon," may be construed to mean, "by execution or otherwise;" and if that is the proper construction, the purchaser here is right in objecting to the title proposed, unless these executions are removed.

The question is not free from doubt, but I do not feel at liberty to destroy the security which these execution creditors have by virtue of their *fi. fa.'s* against lands and handing them over to the administrators for payment of their claims. In this case, there would be no risk; but there may be instances where through the insufficiency of the security given by the administrators the creditors would be deprived of their claim, which was secured up to the time of the death of the debtor, through a devastavit or otherwise.

Under these circumstances, I cannot see my way to declaring that a deed from the administrators of the lands in question, to these purchasers, will vest in the latter a good title to the lands freed from any lien or charge thereon in respect of said executions. The costs of the application should be paid by the vendors.

G. A. B.

[CHANCERY DIVISION.]

NASON V. ARMSTRONG ET AL.

Will—Defeasible fee—Sale of land—Condition of sale—Good title—Time within which to raise objection—Specific performance—Costs.

A testatrix devised separate lots of land to each of her two daughters, A. and B., and then provided that if "either of my daughters die without lawful issue, the part and portion of the deceased shall revert to the surviving daughter, and in case of both dying without issue, then I authorize" * * naming her executors and other living persons to subdivide the estate among her relatives as they should deem right and equitable. B. conveyed the lot devised to her to a purchaser through whom in B.'s lifetime title was sought to be made:—

Held, that B. only took a defeasible fee simple with a devise over to her sister and her heirs in case B. should die leaving no issue at her death. B. being still alive, it was impossible to say that a conveyance from her passed a good title: *Little* v. *Billings*, 27 Gr. 353, followed.

Ashbridge v. *Ashbridge*, 22 O. R. 146, not followed.

Notwithstanding a condition in an agreement for the sale of land that "the vendee is to examine the title at his own expense, and to have ten days * * for that purpose, and shall be deemed to have waived all objections to title not raised within that time," in the absence of a condition that he shall take a bad title, the vendee is entitled to have a good title; and at any time before conveyance to shew that the vendor cannot make any title to the property in question.

Under the circumstances of this case, it was held that the vendee had not, by his conduct and delay, waived his right to object to the title, but as he had not raised the objection in the proper manner at the proper time, he was allowed no costs of his action.

Statement. THIS was an action brought by Joseph Nason against James Armstrong and John J. Cook, tried at Osgoode Hall, on September 9th, 1892, before STREET, J., without a jury, having been adjourned there from the Toronto Summer Assizes.

The plaintiff asked for specific performance of a contract, dated 22nd March, 1889, between him and the defendants for the sale by the latter to him of lots nine and ten, south side of Gerrard street east, in the city of Toronto, according to plan No. 907, and for a declaration that the defendants should pay off certain charges upon the property for local improvements; and that in case it should be found that the defendants could not make a good title, they might be ordered to repay to him certain sums paid by way of purchase money.

Statement.

The defendants answered that they were ready to pay the local improvement charges, and that they had answered sufficiently all requisitions as to title made by the plaintiff, or that he had waived answers to them. To this the plaintiff replied, specially denying that the requisitions had been answered or waived, and alleging that the defendants had no title to the property and could not make out a good title.

E. D. Armour, Q. C., for the plaintiff. The purchaser has the right at any time before the sale is closed to shew that the vendor has no title when the objection goes to the root of the title: *Denison* v. *Fuller*, 10 Gr. 498; *Warren* v. *Richardson*, Younge 1; *Want* v. *Stallibrass*, L. R. 8 Ex. 175; *Saxby* v. *Thomas*, 63 L. T. N. S. 695; *Re Thompson to Curzon*, 52 L. T. N. S. 498; *Brown* v. *Pears*, 12 P. R. 396; *Waddell* v. *Wolfe*, L. R. 9 Q. B. at p. 521; *Harnett* v. *Baker*, L. R. 20 Eq. at p. 55. The defendants have not complied with the plaintiff's requisition to furnish the evidence, and having been guilty of delay cannot hold the purchaser strictly to his contract. There was no waiver on the part of the purchaser. Waiver is a question of intention, and he has always insisted on his rights. The devisee under the will of Anne Peterson only took a conditional estate in fee: *Re Thomas MacNabb*, 1 O. R. 94; *Ashbridge* v. *Ashbridge*, 22 O. R. 146. The failure of issue intended is not an indefinite failure, but was intended to be a failure on the death of the devisee, because on the failure a living person named in the will is to co-operate with the executors in dividing the estate: *Greenwood* v. *Verdon*, 1 K. & J. 74; *Re Rye's Settlement*, 10 Ha. at p. 112; 2 Jarman on Wills, 4th ed., 511 and 519.

Moss, Q. C., and *J. A. Macdonald*, for the defendants. The objection now urged was not taken in the requisitions on title, and it is too late: *Imperial Bank of Canada* v. *Metcalfe*, 11 O. R. 467; *Robinson* v. *Harris*, 21 O. R. at p. 52. The plaintiff has waived his objection; he was put to his election on October 22nd, 1889, and he should

Argument. have elected to rescind then, when the property was saleable, which is not the case now. And his not doing so, and his subsequent conduct was an election to take such title as the defendants had. The payments made by the plaintiff on the purchase operated as a waiver: *Margravine of Anspack* v. *Noel*, 1 Madd. 310; *In re Gloag and Miller's Contract*, 23 Ch. D. 320. As to what estate the devisee took under the will, see *Little* v. *Billings*, 27 Gr. 353; *Gray* v. *Richford*, 2 S. C. R. 431; *Travers* v. *Gustin*, 20 Gr. 106; Theobald on Wills, 3rd ed., 302.

Armour, Q. C., in reply, referred to *McIntosh* v. *Rogers*, 14 O. R. 97.

September 24th, 1892. STREET, J.:—

The plaintiff's objections to the defendants' title were narrowed down to the single question arising under the will of Anne Peterson, dated 29th September, 1863, through which they claimed. The material portions of this will are the 3rd, 4th, and 5th paragraphs, which are as follows:

"3rd. I bequeath to my older and well beloved daughter Anne Peterson the north half of lot number 11, with houses and appurtenances situate on the east side of Clifford street, being in the first concession from the bay of lake Ontario, and situated in the township of York.

4th. I bequeath to my younger and also beloved daughter Bridget Peterson, the south half of lot number 11, situate as above mentioned, which lot entirely contains 5 acres, the same being more or less.

5th. I will and order my executors to oblige my daughter Anne to pay the sum of fifty pounds of the lawful currency of Canada to my daughter Bridget, in the 22nd year of her age, in consideration of improvements now made on said property, or rather that the sum of fifty pounds be paid in five annual instalments of ten pounds each year until the whole sum be paid, the first instalment to be paid to Bridget in the 22nd year of her age as above

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Street, J.

mentioned, and be it understood that if either of my daughters die without lawful issue, the part and portion of the deceased shall revert to the surviving daughter, and in the case of both dying without issue, then I authorize my executors, with the pastor of St. Paul's Church, and my brother Michael Murnan, to subdivide the estate amongst my relatives, as those gentlemen whom I have appointed for that purpose may deem right and equitable in their prudence, justice and charity."

Bridget Peterson named in the will became Bridget Sherwood, and conveyed to Henry Callender on 17th June, 1879, the property devised to her by the will, of which the land in question formed part.

The plaintiff's fourth requisition was as follows:

"Required evidence that the Bridget Sherwood who conveyed to Henry Callender, etc., etc., is the same person as Bridget Peterson, a devisee under the will of Anne Peterson, etc., and that she has had lawful issue prior to 17th June, 1879."

This requisition does not specifically raise the objection now urged, which is that the estate taken by Bridget Peterson under the will was a conditional fee; the condition being that she should have issue surviving her. It was admitted that she is still living. On the part of the defendants it is contended that she took an estate tail which was converted into an estate in fee simple by her conveyance of 17th June, 1879.

The devise contained in the 4th paragraph of the will standing alone would no doubt have passed an unconditional estate in fee simple to Bridget Peterson, C. S. U. C. cap. 82, sec. 12. The general rule is equally clear, that under the law as it existed at the date of this will such a devise followed by a devise over in case the first taker should die without issue, would give an estate tail only to the first taker, unless the context shew that the failure of issue intended is a restricted and not an indefinite failure.

The contention of the plaintiff here is that the context shews that the failure of issue contemplated by the testa-

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trix was one which should take place, if at all, at the death of the first taker: first, because of the provision that if either devisee should die without issue, her share should go to the surviving daughter: second, because the devise over is to the relatives in shares to be fixed by persons of whom one was a named living person.

In *Little* v. *Billings*, 27 Gr. 353, decided by Proudfoot, V. C., in 1880, a question came up which I am unable to distinguish from the present, so far as the first ground above mentioned is concerned. There a testator had given to his son Robert eighty-six acres of land, and to his son John fifty acres of land, by a devise made in 1858, in terms which would have carried the fee simple absolute to each son had there been no more; he added, however, "Should either of my two sons, Robert and John, die without issue, I wish that their shares should be divided equally among my surviving children." The learned Vice-Chancellor held, after fully considering the authorities, that the sons took estates tail. The ground upon which this decision is based is one well recognized and established by line of authorities, namely, that a transmissible and not a mere personal interest passed by the devise over: *Massey* v. *Hudson*, 2 Mer. at p. 134; *Barlow* v. *Salter*, 17 Ves. 479; *Wilson* v. *Chestnut*, 1 Ir. Rep. Eq. 559, at p. 566; *Hughes* v. *Sayer*, 1 P. Wms. 534; *Roe de Sheers* v. *Jeffery*, 7 T. R. 589; 2 Jarman on Wills, 5th Am. ed. (1881) by Bigelow, 511, 512; *Taylor* v. *Walker*, 11 Jur N. S. 723.

The only decision which appears to conflict with these authorities is that of *Ashbridge* v. *Ashbridge*, 22 O. R. 146. There a testator died in 1845, and by his will devised a farm to his two sons, without words of limitation, to be equally divided between them, adding: "And in case either of my sons should die without lawful issue of their bodies, then his share to go to the remaining survivor." It was held by the Chancellor that each devisee took a defeasible fee followed by an executory devise over in case the event should happen. Unless the word "remaining" is to be taken as distinguishing this case from those to which I

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Street, J.

have referred, it appears to be in conflict with them. With that degree of hesitation which I must naturally feel in venturing to differ from so high an authority, I am unable to follow the distinction drawn by the Chancellor in *Ashbridge* v. *Ashbridge*, and in so far as the present case depends upon the construction to be placed upon the words "the surviving daughter," I follow *Little* v. *Billings* in preference to *Ashbridge* v. *Ashbridge*.

The further context here, however, seems to me conclusive in favour of the plaintiff's contention. The devise over is subject to a discretion to be exercised by the pastor of St. Paul's church, the testator's brother, Michael Murnan, and her executors as to the shares in which the relatives are to take. It was plainly contemplated that this discretion should be personally exercised by the persons named, and that circumstance I think is sufficient upon the authorities to shew that a failure of issue during the lives of the daughters of the testatrix was what she intended: *Re Chisholm*, 17 Gr. 403; *Chisholm* v. *Emery*, 18 Gr. 467; *Doe d. Smith* v. *Webber*, 1 B. & Ald. 713; 2 Jarman on Wills, 5th Am. ed. (1881), by Bigelow, 525, 526.

I am, therefore, of opinion, that Bridget Peterson took a defeasible fee with a devise over to Anne Peterson and her heirs in case Bridget should die leaving no issue living at her death. Bridget is still alive, and it is impossible to say that the conveyance from her to Callender passed a good title.

The defendants, the vendors, however, contend that the plaintiff is debarred by the terms of the agreement of sale from raising this objection at the present time.

By the agreement, the vendors agree to convey the said lots to the purchaser by a good and sufficient deed when half the purchase money is paid, and to take a mortgage for the balance. "The vendee to examine the title at his own expense, and to have ten days from the date hereof for that purpose, and shall be deemed to have waived all objections to title not raised within that time; and should any valid objection to the title be raised that the said

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Street, J.

vendors cannot or are unwilling to remove, they shall cancel this agreement and return the money paid. The vendors not to furnish abstract of title, title deeds, or copies thereof, or any evidences of title other than those in their own possession."

The plaintiff delivered requisitions within ten days from the date of the agreement; the fourth requisition which I have quoted above, is the only one which refers in any way to the objection now urged. The rule seems to be that in the absence of an express condition that the purchaser shall take a bad title, he is entitled to a good one; and in the absence of such a condition he is entitled at any time before conveyance to shew that the vendor is unable to do that which is the very foundation of the contract, namely, to convey to him the land which he has agreed to purchase. The ordinary conditions of sale are based upon the supposition that the vendor has a title to the property which is the subject of the contract, and are only applicable to that state of things. If the purchaser can shew that the vendor has no title to that which he professes to sell, and cannot procure one, the conditions of sale cease to be applicable.

In the present case, the objection now urged does not appear to have been properly or formally raised until long after the expiration of the time fixed by the contract, perhaps not until the trial. But the plaintiff has shewn in my opinion, that the defendants have no title to the land in question, and I think he is not precluded by the conditions from shewing the fact even at that late date: *Denison* v. *Fuller*, 10 Gr. 498; *Want* v. *Stallibrass*, L. R. 8 Ex. 175; *Saxby* v. *Thomas*, 63 L. T. N. S. 695.

The defendants further contend that the plaintiff by his acts and his laches has waived his right to call for a good title, and must be taken to have accepted the title as he found it. It is shewn that he continued to make the quarterly payments of principal and interest called for by the agreement after delivering his requisitions, and after an offer by the defendants to cancel the agreement if he

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Street, J.

thought his objections had not been satisfactorily answered. This coupled with the fact that the property was of a speculative and fluctuating character, and that the purchaser had delayed for a year and a-half after the defendants' offer to cancel the agreement before urging any further objection, and that the property had seriously declined in value in the interval, would under other circumstances have made a strong case of waiver. Here, however, the time had not arrived which was fixed by the contract for the making of the conveyance, and the purchaser may have considered himself as not bound until that time had come to elect whether to take the title or not; the vendor took no steps to have a distinct acceptance of his title or to cancel the contract, as the agreement entitled him to do, and the matter was simply left in abeyance by both parties. The real difficulty in the title does not appear to have presented itself to the mind of the plaintiff or his advisers until June, 1891, immediately before the commencement of this action, and more than two years after the making of the contract.

The question of waiver is always one of intention to be gathered from the circumstances of each case; and I cannot find in those surrounding this one any evidence at all conclusive shewing that the plaintiff with his eyes open elected to accept a bad title. In the absence of that evidence I think the cases shew that I should not hold the plaintiff bound to accept such a title: *Warren* v. *Richardson*, Younge 1; *Blackford* v. *Kirkpatrick*, 6 Beav. 232; Fry on Specific Performance, 3rd ed., 1892, ph. 1356.

With regard to costs I think the plaintiff would have been entitled to them had he specifically stated upon his pleadings or even before action in any thing like precise terms the objection upon which the case has turned. He says that on 19th June, 1891, eight days before action, and twenty-seven months after his contract was entered into, he saw the defendants and told them that he wanted his deed, and that they should make the title good; that he didn't think Bridget Sherwood had power to convey. In

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Street, J.

his reply to the statement of defence he says that, "even if he has waived the answering of certain requisitions the defendants have no title to the lands in question, and cannot make out a good title to the plaintiff."

His action is one asking for specific performance of the contract or for a rescission. The defendants have therefore, in consequence of the plaintiff's uncertain and slipshod methods, had no opportunity offered them of doing that which the contract entitled them to do, namely, of electing to cancel the agreement in case any objection should be raised to the title which they were unable or unwilling to remove.

The judgment will therefore go for a rescission of the contract and repayment of the money paid on account of it, but without costs.

G. A. B.

[CHANCERY DIVISION.]

RE RATHBONE AND WHITE.

Vendor and purchaser—Conveyance by all parties interested during life of life tenant—Title—R. S. O. ch. 112.

A testator devised his lands to executors and trustees, to lease and pay the amount received to his widow for life, and after her death to sell and divide the proceeds between two sons. One of the sons sold and conveyed all his interest to his brother's wife. During the lifetime of the widow the trustees, the widow, and the remaining son and his wife, all being *sui juris*, conveyed by way of exchange all their interests to a purchaser :—

Held, that the grantee claiming through that conveyance could make a good title.

Statement.

THIS was an application under the Vendor and Purchaser Act, R. S. O. ch. 112, in which the vendor Charles S. Rathbone was the petitioner, and Alfred White the purchaser was the respondent.

The petition set out that one William Abbs, deceased, a former owner, had devised the property in question to two trustees and executors to lease the same, and pay all the rent received to his widow Elizabeth Abbs as long as she lived, and after her death to sell it, and divide the proceeds equally between his two sons Edward Abbs and Robert Abbs; that Robert Abbs had conveyed all his interest to Annie, the wife of Edward Abbs; that the petitioner Charles S. Rathbone acquired title under a conveyance in which the two trustees and executors, Annie Abbs as grantee from Robert Abbs, the son, Edward Abbs, and the widow, Elizabeth Abbs, all joined and conveyed all their interests, all being *sui juris*; that this deed was objected to on the ground that the power of sale to the trustees and executors did not arise until after the death of the life tenant, the widow; and that the transaction was not a sale but an exchange,* which latter would be a breach of trust. Statement.

The petition was argued on 23rd November, 1892, before BOYD, C.

F. E. Hodgins, appeared for the petitioner.

T. C. Thomson, for the purchaser, was called on by the Court. The vendor cannot make title as he took the property subject to the trusts in the will. In no case will the Court enforce the specific performance of a contract which involves a breach of trust: Lewin on Trusts, 9th ed., p. 468, and cases there collected. The trustees had no power to sell during the widow's lifetime: *Blacklow* v. *Laws*, 2 Ha. 40; *Mosley* v. *Hide*, 17 Q. B. 91; *Johnstone* v. *Baber*, 8 Beav. 233; *Want* v. *Stallibrass*, L. R. 8 Ex. 175; *Swaine* v. *Denby*, 14 Ch. D. 326; *In re Bryant and Barningham's Contract*, 44 Ch. D. 218; *In re Head's Trustees and Macdonald*, 45 Ch. D. 310; *Taylor* v. *Plumer*, 3 M. & S., at p. 574; *Hawkins* v. *Chappel*, 1 Atk., at p. 623.

Hodgins in reply. Rathbone acquired a good title. All interested in the property have conveyed to him. I refer to *Givins* v. *Darvill*, 27 Gr. 502; *Truell* v. *Tysson*, 21 Beav. 437. There is power to exchange as well as to sell:

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* The bargain was an exchange of another property for the one in question.—REP.

Argument. *Smith* v. *Spears*, 22 O. R. 286. In *Blacklow* v. *Laws*, 2 Ha. 40, the beneficiaries objected. *Mosley* v. *Hyde*, 17 Q. B. 91, shews that if all parties are *sui juris* they can convey a good title. See also *Paisley* v. *Wills*, 19 O. R. 303; Lewin on Trusts, 9th ed. 476, 477; *Biggs* v. *Peacock*, 22 Ch. D. 284; *Morris* v. *Debenham*, 2 Ch. D. 540.

November 24, 1892. BOYD, C.:—

The testator gives all his real estate to executors in trust after the death of his wife to sell on time or for cash * * and to divide the proceeds of such real estate equally between his two sons Edward and Robert. This vests the legal estate in the executors as trustees. They, before the death of the widow, with her concurrence and the concurrence of the two sons, being of age, united in an exchange of the property held under the trusts to the present vendor. That title is objected to by the purchaser on the ground that no title passed because the time for exercise of the power of sale had not arrived.

The rule is now established (as against what was held in *Uvedale* v. *Uvedale*, 3 Atk. 117) that on a devise to A. for life, and that after his death the estate shall be sold, that sale cannot be made during his life, but must wait till after his death. See other cases in Sugden on Powers, 8th ed., 266.

Of modern cases holding the same, *Want* v. *Stallibrass* may be referred to, L. R. 8 Ex. 175, wherein the Chief Baron suggests that a good title might be made by the beneficiaries if of age becoming parties to the conveyance.

Commenting on this law it is said by Mr. Farwell, p. 120: "If the tenant for life and the persons entitled to the proceeds of the sale are all *sui juris*, they can of course make a good title; but the power will not in such case come into operation."

To the like effect in Sugden at p. 266 it is said: "Where the parties beneficially entitled are adult, and the fee is devised, a sale may of course be made with

Judgment.

Boyd, C.

their concurrence, during the life of the tenant for life. The purchaser would obtain the legal estate, and the *cestui que trust* would be bound by the sale."

Here, every one interested being of age joins in the conveyance to Rathbone by which he gets a good title, though not by virtue of the exercise of the power. The validity of a conveyance under these conditions was affirmed by Proudfoot, J., in *Givins* v. *Darvill*, 27 Gr. 502, and I agree with its conclusions.

Indirectly, supporting such a result, are the cases of *Leedham* v. *Chawner*, 4 K. & J. 458, and *Blacklow* v. *Laws*, 2 Ha. 40, as mentioned in the first paragraph of the headnote.

There was power with the concurrence of all to dispose of the lands upon an exchange of properties instead of a sale for cash; particularly as the matter was dealt with apart from the power. I discussed the meaning of sale under a power in *Smith* v. *Spears*, 22 O. R. 286.

The defendant, in my opinion, cannot on this ground refuse the title, and he should pay the costs of the petition.

G. A. B.

[CHANCERY DIVISION.]

RE DOUGLAS.

KINSEY V. DOUGLAS.

Will—Gift contained in direction to pay—Postponement of enjoyment—Time of vesting.

A testator by his will directed that his estate should be divided upon his youngest child attaining the age of twenty-one years, the income of the estate in the meantime to be paid to the wife, for the benefit of herself and the children. The only gift was contained in the direction to pay and divide upon the arrival of the period of distribution:—

Held, that the gift vested prior to the enjoyment of the *corpus* of the estate which was only postponed in order to provide for the maintenance of the family:—

Held, also, that the gift vested in each child upon attaining the age of twenty-one, and that no child who did not attain that age was intended to take a share of the *corpus*.

Statement.

THIS was a special case stated for the opinion of the Court as to the construction of the will of Hugh Douglas deceased.

Statement.

The case set out that the testator by his will directed his executors to sell his farm and invest the proceeds for the benefit of his wife and children until all the children came of age, "when my son John Douglas will get one-third of the money, and the balance (two-thirds) of the money will be equally divided with my wife and the remaining children, * * provided always that my son John gets no more than one-third above mentioned."

The testator left a wife and seven children. The widow died without having married again; two of the children died unmarried and without issue, before attaining twenty-one, and five consisting of two sons and three daughters attained twenty-one. The three daughters all married and died, and letters of administration were granted to their estates. The two sons, Hugh Douglas and John Douglas, were the only survivors of the children, and Hugh Douglas (it being admitted that John Douglas could not take more than his one-third under the will), claimed to be entitled to the whole remaining two-thirds as against the representatives of the estates of the deceased sisters.

The case was argued on September 28th, 1892, before BOYD, C.

W. A. G. Bell, for the plaintiff. The property passing under the will vested in the parties on their attaining twenty-one, and so all the representatives of those who attained that age and died are entitled to their respective shares. I refer to *Leeming* v. *Sherratt*, 2 Ha. 14; *Murphy* v. *Murphy*, 20 Gr. 575; *Brocklebank* v. *Johnson*, 20 Beav. 205; *Latta* v. *Lowry*, 11 O. R. 517; *Fox* v. *Fox*, L. R. 19 Eq., 286; *Ryan* v. *Cooley*, 15 A. R. 379.

H. S. Osler, for the defendants (the two brothers). There was no vesting until all the children came of age. There was no gift except in the direction to pay: *Leeming* v. *Sherratt* 2 Ha. 14, imports a highly technical rule as to the construction of wills, and ought not to be followed, as it is not in accord with the more modern cases. The word

Argument.

"remaining," means "remaining alive," when the youngest child attains twenty-one. I refer to *In re Thomas Bartholomew*, 1 McN. & G. 354, at p. 359; *In re Hunter's Trusts*, L. R. 1 Eq. 295.

Bell, in reply.

September 29th, 1892. Boyd, C.

The gift of two-thirds is to the children (other than John, who gets one-third); but the only declaration of gift is in direction to pay—this payment is to be when the youngest child has become of age. The fund meanwhile is to bear interest for the benefit of wife and children.

From these provisions two results flow on the cases; first, the enjoyment of the *corpus* by the children is only postponed in order to give maintenance to the family, and the gift vests before the period of enjoyment; second, no child who does not attain twenty-one is intended by the testator to take the *corpus*, so that the period of vesting is as each child attains twenty-one. The class to take is thus ascertained.

The authorities which conclude these points are *Leeming* v. *Sherratt*, 2 Ha. 14; *Bigelow* v. *Bigelow*, 19 Gr. 549; *Murphy* v. *Murphy*, 20 Gr. 575, and *Cooper* v. *Cooper*, 29 Beav. p. 229. The two-thirds will be equally divided among those (other than John) who attained twenty-one years of age, and to their representatives if now dead. Costs out of this part of the estate.

G. A. B.

[CHANCERY DIVISION.]

RE EDDIE.

Will—Devise—Legacy charged on land—Sale by executors in order to pay the legacy.

A testator devised to his daughter a lot of land charged with a legacy. The daughter predeceased the testator, leaving two children to whom the lot descended.

On an application by the executors at the instance of the Official Guardian, it was:—

Held, that it was the duty of the executors to sell the land and pay the legacy.

Statement. THIS was an application under Con. Rule 1006,* made by an executor at the instance of the Official Guardian.

One Alexander Eddie, who died on October 21st, 1890, had charged a lot of land devised to a daughter with the payment of a legacy to another daughter, in the following words: "I devise unto my daughter, Ester McBean, the wife of John McBean, her heirs and assigns, lot * * and I direct Ester McBean to pay to my daughter, Jane Currie, the wife of Robert Currie, the sum of fifty dollars within one year after my decease."

The devisee, Ester McBean, predeceased the testator, leaving two children to whom the lot descended.

The executors proposed to sell the lot in order to pay the legacy, but the Official Guardian declined to consent to the sale without the approval of a Judge in Chambers.

The matter came up in Chambers on September 26th, 1892, before BOYD, C.

Middleton appeared for the executor and asked for a direction.

J. Hoskin, Q. C., the Official Guardian appeared for the infants.

BOYD, C.—I think it is the duty of the executors to sell the land and pay the legacy out of the proceeds, and I make the direction necessary for that purpose.

G. A. B.

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* Con. Rule 1006. The Official Guardian or other officer aforesaid, or any person interested in the real estate, or in the proceeds of the sale thereof, may apply in a summary manner to a Judge in Chambers, upon notice to all parties concerned, or to such persons as the Judge may direct, for such direction or order touching the real estate and the proceeds thereof or the costs of the proceedings as to the Judge may seem meet.

[QUEEN'S BENCH DIVISION.]

MURRAY ET AL. V. MACDONALD.

Life insurance—Policy—Construction of—Money payable to "children"—Representative of deceased child—Exclusion of grandchildren.

By a policy of life insurance the insurers agreed to pay the amount of the insurance, after the death of the insured, to his wife, or her legal representatives; or, if she should not then be living, to her children, or to their guardian if under age. The wife predeceased the insured. Two of her children died before her, one of them leaving a child:—*Held*, that only the children who survived the wife were entitled to share in the insurance moneys payable under the policy.

Statement.

ON the 20th June, 1874, the late William Allan Murray insured his life in the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, for the sum of $10,000. The material part of the policy was as follows:—

"The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, in consideration of the representations, * * and of the annual premium, * * do hereby insure the life of William A. Murray (the insured) of Toronto, county of York and Dominion of Canada, for the term of his natural life, in the sum of $10,000 in gold or its equivalent, for the sole use or benefit of Jane Murray, (the assured) wife of the said insured; the said sum insured to be paid at the office of the company in Hartford, Connecticut, to the said assured, or her legal representatives, within ninety days after due notice and satisfactory evidence of the death of the said insured, during the continuance of this policy; or, if the said assured be not then living, the said sum insured shall be paid as above to her children, or to their guardian if under age."

Mrs. Jane Murray referred to in the policy, died on the 19th September, 1889, and left her surviving five children, who were the plaintiffs in this action. Two of her children predeceased her, one without issue, and the other, the wife of Hugh John Macdonald, (formerly Mary Murray) leaving one child, Isabella Macdonald, the present defendant.

Statement.

William Allan Murray died on or about the 7th September, 1891, and his will was proved by three of the plaintiffs, his executors and trustees, on or about the 25th September, 1891.

The will and codicil did not affect the matters in question in this action.

Doubts having arisen as to the parties entitled to share in the insurance money payable under the above-mentioned policy, the plaintiffs brought this, a friendly action, asking for an interpretation of the policy and a declaration as to the parties and their rights to the insurance moneys arising under the policy.

The question for determination was whether only the children who survived Mrs. Jane Murray were entitled to any interest in the insurance moneys, or whether the issue or representative of the married daughter who predeceased her mother, was entitled to share in such moneys.

The facts were all admitted as above, and the action came on for hearing before FALCONBRIDGE J., by way of motion for judgment upon the pleadings on the 10th June, 1892.

Bain, Q. C., for the plaintiffs. The question is not whether "children" includes grandchildren, but whether in this case the grandchild represents the child. This is not a testamentary instrument, but a deed of settlement, and is to be construed strictly: Porter on Insurance, Bl. ed., *p. 336; *In re Dixon's Trusts*, Ir. R. 4 Eq. 1; Hawkins on Wills, pp. 84, 85; *Morgan* v. *Thomas*, 9 Q. B. D. 643; Elphinstone on the Interpretation of Deeds, pp. 318, 325; *Re Heath's Settlement*, 23 Beav. 193; *Re Denis' Trusts*, Ir. R. 10 Eq. 81; *Russell* v. *Russell*, 64 Ala. 500.

Marsh, Q. C., for the defendant. The instrument is *sui generis*; it is neither a will nor a settlement. *Wyth* v. *Blackman*, 1 Ves. Sr. 196, collects the cases, and shews that *primâ facie* "children" means children, but that very little will turn the scale and make it include grandchildren.

Argument.

The Wills Act, R. S. O. ch. 109, sec. 36, makes "children" include grandchildren as regards wills. This instrument is quasi-testamentary, and the Court may well apply the same construction as in the case of wills.

Bain, in reply. This is a post-nuptial settlement of a fund. It has in it none of the incidents of a will. There is no legacy duty; and the fund is not applicable to payment of the debts of the testator.

December 5, 1892. FALCONBRIDGE, J.:—(after stating the facts as above)—

I have long delayed the giving of judgment in this case, hoping that the parties might be able to arrive at an amicable settlement. But I have been given to understand that, whilst the suit is entirely a friendly one, the parties desire is that their strict legal rights should be ascertained, and I now proceed to define them.

In the case of a will it is perfectly settled that a gift to the "children" of a person does not include grandchildren: *Radcliffe* v. *Buckley*, 10 Ves. 195; *Pride* v. *Fooks*, 3 DeG. & J. 252. "The word 'children' has, both in law and common parlance, only one meaning, though you may by a context shew it is improperly used; that it is written by mistake for descendants or something else:" per Jessel, M. R., in *Morgan* v. *Thomas*, 9 Q. B. D. at p. 646.

It does not seem to advance the defendant's case, if we regard the policy not as a testamentary instrument, but as a deed of settlement, or as something intermediate between a will and a settlement: Porter on Insurance, Bl. ed., p. *336; *In re Dixon's Trusts*, Ir. R. 4 Eq. at p. 12; Elphinstone on the Interpretation of Deeds, Bl. ed., pp. *318, *325; *Re Denis' Trusts*, Ir. R. 10 Eq. 81.

The provisions of R. S. O. ch. 109, sec. 36, and of R. S. O. ch. 136, are not applicable, and no assistance can be derived from them.

The exact point was decided in the Supreme Court of

Judgment.

Falconbridge, J.

Alabama, in a case of *Russell* v. *Russell*, reported 64 Ala. 500.

The judgment will be that only the children who survived the late Mrs. Murray are entitled to any interest in the policy, and they are absolutely and beneficially entitled to all the insurance money payable under said policy.

Costs to all parties out of the estate of Mr. W. A. Murray.

[CHANCERY DIVISION.]

RE VANSICKLE AND MOORE.

Trusts and trustees—Power of sale—Prior incumbrance—Power to mortgage, to pay off.

Held, that trustees of real estate with a power of sale had power to mortgage for the purpose of paying a part of a prior incumbrance thereon with a view to saving the property from foreclosure.

Statement.

THIS was an application under the Vendor and Purchaser Act R. S. O. ch. 112, in which John Thomas Moore, the purchaser, was the petitioner, and William D. Vansickle, the vendor, was the respondent.

The petition set out that the property in question had been conveyed by Kate Wilkinson Campbell and Donald Campbell to trustees, to secure the payment of certain promissory notes given by Donald Campbell to his creditors. The conveyance was made upon trust that in case the said Campbell should, with the approval of the trustees, make a sale of the property prior to the maturity of any of the notes, the trustees were to convey the lands and retain the proceeds to meet the notes, and if after the maturity of the notes any of them should be dishonoured, then the trustees were to sell and convey the lands and apply the proceeds in payment thereof, and after all the

Statement.

notes, costs, etc., were paid, to account to Kate Campbell for the balance.

At the time of the making of the trust deed the property was subject to a mortgage for $10,000, upon which foreclosure proceedings were subsequently taken; and two days before the expiry of the time for redemption, the trustees borrowed money from the vendor, William D. Vansickle, giving a mortgage upon the property, and applied the proceeds in reduction of the first mortgage debt, and in this way succeeded in postponing the threatened foreclosure. When the mortgage to Vansickle matured, the trustees were unable to pay it, and Vansickle foreclosed it and took the property.

On Vansickle attempting to make title through his mortgage and foreclosure proceedings it was contended that although the trustees had power to sell, they had no power to mortgage.

The petition was argued on November 9th, 1892, before Robertson, J.

F. A. Eddis, for the petitioner. The vendor is a mortgagee from the trustees who has foreclosed his mortgage. The trustees had power to sell, but no power to mortgage is given by the trust deed to them.

A. Elliot, for the vendor. The trust estate was in danger of being lost altogether, and although the trust deed does not give the trustees definite power to mortgage, they had it by implication to save the estate. Notwithstanding their action did not ultimately save the estate, still the result might have been to save it, and what was done was in the interest of the estate and all parties interested. I refer to *Ball* v. *Harris*, 4 My. & Cr. 264, and *Stroughill* v. *Anstey* 1 D. M. & G. at p. 642.

November 16, 1892. Robertson, J.

It is clear that if the arrangement referred to in the petition had not been made, the equity of redemp-

Judgment.

Robertson, J.

tion would have been foreclosed, and the trustees would thereby have been deprived of their right to sell in furtherance of the trusts. The borrowing the $4,500 from Vansickle was in the interest of the estate; it, however, had the effect only of staving off the evil day; but those entitled to the residue, after paying off the incumbrances, subject to which the deed in trust was executed, and the promissory notes, to secure the payment of which the deed in trust was given, are in no worse plight now than they would have been had the $4,500 not been borrowed.

Taking into account the peculiar circumstances of the case, I think the trustees were justified in mortgaging, and that in order to save the estate, it was right for them to do so, and that they had power for that purpose.

Under the authority of *Ball* v. *Harris*, 4 My. & Cr. 264, they might have borrowed on the security of the estate money sufficient to pay off the promissory notes, as that would be a conditional sale; although in *Stroughill* v. *Anstey*, 1 D. M. & G. at p. 642, it was held that a trust "to sell out and out," did not imply a power to mortgage. But here the object was *bonâ fide* to preserve the estate. It is true the good intention has not resulted satisfactorily, but that is no reason why the act should not be considered binding. I think on the whole that the vendor, with the assistance of the trustees can make a good title. I make no order as to costs.

G. A. B.

[CHANCERY DIVISION.]

RE McDOWELL
AND
THE CORPORATION OF THE TOWN OF PALMERSTON.

Constitutional law—Change of ownership of land by statute—Power of Local Legislature—48 Vic. ch. 92 (O.).

So far as abstract competence is concerned the Ontario Legislature has power to change the ownership of land within the Province with or without compensation.

Land which had been dedicated by its owner for a public burying ground was used for many years for such purpose. The municipality in which the ground was situate procured an Act of the Ontario Legislature authorizing the closing of the burial ground, and the removal of the dead, thereafter vesting the land in the corporation; the Act providing for compensation for all parties likely to be affected by the carrying out of its provisions, and for payment of the value of the lot to the dedicator or those claiming under him to be fixed by arbitration:—

Held, that the Act was within the competence of the Legislature.

Statement. THIS was a motion to set aside an award made under the provisions of sec. 4 of 48 Vic. ch. 92 (O.), "An Act respecting the old Cemetery in the Town of Palmerston."

It appeared that an arbitration had been held and an award made* by which the value of the cemetery in question was fixed at $300, but as the expenses of the corporation in obtaining the Act of the Legislature providing for the closing of the cemetery and in removing the remains interred were greater than that sum, the arbitrators had not found anything due to the representatives of McDowell, the original owner and dedicator of the land, to whom by the Act compensation was made payable.

The motion was argued on September 28th, 1892, before BOYD, C.

A. M. Clark, for the motion. The statute 48 Vic. ch. 92 (O.), is *ultra vires* of the Ontario Legislature. It was pro-

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* This award was made by A. C. Chadwick, a junior County Judge, and A. M. McKinnon, a barrister, the third arbitrator not joining in it.—REP.

Argument. cured by the corporation of the town of Palmerston in the absence of any one to represent McDowell. His interests were not protected and great burdens, such as costs of the Act, of removing remains, etc., were put upon him. No confiscation should be presumed: Maxwell on the Interpretation of Statutes, 2nd ed., 346. The Act should be construed strictly and against the corporation: Maxwell 348. The value of the land should be taken as at the time of the passing of the Act, not as at the time of the arbitration: *Prittie* v. *The Corporation of the City of Toronto*, 19 A. R. 503. The land should revert to the original owner: *Jessup* v. *Grand Trunk R. W. Co.*, 7 A. R. 128; *Re Trent Valley Canal*, 11 O. R. 687. The evidence shows the land should have been valued higher than the arbitrators valued it.

Guthrie, Q. C., and *Hoyles*, Q. C., contra. The Act was a necessity, and the Legislature was asked to interfere, as the cemetery was a nuisance with no one to look after it. The arbitration was started by the applicant who was claiming a benefit under it, and now seeks to repudiate it. The expense of the Act and the removal of the bodies was a proper charge and condition to make against the value of the land. The statute is not *ultra vires*: *Kennedy* v. *The Corporation of the City of Toronto*, 12 O. R. 211, and if it was, it must be attacked directly, and not in this proceeding only.

Clark, in reply.

October 4, 1892. BOYD, C.:—

The statute respecting the old cemetery at Palmerston is attacked, 48 Vic. ch. 92 (O.), on the ground of its being *ultra vires*, because it is said the owner is deprived of his land without proper compensation.

The Act deals with land in Ontario, and the Legislature had power (so far as abstract competence is concerned) to change the ownership and that without making any compensation. The expediency and the justice of such legislation is another matter. As to the right, I cannot improve

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upon the emphatic utterance in 1854 of a Lower Canada Judge on the like constitutional question arising under the Imperial Act 3 & 4 Vic. ch. 35, by which the Provincial Parliament was established.

Mr. Justice Day said: "What then are the powers of Parliament? To make laws for the peace, welfare and good government of the Province. Who is to judge of what legislation is for the good government of the Province, and what not? This Court cannot do so. Almost every statute interferes more or less with vested rights; but wherever a general discretion is given to any body to legislate for the peace, welfare and good government of those subjected to their rule, that body necessarily becomes the judge of what is for the peace, welfare and good government of its subjects. The powers of legislation of the Provincial Parliament are as extensive as those of the Imperial Parliament, while they keep within the limits fixed by that statute, even if they were to interfere with *Magna Charta": Ex p. Ira Gould*, 2 Matthieu, Rev. Reports, at p. 378.

Such also is the position of the Province under Confederation. The latest conclusive judicial deliverance on this is to be found in the judgment of Lord Watson, speaking for the Judicial Committee of the Privy Council in a New Brunswick appeal: *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick* [1892], A. C. 437. This case sets at rest many moot points, particularly as to the status of the Lieutenant-Governor; declaring him to be the representative of Her Majesty for all purposes of Provincial Government, and deciding that the Province has powers of legislation within the limits assigned by section 92 of the Act of 1867, which are exclusive and supreme.

The subject dealt with in the present statute is to change an old, disused and dismantled cemetery into property available for public purposes of the town. To this end the remains of the dead were to be disinterred, removed to the ground of the new cemetery, and there suitably and decently

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reinterred at the cost of the municipal corporation. The preamble of the statute shows that this was a desirable change.

To accomplish such a scheme by the disturbance of the dead necessitated the intervention of the Legislature. Because no private person and no combination of private persons, whether relatives of the deceased or not, could agree to divest the old burial ground of its distinctive character, or to change the site of the graves. McDowell, the original owner, had dedicated this acre of land some fifty years ago for a public burying ground, and whether it ceased to be used for such purpose or not, after the lapse of half a century, and after the scores of burials which had been made there, he or his could never have had any beneficial use of it: *Regina* v. *Twiss*, 10 B. & S. 298; *S. C.*, L. R. 4 Q. B. 407; *Beaty* v. *Kurtz*, 2 Peters (S. C.) 566; *Re Cremation of Dixon*, 8 Times L. R. 744.

This Act, however, provides adequate compensation for all parties likely to be affected by the carrying out of its provisions: (1) To the trustees acting under the instrument of dedication for improvements made by them; (2) to the relatives of the dead in respect of any reasonable expenses incurred in the removal of the remains, and (3) to the original owner and his representatives in respect of the value of land. But it is obvious that he should not get the value of the land irrespective of the outlay made and to be made by the municipality. The town of Palmerston had to be at the expense of procuring the passage of the statute—a necessary expense which would fall equally on the first owner had he been the applicant; and also to pay the expenses connected with the removal of the dead—expenses which would equally have fallen upon the first owner had he been permitted to resume possession of the plot as a piece of private property: for this could only have been after providing for some other disposition of the remains which in law form part of the soil.

The Act therefore justly provides that the amount of McDowell's compensation shall be subject to deduction so

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that the expenses of legislation and reinterment, etc., shall be set against the value of the land. It was assumed during argument that the value of the land in 1885 (the date of the Act) was the matter to be ascertained. That is much more favourable to the original owner than to cast him back to its value at the time of the dedication, for that would be a very small matter. The arbitrators find that the value of the land in 1885 was $300, and that the expenses of the corporation were greater than this, so that nothing is allowed to McDowell. The expenses of the corporation were: for legislation, $224, and for opening graves, removing bodies, supplying coffins, and labour, some $250. The appeal on questions of fact resolves itself into the true value of the land in question. The stress of complaint is that the place is valuable as a gravel pit, and that the estimate should proceed on that footing.

I have read all the evidence, and the result is, that I agree with the value awarded. As a lot it is not worth as much as $300 I should say. The witnesses called by the appellant do not fix a higher value than has been given. As to the gravel the great preponderance of evidence shews it is worth no more than five cents a yard at the pit; that gravel is plentiful in that neighbourhood, and its existence is not an enhancement of value; and that the gravel has been already pretty well taken out of this lot. The arbitrators are of great experience, and themselves went to view the premises. It would be mischievous to interfere with their award.

When arbitrators assess the value of land on correct legal principles, the Court is reluctant to interfere merely as to the amount awarded, and this is so *à fortiori* where they have gone to view the property in order to assist their judgment: *Gough* v. *The Mayor, etc., of Liverpool*, 8 Times L. R. 247, and affirmed 323.

No case is made out on the ground of surprise, or of the discovery of new evidence.

I have no course open but to dismiss the appeal with costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

RE FORBES V. MICHIGAN CENTRAL RAILWAY COMPANY.

RE MURPHY V. MICHIGAN CENTRAL RAILWAY COMPANY.

Prohibition—Division Court—Judge reserving judgment without naming day—R. S. O. ch. 51, sec. 144—Failure to notify parties of judgment—Prejudice—Waiver.

The County Judge presiding in a Division Court heard two plaints, and, in the presence of the agents for the parties, who made no objection, stated his intention of postponing judgment, but did not name a subsequent day and hour for the delivery thereof, as required by R. S. O. ch. 51, sec. 144. A month later the Judge, without any previous announcement, gave judgment in writing in favour of the plaintiffs, handing it to the agent of the plaintiffs, who delivered it to the clerk of the Division Court. The defendants were not notified by the clerk that judgment had been given till seven weeks later, and till then neither they nor their agent had any knowledge of the judgment. It was then too late to move for a new trial:—

Held, that what had happened was just what sec. 144 was designed to prevent; that the defendants had lost the opportunity of moving for a new trial, and so were prejudiced; and that there had been no such acquiescence in the course taken by the Judge as to deprive them of the right to prohibition.

Judgment of ROSE, J., reversed.

Statement. APPLICATIONS by the defendants in two actions in the 7th Division Court in the county of Kent, for orders prohibiting the junior Judge of the county of Kent, the clerk of the 7th Division Court, and the plaintiffs from further proceeding in the two actions, on the ground that the junior Judge, who tried the actions, reserved his judgment and gave it without naming a day and hour for the delivery thereof, contrary to section 144 of the Division Courts Act, R. S. O. ch. 51.

The actions were tried together before the junior Judge on the 17th February, 1892. The Judge did not hear argument at the conclusion of the evidence, but requested the agents for the parties to hand him memoranda of authorities, and, in the presence of such agents, stated his intention of reserving judgment but did not name a day for giving it. No objection was then made by or on behalf of any of the parties.

Statement.

Memoranda of authorities were handed to the Judge by the agents for the plaintiffs and defendants some time during the month of February, and on the 17th March, 1892, the Judge, without any previous announcement, delivered his judgment in favour of the plaintiffs, handing it to the agent of the plaintiffs, who gave it to the clerk of the Court, who entered it as of the 17th March, but did not notify the defendants thereof till the 10th May following, when he sent the defendants' agent a post-card advising him that judgment had been given. Up to that time the defendants had no knowledge that judgment had been given, and it was then too late to move for a new trial.

The defendants' motion for a prohibition order was argued before Rose, J., in Chambers, on the 21st June, 1892.

D. W. Saunders, for the defendants.
E. D. Armour, Q. C., for the plaintiffs.

June 22, 1892. Rose, J. :—

I think that upon a proper construction of section 144, ch. 51, R. S. O. (1887), the Judge is required, in the event of postponing judgment, to at once, at the hearing, name a subsequent day and hour for the delivery thereof; and that if he did not do so, prohibition will lie if the parties do not by acquiescence or express agreement waive their rights.

In this case the learned Judge, in the presence of the agents for the parties, expressed his intention of postponing judgment, and did not name a day for the delivery thereof.

No objection was then raised, nor indeed was any action taken by the defendant, until after judgment. The defendant took the chances of the judgment being in his favour, and now moves for prohibition, alleging as a ground that

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notice of the judgment did not come until after the time for moving for a new trial had elapsed.

Mr. Saunders very properly and candidly admitted that it was incumbent on the defendants to move promptly. I think there was that acquiescence which prevents success.

The motion must be dismissed with costs.

The defendants appealed to the Queen's Bench Divisional Court, and their appeal was argued before ARMOUR, C. J., and STREET, J., on the 21st November, 1892.

H. Symons, for the defendants.

H. W. Mickle, for the plaintiffs.

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

Judgment was delivered at the close of the argument.

The Court held that what had happened in this case was just what section 144 was specially designed to prevent. The defendants did not hear of the giving of judgment for seven weeks after it was given, and thereby lost the opportunity of moving for a new trial, and so were prejudiced. And that there had been no such acquiescence in the course taken by the Judge as to deprive them of the right to prohibition.

Appeal allowed and order of prohibition granted with costs here and below.

[CHANCERY DIVISION.]

IN RE HUNTER V. PATTERSON.

Trusts and trustees—Appointment of new trustees where estate not in appointor—R. S. O. ch. 110, sec. 4—Vesting of estate in appointees.

Where an appointment of new trustees is duly made under R. S. O., 1887, ch. 110, the legal estate by virtue of section 4, vests in the new trustees so appointed, even though it was not vested in the parties making the appointment.

Statement. THIS was a vendor and purchaser application. It appeared that Alexander Hunter and Charles Patterson as trustees of the will of one George Henry, deceased, had contracted to sell certain lands under the following circumstances.

The said George Henry, who died on December 25th, 1867, by his will appointed Robert Henry and John Ferguson his trustees of the said will, and they purchased the lands in question with moneys belonging to the trust, but caused the conveyance to be taken to Robert Henry alone. Robert Henry died on May 18th, 1882, and John Ferguson died November 10th, 1888, and the latter by his will appointed James C. Stokes and Thomas J. Ferguson his executors, who, by instrument, dated December 12th, 1890, and purporting to be made in pursuance of the Act respecting Trustees and Executors, R. S. O. ch. 110, appointed the present petitioners, Alexander Henry and Charles Patterson, as new trustees of the will of George Henry.

The question arose whether the present petitioners were vested with the legal estate, so that it would pass to the purchaser by their conveyance.

The petition came on for argument on October 5th 1892, before **FERGUSON**, J.

Argument.

J. A. Macdonald, for the petitioners. The trust property was never in John Ferguson, the surviving trustee. But, R. S. O. ch. 110, s. 4, as to the appointment of a new trustee, was sufficient to carry the legal estate: *Re Keeley's Trusts,* 53 L. T. N. S. 487. The bare legal estate descended to the heirs of Robert Henry. Nevertheless, wherever it was it became vested in the new trustees. There is no reported case in point, though our enactment is the same as the English Act of 1881, 44-45 Vict. ch. 41, sec. 34.

Bradford, for the respondent. The statute was not intended to mean that a man could vest in another what he had not himself. Thus the executors of John Ferguson could not make a title, and if they could not, much less could the appointees: *In re Ingleby and Boak, and the Norwich Union Ins. Co.,* 13 L. R. Ir. 327. The construction sought to be put on section 4, renders section 3 useless. Section 4 meant to remedy an ineffectual conveyance by trustees. The power to make any appointment of new trustees, was in the executors of Robert Henry. The whole statute speaks, and section 3 says that the heir shall convey to the said appointees.

Per curiam. The 4th section of R. S. O. ch. 110 applies, and the vendors can make a good title.

A. H. F. L.

[CHANCERY DIVISION.]

FAREWELL V. FAREWELL.

Will — Mortmain — Impure personalty — Legacy to promote temperance legislation — Validity of bequest.

Where a testator bequeathed a sum of money to trustees upon trust "to apply the same in such lawful ways as in their discretion they may deem best in order to promote the adoption by the parliament of the Dominion of Canada of legislation prohibiting totally the manufacture or sale in the Dominion of intoxicating liquor to be used as a beverage, and in order to give practical aid in the enforcement of such legislation when adopted, whether by educating and developing a strong public sentiment in its favour or by other and more direct means, or in such other ways as my trustees shall think best":—

Held, a good charitable legacy, being for a lawful public or general purpose and not contrary to morality or to public policy.

The testator merely sought to promote a desirable change in the law by constitutional means:—

Held, also, that a promissory note payable to the testator collaterally secured by mortgage on land was impure personalty.

Where one of several residuary legatees was also a witness to the will:—

Held, that the will must be read as if the gift to her had been blotted out by the testator and the residuary gift distributed ratably among the other residuary legatees as if she were non-existent.

Statement.

THIS was an action brought by the executors and trustees of the will of Abram Farewell, who died on February 7th, 1888, and whose will was dated July 5th, 1886, to have the rights and interests of the parties to this action, in the estate of the said Abram Farewell, declared. The defendants to the action were the next of kin of Abram Farewell, or parties claiming by assignment from them, and the Foreign Christian Missionary Society of Cincinnati, Ohio.

The will in question, after various bequests and devises, proceeded as follows:—

13. "I give and bequeath the three following charitable legacies, namely:

First: I give and bequeath to the Foreign Christian Missionary Society of Cincinnati, Ohio, a corporation existing under the laws of the State of Ohio, in the United States of America, the sum of $8,000. And I declare that the receipt of the treasurer of the said society shall be a sufficient discharge for the said legacy.

Statement.

Secondly: I give and bequeath to my trustees the sum of $5,000, upon trust to apply the same in such lawful ways as they may deem best, in order to promote Christianity by aiding the Churches of Disciples of Christ in the Province of Ontario, in their evangelistic and home mission work, and with full power to my trustees in carrying out this direction to pay the whole of the last mentioned sum to the Board of Managers of the United Wellington and Ontario Co-operations of Churches of said denomination, or of any similar co-operation of Churches of said denomination in this Province, for all or any of the purposes of said United Co-operations, or of any similar co-operations, and the receipt of the treasurer of such Board of Managers shall be a sufficient discharge therefor, and

Thirdly: I give and bequeath to my trustees the sum of $2,000, upon trust, to apply the same in such lawful ways as in their discretion they may deem best in order to promote the adoption by the Parliament of the Dominion of Canada of legislation prohibiting totally the manufacture or sale in the Dominion of Canada of intoxicating liquor to be used as a beverage, and in order to give practical aid in the enforcement of such legislation when adopted, and whether by educating and developing a strong public sentiment in its favour, or by other and more direct means, or in such other way as my trustees shall think best. And I declare that the three charitable legacies mentioned in this paragraph, numbered 13 of my will, shall be paid exclusively out of such part of my personal estate as may be legally bequeathed for charitable purposes, and in priority to all other payments thereout; and in order to give the fullest possible effect to the said charitable legacies my assets shall be marshalled in their favour. And also, that in case those of my assets legally applicable to the payment of the said charitable legacies shall not be sufficient in amount to pay the whole of them, such assets shall be applied to the payment of said charitable legacies *pro tanto*, in the order in which said charitable legacies are mentioned in this will, beginning with the legacy to the Foreign Christian Missionary Society, who shall have priority to its full amount over the other two of the said charitable legacies."

Statement.

The testator then devised and bequeathed the residue of his estate upon certain trusts.

It appeared from the facts set out in the statement of claim, that the pure personalty forming part of the testator's estate at the time of his decease was insufficient for the payment of the legacy in favour of the Foreign Christian Missionary Society, and that it was claimed by the defendants, the next of kin, that the said legacy should not, nor should any of the three charitable legacies be paid out of moneys of the testator secured by mortgages upon real estate situated in this province, nor out of the real estate owned by the said testator at the time of his decease, though the amount of such mortgage moneys if so applicable would, with the pure personalty, be more than enough to pay the three charitable legacies in full, and that on the marshalling of the assets for the payment of the three charitable legacies as directed by the will, difficult questions had arisen as to which the plaintiffs sought the advice or direction of the Court, as they did also as to whether the amount of certain orders drawn by the testator in his lifetime on one F. L. Fowke for the payment of money to certain parties, which had been duly honoured by Fowke, should be set off *pro tanto*, or credited as payments on account of Fowke's indebtedness to the testator.

Amongst other assets of the testator was a promissory note dated August 18th, 1886, by Alexander Mackie, and collaterally secured by a certain mortgage assigned by Mackie to the testator.

The matter came up on motion for judgment, on September 22nd, 1892, before BOYD, C.

S. H. Blake, Q. C., for the plaintiffs. As to Mackie's debt, it would seem to savour of realty: *Smith* v. *Sopwith*, W. N.

Argument. 1877, p. 208; Tyssen's Law of Charitable Bequests, p. 352; *Parkhurst* v. *Roy*, 27 Gr. 361; 7 A. R. 614.

McLaren, Q. C., for the Foreign Missionary Society of Cincinnati, Ohio. The debts and funeral expenses should be cast upon the realty and impure personalty if need be, so as to leave the pure personalty to this society. Fowke is merely a creditor of the estate, and should be thrown on the impure personalty so as to relieve the other for the society. Mackie's note was pure personalty.

A. H. Marsh, Q. C., for the other defendants, except the defendants Young and Wallace Farewell. Mackie's debt was realty or savoured of realty: Tudor's Law of Charities and Mortmain, 3rd ed., p. 400-2; Tyssen's Law of Charitable Bequests, p. 348. Marshalling should not be enforced so as to override Fowke's payments to the estate made under the three orders. The bequest to promote temperance legislation is not a charitable trust, and is void for uncertainty: *Scott* v. *Brownrigg*, 9 L. R. Ir. 246; *Brown* v. *Yeall*, 7 Ves. 50 *n.*; *Budget* v. *Hulford*, W. N. 1873, p. 175; *Doe* v. *Copestake*, 6 East. 328; *Fowler* v. *Garlike*, 1 Russ. & M. 232; *Buckle* v. *Bristow*, 13 W. R. 68; *Morice* v. *Bishop of Durham*, 9 Ves. 399; 10 *ib.* 521. There is no *cestui que trust* named, *Williams* v. *Kershaw*, 5 C. & F. 111; *In re Jarman's Estate, Leavers* v. *Clayton*, 8 Ch. D. 584. As to Adeline Young, her legacy lapses by reason of her husband being a witness: R. S. O. ch. 109, sec. 17. It must go as if she had died before the testator.

Blake. As to the lapse of Adeline Young's legacy: *In re Coleman and Jarrom*, 4 Ch. D. 165; *Fell* v. *Biddolph*, L. R. 10 C. P. 701, 709. As to the legacy to promote prohibitive legislation, there are trustees, and they have a specific duty: *Whicker* v. *Hume*, 7 H. L. 124; Tyssen's Law of Charitable Bequests, p. 194, 197, 203.

Grierson, for the defendants Young and Wallace Farewell, cited *In re Coleman and Jarrom*, 4 Ch. D. 165; *Young* v. *Davies*, 2 Dr. & Sm. 167; Sweet's Law Dict., p. 598.

Judgment.

Boyd, C.

September 28th, 1892. BOYD, C.:—

Upon the various questions raised in the statement of claim, I deal with those which can be ruled upon without the need of a reference.

1. The promissory note of Mackie collaterally secured by mortgage on land, was at the death of the testator impure personalty within the authorities. Brett, L. J., in *Ashworth* v. *Mun*, 15 Ch. D. at p. 371, says they have gone this length, that although the devise to a charity is in terms of money only, and although the thing which by the devise will come to that charity is money, yet, if in order to effectuate the devise in favour of that charity, it may be necessary to deal with an interest in land of the testator, that devise is within the Statute of Mortmain. The note may have been the primary security, but the debt was collaterally secured by realty, which as collateral was an accessory to the other, and could not in law be separated from it. The payment of the note worked a discharge of the land, so that the charge on the land was linked with this particular asset. The payment of the note, and the discharge of the mortgage by the executors after the testator's death does not affect the character of the claim held by the estate upon the will becoming operative by the death of the testator. The test as to the nature of the asset is to be applied at the death, and is not subject to variation by what happens afterwards. Besides the case cited of *Smith* v. *Sopwith*, I refer to *Lucas* v. *Jones*, L. R. 4 Eq. at p. 76.

2. Upon the language of the will, I hold that the testator has directed that the pure personalty is to be so marshalled as to give priority to the bequest to the Ohio Society; that is to say, the debts, funeral expenses, and other legacies, are to be levied out of the assets other than pure personalty, so as to free this fund from the satisfaction of that preferential charitable legacy: *In re Arnold, Ravenscroft* v. *Workman*, 37 Ch. D. 637.

3. Of the cases cited against the validity of the chari-

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table bequest, *Scott* v. *Brownrigg* is no more than a decision on the meaning of "missionary," and *In re Jarman's Estate, Leavers* v. *Clayton*, 8 Ch. D. 584, decides neatly this, and only this, that if the gift is for charitable and [or] benevolent purposes at the discretion of the trustees—the two cannot be separated to make the gift available only for charitable purposes. The benevolent purpose is not charitable, and so the whole is void for want of being definite. The Court cannot tell how much there is for either purpose, and cannot supervise "benevolence" as distinguished from "charity." The same was held in a later case of *In re Hewitt's Estate*, 53 L. J. Ch. 132, (1883) where the money was to be expended by the executor "in acts of hospitality or charity at such times and in such manner as he might think best."

These cases are not to be pressed further, and were indeed decided much against the liking of the Judges themselves. On the other hand in *Dolan* v. *Macdermot*, L. R. 3 Ch. 676, Cairns, L. C., held valid a bequest "for such charities and other public purposes as lawfully might be in the parish of Tadmarton." The one expression he held covered the same ground as the other, and both expressed a good charitable gift for the benefit of that parish. And in *Lewis* v. *Allenby*, 10 Eq. 668, a gift "among such charities in England as trustees should think proper," was sustained as valid, and a scheme was directed to be settled by the Court as to those proposed to be benefited.

Again, in *In re Sutton, Stone* v. *Attorney-General*, 28 Ch. D. 464, a direction to give money amounting to £600 sterling "in charitable and deserving objects," was held a valid charitable gift, because it meant objects which were at once charitable and deserving.

See also *In re Douglas, Obert* v. *Barron*, 35 Ch. D. 472; *In the matter of Sinclair's Trust*, 13 L. R. Ir. 150, and *In re Dean, Cooper-Dean* v. *Stevens*, 41 Ch. D. 552.

These authorities suffice to shew that the testator has designated with sufficient clearness the objects to be bene-

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fited by what he calls "charitable legacies;" and that the Court will give any directions for the distribution of the fund that may be needed in that regard.

Further to shew that the third legacy (which is the one questioned) is indeed "charitable," I refer to the following expositions of that term.

Sir John Leach, has more than once said judicially, that in his opinion, funds supplied from private gift for any legal, public or general purpose were charitable funds, and that it was not material that the particular public or general purpose was not expressed in the Statute of Elizabeth all other legal, public or general purposes being within the equity of that statute. See (to this effect), Wigram, V. C., in *Nightingale* v. *Goulburn*, 5 Ha. 484-488. Of the places not noted by Wigram, V. C., I may extract his succinct expression to be found: *Trustees of British Museum* v. *White*, 2 S. & S. at p. 596: "I consider that every gift for a public purpose, whether local or general, is within the 9th Geo. II., although not a charitable use within the common and narrow sense of these words." That of course is to be qualified by the further consideration that the purpose is a lawful one, not contrary to morality or to public policy. Still more brief was the definition given by Lord Camden, "a gift to a general public use:" *Jones* v. *Williams*, *Ambl.*, at p. 652.

Regarded from a moral or humanitarian point of view it cannot be doubted that the third charitable bequest is for a public purpose not only legitimate but praiseworthy. The Court however does not concern itself with the measure of commendation or disapprobation which may attach to the proposed charitable schemes of testators, provided only they are not detrimental to the well-being of society. A very notable instance of this indifference of the Court is to be found in the opinion of Lord Romilly in *Thornton* v. *Howe*, 31 Beav. 14, when adverting to the propagation of the opinions of Johanna Southcote by testamentary endowment.

Some doubt may however arise when the bequest is

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regarded in its political aspect—as seeking to promote the adoption of legislation by which total prohibition in the sale and manufacture of intoxicating liquors will be secured. The opinion expressed in Tyssen's Law of Charitable Bequests p. 177, is that a gift for the purpose of advocating a change in the law would be void. No authority is cited but the conclusion is expressed as a deduction from the decision in *Habershon* v. *Vardon,* 4 DeG. & Sm. 467 that money could not be willed for aiding the political restoration of the Jews to Jerusalem and to their own land. Knight-Bruce, V. C., said: "if it could be understood to mean anything, it was to create a revolution in a friendly country. Jews might at present reside at Jerusalem; and if the acquisition of political power by them was intended, the promotion of such an object would not be consistent with our amicable relations with the Sublime Porte." Now the reason of this decision is that the bequest was contrary to public policy, because calculated to embroil Great Britain with a friendly power.

Mr. Tyssen says, "Each Court on deciding on the validity of the gift must decide on the principle that the law is right as it stands. However desirable the change may really be, the law could not stultify itself by holding that it was for the public benefit that the law itself should be changed," p. 177. But the judges frequently say that the law is not right as it stands—they suggest amendments of the law, and though they are undoubtedly bound to administer the law as they find it, they are not on that account to assist the bequests of one who seeks to procure what he deems a desirable change in the law by constitutional means. Such is the purpose of the testator—the means he suggests is by the education and developing of public sentiment which may be satisfied through the medium of the public school, or the public lecture, or the public press.

Again the question is not as I take it whether the law should stultify itself by declaring that it was for the public benefit that the law should be changed. The Court in

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Boyd, C.

affirming the validity of a charitable bequest does not so declare because satisfied that it is or that it will be a public benefit—the question is first: Is it for a public purpose? then: Is that purpose a lawful one? If both interrogatories can be answered "yea" it is not for the Court to frustrate the intentions of the testator. He is the judge of the benefit or the wisdom of the scheme he seeks to foster, and if that does not offend against the Christian religion, public morality, or public policy, the Court should not interfere, even if dubious about the practical results.

Another consideration in the present case so far as its forensic aspect is concerned is that the legislation has already moved in the direction contemplated by the testator. The temperance and liquor legislation now on the statute book seeks to regulate and so to diminish the quantity consumed and even makes prohibitory provisions dependent on the popular vote. To go further may not perhaps be possible or even desirable unless a solid foundation for advance in that direction be first made in the enlightened sentiment of the people. And by such legitimate means the testator seeks to promote the passage of more restrictive laws. The result arrived at may prove a political impossibility, but the Court should not, on any *quia timet* theory, thwart the attempt of this man to better the condition of his fellows.

This is the sum of the matter: the testator's object is to prohibit the use in order to restrain the abuse of intoxicating liquors in Canada; that is a lawful purpose of a public character which may well rank under the head of "charitable," though it was unheard and unthought of (so changed are the conditions), when the Statute of Elizabeth was passed.

Does this object become other than "charitable" because the testator indicates that the mode of obtaining what he aims at is by means of legislation?

Surely no; because the result desired is to be pursued by the education of public opinion; that *vis a tergo* by which the organism of government is moved—statutes are shaped—penalties enforced.

Judgment

Boyd, C.

This is to seek the amendment of the law, according to law, and therefore the proposed scheme is not contrary to law.

4. As to the orders accepted and paid by Fowke, one of the executors, I think they had reference to the amount then due by him to the testator on the promissory note made by Fowke, which is one of the assets. By the terms of acceptance * Fowke connects the two things, and it follows, therefore, in my opinion, that his payment of these orders operated as a direct satisfaction *pro tanto* of the promissory note held by the testator and his estate after his death. He is not therefore to pay that note in full and look to the estate to be recouped his outlay on the orders; on the contrary, his liability is to be forthwith reduced by so much as he has paid on the said orders.

5. The husband of Adeline Young being witness to the will, she cannot take a share of the residue as intended by the last clause of the will. That bequest to her is avoided by the Statute of Wills, and she cannot therefore take under the will. The effect is, I think, as said by Bacon, V. C., in *Re Clark*, 31 Ch. D. 79, that the will is to be read as if the gift to the wife of the subscribing witness had been blotted out by the testator. That is to say, the residuary gift should be distributed ratably among the others, as if she were nonexistent.

There may be a reference to settle a scheme as to the prohibition moneys if it is decided, and a reference to ascertain to whom the second charitable legacy intended for the Disciples of Christ should go.

Costs of this case to the present out of the estate.

A. H. F. L.

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* "Accepted payable after the death of the said A. Farewell, as the amount then due or to accrue due may be payable."

[QUEEN'S BENCH DIVISION.]

RE THOMPSON V. HAY.

Prohibition—Division Court—Territorial jurisdiction—R. S. O. ch. 51, sec. 87—52 Vic. ch. 12, sec. 5—Application to transfer cause—Trial of question raised by notice disputing jurisdiction—Refusal of Judge to try.

Where the Judge presiding at the trial of an action in a Division Court declines to try the question of the jurisdiction of that Court raised by a notice disputing the jurisdiction, he may be prohibited.

Such question may be tried at the time and place of the trial of the action; and the defendant is in no way bound by anything contained in R. S. O. ch. 51, sec. 87, as amended by 52 Vic. ch. 12, sec. 5, to apply for an order transferring the action to a Division Court having jurisdiction over it, or to apply to the Judge at any other time or place for the trial of the question so raised.

In re Watson v. *Woolverton*, 9 C. L. T. Occ. N. 480, distinguished.

Per FALCONBRIDGE, J., dissenting:—The defendant, before coming to the High Court for prohibition, is bound to apply to the County Judge somewhere, either at or before the trial, to transfer the cause; and in this casé he did not so apply.

Statement. THE plaintiff sued the defendant for the sum of $59.40 in the first Division Court in the county of Middlesex, the plaintiff residing in the city of London, in the said first division, and the defendant residing in the town of Woodstock, in the county of Oxford. The defendant in due time duly filed a notice to the effect that he disputed the jurisdiction of the Court under the provision of R. S. O. (1887) ch. 51, sec. 176.

At the trial a solicitor appeared on behalf of the defendant, and objected to the jurisdiction of the said Division Court to entertain or try this action or suit, on the ground that the whole cause of action did not arise, and that the defendant did not reside or carry on business within the limits of the said Division Court. The counsel for the plaintiff then argued that the defendant, if he objected to the jurisdiction of the Court, should have made an application in Chambers for an order transferring the case to the proper Court. The Judge decided in favour of such contention, and held that the objection to the jurisdiction could not be entertained, and proceeded with the trial of the

Statement. case, and gave judgment for the plaintiff upon his own evidence.

The defendant had a witness present for the purpose of giving evidence on the question of jurisdiction, and, relying upon the want of jurisdiction, was without witnesses for the defence of the action, but the ruling of the learned Judge precluded his calling such witness.

The defendant applied to a Judge in Chambers for prohibition, which was refused, and he then appealed.

The appeal was argued before a Divisional Court composed of ARMOUR, C. J., and FALCONBRIDGE, J., on the 5th February, 1892.

G. W. Marsh, for the defendant.

Middleton, for the plaintiff.

Cur. adv. vult.

February 27, 1892. The Court directed that the appeal should stand for argument before a Court of three Judges.

On the 16th May, 1892, the appeal was reargued before ARMOUR, C. J., and FALCONBRIDGE, and STREET, JJ.

G. W. Marsh, for the defendant. The first Division Court in the county of Middlesex has no jurisdiction in this case: *Re Elliott* v. *Norris*, 17 O. R. 78; *Bowes* v. *Shand*, 2 App. Cas, 445 (as to meaning of word "shipped"); *In re Hagel* v. *Dalrymple*, 8 P. R 183; *King* v. *Farrell*, 8 P. R. 119; *Noxon* v. *Holmes*, 24 C. P. 541; *Re Watt* v. *Van Every*, 23 U. C. R. 196; *Re Cooke* v. *Gill*, L. R. 8 C. P. 107. The statute 52 Vic. ch. 12, sec. 5, (O.), was passed in ease of the plaintiff. By section 87 of the Division Courts Act, R. S. O. ch. 51, it was only where "by mistake or inadvertence" the action was entered in the wrong Division Court, that it could be transferred to the proper Court; but by the amending Act, the words "by mistake or inadvertence" were struck out, and the words "but the party making the application shall satisfy the Judge by affidavit of the alleged want of jurisdiction of

Argument.

the said Court," are added.* Section 176 of R. S. O. ch. 51 expressly takes away the right to prohibition where a notice disputing the jurisdiction has not been given. If it was intended that section 5 of 52 Vic. ch. 12 should take away the right to prohibition, it would have said so expressly. At all events it is not said in *Re Watson* v. *Woolverton*, 9 C. L. T. Occ. N. 480, that the application to transfer the case to another Division Court could not be made at the trial, and here it was made at the trial. It is said that the County Judge decided on the evidence before him that there was jurisdiction. But if so, that decision was on a collateral question, and prohibition will lie: *Bunbury* v. *Fuller*, 9 Ex. 111, which is a case very like the present. The decisions as to disputed facts which will not be reviewed in prohibition are in cases where the dispute is as to the matters actually in question in the action, as in *Re Bushell* v. *Moss*, 11 P. R. 252. We are not within that kind of case. The Court will interfere where the Judge in the inferior Court gives himself jurisdiction by an erroneous decision on a collateral question, even on disputed facts: *Pease* v. *Chaytor*, 3 B. & S. at p. 640; *Re Chisholm and Oakville*, 12 A. R. at p. 230.

Shepley, Q. C., for the plaintiff. On the material before the Court there is no reasonable doubt that the first Division Court in the county of Middlesex has jurisdiction; there is no evidence to satisfy the Court that it had not jurisdiction. Here there was in law (and I say in fact also) an adjudication upon the question as to where the

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* The section as amended, reads: "If an action shall be entered in the wrong Division Court which might properly have been entered in some other Division Court of the same or any other county, the cause shall not abate for want of jurisdiction, but on such terms as the Judge shall order, all the papers and proceedings in the cause may be transferred to any Division Court having jurisdiction in the premises, and shall become proceedings thereof as though the cause were at first properly entered therein, and the same shall be continued and carried on to the conclusion thereof as though the action had originally been entered in the said last mentioned Court; but the party making the application shall satisfy the Judge by affidavit of the alleged want of jurisdiction of the said Court * * *."

Argument. contract was made. It was made in London, and the cause of action arose there. I say that the decision in *Re Watson* v. *Woolverton* is unimpeachable law. The legislature did not intend that an action should be transferred from one Division Court to another only where there is a plain want of jurisdiction; but also in cases where the plaintiff asserts the jurisdiction and the defendant denies it. That was the case here, and the Judge in the Division Court found that there was jurisdiction. His decision, I submit, cannot be reviewed.

Marsh, in reply.

November 28, 1892. ARMOUR, C. J.:—(after stating the facts)—

In the case of *Re Watson* v. *Woolverton*, 9 C. L. T. Occ. N. 480, which was relied on by the plaintiff's counsel, the plaintiff, who lived in the county of Dundas, sued the defendant, who lived in the county of Lincoln, in the fifth Division Court of the united counties of Stormont, Dundas, and Glengarry, upon a contract made between the parties by letters. The defendant, upon being sued, filed a notice disputing the jurisdiction of the Court with the clerk of that Court, and without waiting for the decision of the Judge of the County Court, upon the question thus raised, applied to this Court for prohibition, which my learned brother Falconbridge very properly refused.*

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* The judgment of Falconbridge, J., in *Re Watson* v. *Woolverton* was delivered on the 9th September, 1889, and was as follows:—

"By section 87 of the Division Courts Act it is provided that "If by mistake or inadvertence an action shall be entered in the wrong Division Court, * * all the papers and proceedings in the cause may be transferred," etc.

This seems to be a provision enabling a plaintiff who has entered a suit in the wrong Court by mistake, to correct his error without losing the benefit of the proceedings which have been taken in such wrong Court.

By 52 Vic. ch. 12, sec. 5, (O.), the words "by mistake or inadvertence" are struck out, and the following words are added to section 87 of the revised statute: "but the party making the application shall satisfy the Judge by affidavit of the alleged want of jurisdiction of the said Court."

I suppose "party making the application" must refer as well to a

Judgment.

Armour, C.J.

It is obvious, therefore, that the decision of that case in no way affects this case.

The defendant in this case was entitled to have the question raised by his notice disputing the jurisdiction of the Court tried by the learned Judge of the County Court at the sittings of the Division Court, and the sittings of such Court was the proper time and place to try it; and the defendant was in no way bound by anything contained in R. S. O. (1887) ch. 51, sec. 87, as amended by 52 Vic. ch. 12, sec. 5, to apply for an order transferring the cause to a Division Court having jurisdiction over it, or to apply to the said Judge at any other time or place for the trial of the question so raised.

The learned Judge having declined to try the question of jurisdiction so raised before him at the said sittings, we have no alternative but to order prohibition.

The appeal will therefore be allowed with costs here and below.

Street, J.:—

I do not understand that section 87 of the Division Courts Act, as amended by 52 Vic. ch. 12, sec. 5, gives to the Judge of a Division Court any right to try cases under any circumstances which are not within his jurisdiction; it merely provides a method whereby actions brought in a wrong division may be transferred to the right division without obliging the plaintiff to begin them anew. A defendant against whom an action is begun in a wrong division may apply to have it transferred to the right division either before or at the trial. What was actually

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defendant as to a plaintiff. If so, the amending section, if it does not expressly take away the right to prohibit where a suit is entered in the wrong Division Court, at least contemplates the application being made in the first instance to the County Judge.

In neither aspect can the present motion prevail, and it must be dismissed with costs."

This decision was affirmed by the Common Pleas Divisional Court on the 19th November, 1889.

Judgment

Street, J.

decided in *Re Watson* v. *Woolverton*, and very properly decided, if I may be allowed to say so, was that a defendant sued in a wrong division must not at once apply for a prohibition, but must first apply to the County Court Judge for an order under the amended section 87, to transfer the action to the proper Court. A plaintiff also who has brought his action in a wrong division, may, no doubt, apply under this section to transfer it. But suppose the action to come on for trial in a wrong division, neither party having applied to have it transferred. In that case the Judge has no jurisdiction to try the action, and if he proceed to do so, he may be prohibited. He may proceed to try the case until it appear that it is really brought in the wrong division, and then he must stop. Either party may then apply to him upon affidavit to transfer it. The fact that no application has been made for a transfer previously, does not oust the right to a prohibition, should the Judge proceed without jurisdiction.

In the present case, the conclusion to which I come from a perusal of the affidavits is that the Judge declined to consider the question of jurisdiction under the impression that, because no application had been made to him to have it transferred to another division, he was entitled under the Act above mentioned to treat the case as being within his jurisdiction. The defendant, however, was entitled to have the question of jurisdiction which he had raised, tried and disposed of by the Judge; the Judge has refused altogether to consider it, and therefore prohibition should go. The appeal will therefore be allowed with costs here and below. The plaintiff will, of course, be at liberty to commence a new action if so advised.

FALCONBRIDGE, J. :—

Under *Re Watson* v. *Woolverton*, 9 C. L. T. Occ. N. 480, the defendant, before coming to this Court, was bound to apply to the Judge of the County Court somewhere, either at or before the trial. His solicitor claims to have applied at

Judgment.

Falconbridge, J.

the trial, but how and on what material? The client was told he need not attend; no affidavits were filed or tendered; and the plaintiff was cross-examined by the defendant's solicitor, and on his evidence I do not see how we can review the findings of the learned Judge.

If the defendant's counsel, on hearing the preliminary ruling of the learned Judge, had applied for a postponement for the purpose either of contradicting the plaintiff as to the cause of action or of trying the case out on the merits, it would no doubt have been readily granted on some terms.

But he chose to appear at the trial and risk an adverse adjudication on either ground or on both.

I think that, under these circumstances, the prohibition must be refused.

[CHANCERY DIVISION.]

SKLITZSKY V. CRANSTON.

Way—Highway—Township lot—Registered plan—Unincorporated village—Rights of the public and of the private owner—Injunction—Costs.

A street or road laid out upon a registered plan of a township lot, where, although houses are clustered, there is not an incorporated village, continues to be a private street or road, although the owner should sell a lot fronting on it, until the township council adopts it as a public highway, or until the public by travelling upon it has accepted the dedication offered by the proprietor.

R. S. O. ch. 152, sec. 62, only applies to cities, towns or incorporated villages.

A person who purchases lots according to such a plan, abutting upon streets laid out thereon, acquires as against the person who laid out the plot and sold him the land a private right to use those streets, subject to the right of the public to make them highways, in which case the private right becomes extinguished.

The right so to use a private road does not necessarily mean a right over every part of the roadway, but only to such a width as may be necessary for the reasonable enjoyment of it.

The plaintiff was ordered to pay the costs of an interim injunction obtained by him, because the facts proved at the trial shewed no anticipation of such immediate and serious damage as to justify the application for it.

Statement. THIS was an action brought to restrain the defendant from maintaining fences across certain streets over which the plaintiff claimed to have a right of way.

The action was tried at the Autumn Assizes, held in Stratford on October 6th, 1892, before STREET, J., without a jury, from whose judgment the following statement of facts is taken.

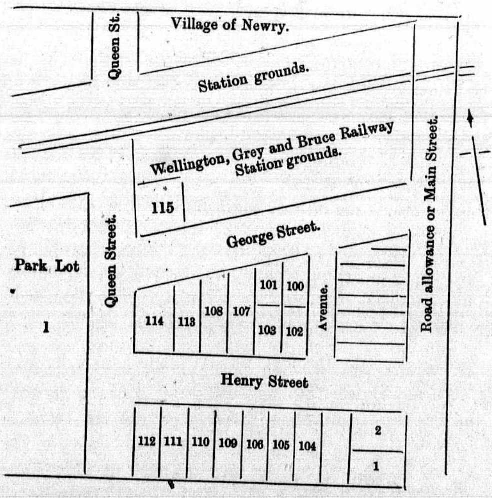
The plaintiff in 1887 became the purchaser of lots Nos. 100, 101, 102, 103, on a plan of a subdivision of the East half of Lot fifteen, in the eighth concession of Elma, made for Messrs. Fuller and Watson, and duly registered in November, 1875.

The defendant in 1887 became beneficially entitled to lots 104 to 115 inclusive, upon the same plan, and also to park lot No. 1 shewn upon it. The survey and subdivision includes the land lying north of the railway track,

Statement.

upon which the business part of the unincorporated village of Newry is built. Queen street is the principal street in the village, but there is no railway crossing upon it. There is a crossing over the railway upon the road allowance. The plaintiff has a stable at the north-west corner of lot 101, and his dwelling-house upon lot 100 and his lots are fenced in.

The position of the lots and streets in question, appears from the following sketch :—



On 18th June, 1891, the defendant purchased from the original owners of the farm lot, who had surveyed it, and took a conveyance of all that part of George street lying to the west of the west line of lot No. 101 produced, all that part of Henry street lying to the west of the west line of lot No. 103 produced; and all that part of Queen street lying north of the south limit of lot No. 112 produced, as far north as the railway land ; and he thereupon

Statement. proceeded to enclose these streets along with his own land with a substantial fence.

The plaintiff complains of this fence as an infringement upon his right to travel along these streets.

Henry street had been opened as far west as Queen street in 1877 or 1878, and statute labour had been regularly done on it; it was ditched and graded. The council of the township had let a contract to fill up a low spot on George street between lot 101 and Main street, and had subsequently done other work upon it, but no work had been done by the council upon it west of lot 101.

Garrow, Q. C., and *G. G. McPherson*, for the defendants. The evidence does not establish the fact that the streets in question are highways. There must be some act of the corporation to make them highways. No by-law for the purpose of opening them was ever passed: *Re Wilson* v. *Wainfleet*, 10 P. R. 147. The public has never adopted them, and until the railway company makes a crossing on Queen street, they will be of no use to the public: *The Queen* v. *Rubidge*, 25 U. C. R. 299. Unless the public have accepted the streets, the plaintiff has no right to maintain this action; *Hubert* v. *Township of Yarmouth*, 18 O. R. 458. Sec. 62, R. S. O. ch. 152, does not apply: a "village," in that section means incorporated village, and none such exists here. We also refer to *In re Morton* v. *The Corporation of the City of St. Thomas*, 6 A. R. 323; *In re the Hon. G. W. Allan*, 10 O. R. at p. 118; *Waldie* v. *Burlington*, 7 O. R. 192; 13 A. R. 104; *Carey* v. *The City of Toronto*, 11 A. R. 416; 14 S. C. R. 172; *In re Chisholm and the Corporation of the Town of Oakville*, 12 A. R. 225.

J. P. Mabee, and *J. L. Darling*, for the plaintiff. The evidence shows that the village of Newry, north of the railway track, is laid out on the same plan, and that the inhabitants are in the same interest as the plaintiff, and so that makes the question a matter of public interest. Dedication has taken place by reason of sales of lots on the plan.

Argument.

The plan must be registered: R. S. O. ch. 114, sec. 84. The performance of statute labour and the spending of public money by the township council, shew the acceptance of the dedication. Section 62, R. S. O. ch. 152, applies to all villages whether formally incorporated or not. I refer also to *Attorney-General* v. *Biphosphated Guano Co.*, 11 Ch. D. at p. 340; *Roche* v. *Ryan*, 22 O. R. 107.

November 15th, 1892. **Street**, J. (after setting out the facts as above):—

It appears important to determine whether these streets are to be deemed to have become public highways before the trespasses which are complained of. The plaintiff insists that they became public highways under section 62 of ch. 152 R. S. O., and also because statute labour has been done upon them. But section 62 of ch. 152 R. S. O. does not refer to allowances for roads, streets, or commons surveyed in townships, but only to those surveyed in cities, towns, and villages.

There is evidence before me that a collection of houses exists across the railway track to the north of the land in question, sufficient to constitute what is popularly known as a village, but there is nothing to shew a village to have existed even in that sense at the time the survey in question was made. Even now the village is not incorporated; and I think there are objections to treating the Act as referring to anything but an incorporated village.

A street or road laid out through a township lot where no village in any sense exists, continues to be a private street or road, even although the owner should sell a lot fronting on it, until the township council adopts it as a public highway; or until the public by travelling upon it has accepted the dedication offered by the proprietor. If, however, a similar act is done by an owner of land in a city, town, or village, the fact of his selling a lot fronting upon the street laid out, has been held by the Common Pleas Division in *Roche* v. *Ryan*, 22

Judgment.
Street, J.

O. R. 107, and by Ferguson, J., in *Gooderham* v. *The Corporation of the City of Toronto*, 21 O. R. 120, to constitute that street *ipso facto* a public highway, by virtue of section 62 of ch. 152 R. S. O.

Having in view the difference created by the section in question, in the effect of the laying out of a street in a township and in a village, I think we should confine the operation of the section to those villages which having become incorporated are recognized by law as villages, and that we should not leave it an open question in each case, whether the houses in the neighbourhood were sufficiently close together to justify us in treating it as a village within the meaning of the Act. I am of opinion, therefore, that section 62 has no bearing upon the present case: first, because it has not been shewn that a village in any sense of the word existed when this survey was made; and second, because the Act applies, in my opinion, to incorporated villages only.

I think, however, that Henry street has become a public highway by reason of the fact that statute labour has been shewn to have been usually performed upon it for a number of years.

I do not come to the conclusion that George street has become a public highway, nor that Queen street south of the railway tract has. It is true that some public money was expended upon George street between lot No. 101, and the road allowance on Main street; but this appears to have been merely done for the purpose of giving the plaintiff an outlet from his lot by making the road passable. There was no public travel over the road, and no object to be gained by the public in travelling over it, as there was no way of crossing the railroad at Queen street.

The plaintiff, however, having purchased his lots as lots laid down upon a registered plan shewing certain streets upon which they abutted, acquired as against the person who laid out the plot and sold him the land, a private right to use those streets, subject to the right of the public to make them highways; *Espley* v. *Wilkes*, L. R. 7 Ex. 298;

The Queen v. *Chorley*, 12 Q. B. 515; *Allen* v. *Ormond*, 8 East 4.

But the private right being in this case subject to the right of the public to accept the dedication offered, must be taken to have become extinguished so far as the dedication has been accepted, and to remain only in those streets which have not become public highways.

Henry street has become a public highway, as I have found, and the plaintiff has sustained no special and peculiar damage from its having been closed, not shared by the rest of the public, and he can, therefore, maintain no action for the obstruction of that street. His private right appears, however, to remain with regard to other streets, and to entitle him to prevent the closing of the ways which his conveyance entitles him to enjoy. It is true, that the damage which he shews himself to have sustained so far, is trifling; but he is prevented, it seems, from having proper access to his stable by the fence of the defendant upon George street, and he is entitled to an injunction to restrain the defendant from maintaining this fence in such a position as to interfere with the access of the defendant with his horses and waggons to his stable. He is also entitled to the reasonable use of the parcels marked "George street" and "Queen street" which have been enclosed by the defendant, that is to say, to a sufficient roadway over them for himself, his servants and friends, with horses and waggons, as well as on foot; and the defendant must be restrained from maintaining any fence or other obstruction preventing his having such reasonable user: *Aynsley* v. *Glover*, L. R, 18 Eq. 544; *Yates* v. *Jack*, L. R. 1 Ch. 295. The plaintiff is not necessarily entitled to a roadway over every part of the streets I have named, but only to such a width as may be necessary for his reasonable enjoyment of it: *Clifford* v. *Hoare*, L. R. 9 C. P. 362; *Hutton* v. *Hamboro*, 2 F. & F. 218.

The defendant must pay to the plaintiff his costs of the issue so far as George street and Queen street are concerned, and the general costs of the cause; the plaintiff

Judgment.

Street, J.

must pay to the defendant the costs of the issue so far as Henry street is concerned.

An interim injunction was obtained by the plaintiff, and the costs have been largely increased by the application for it; the costs of it were reserved, I understand, to be dealt with at the hearing.

It was entirely unnecessary in this case to make that application; there was no such immediate and serious damage to be apprehended from the maintenance of these fences as could alone justify a party in seeking the extraordinary interference of the Court by an interim injunction, and the plaintiff must not recover any part of the costs of that proceeding, and must pay the defendant's costs of the motion for it; such costs to be set off against the plaintiff's costs.

G. A. B.

[CHANCERY DIVISION.]

PURDOM ET AL. V. THE ONTARIO LOAN AND DEBENTURE COMPANY ET AL.

Company—Mortgage of company's property—R. S. O. ch. 157, sec. 38—Voting—Mode of calculating vote—Interference of Court where sanction of shareholders obtainable.

Under the 38th section of the Ontario Joint Stock Companies' Letters Patent Act, R. S. O. ch. 157, the votes of the "two-thirds in value of the shareholders" who may vote for a by-law authorizing the borrowing of money, etc., on the property of the company are, where there has been no default after a call, to be computed upon the face value of the number of the shares held, and not upon the amount paid upon such shares.

The Court will not interfere with the doing of an act by a company which should have been sanctioned by a majority of the shareholders before the act was done, if such sanction can be afterwards obtained.

Statement.

THIS was an action brought by Thomas Hunter Purdom and others who were stockholders in the defendants, The Masonic Temple Company, to enjoin the company through their directors from mortgaging the property of the company to the defendants the Ontario Loan and Debenture Company.

The plaintiffs were the holders of more than one-third in value of stock in the defendants the Masonic Temple Company, if the value was to be ascertained by the amounts paid up on the stock; but the directors and those stockholders favourable to making the mortgage were the owners of more than two-thirds in value, and were more than "two-thirds in value, of the shareholders mentioned in sec. 38, sub-sec. 2, R. S. O. ch. 157," the Ontario Joint Stock Companies' Letters Patent Act, if the value was to be ascertained by the *face value* of the stock held by them.*

No by-law had been passed under that section authorizing the mortgage in question, but a by-law had been passed authorizing a former mortgage: the new loan being to pay off the old mortgage: and the plaintiffs alleged that no by-law could be passed for that purpose if the

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* Some of this stock had only ten per cent. called and paid up.—REP.

Statement. amount *paid up* was the criterion by which the "two-thirds in value, of the shareholders" was to be ascertained, and also that if the directors called up the unpaid stock, there would be no occasion to mortgage the company's premises.

The action was tried at London, on November 4th, 1892, before BOYD, C.

Hoyles, Q. C., and *T. E. Parke*, for the plaintiffs. The two-thirds value meant is two-thirds the amount paid, not the face value of the stock issued. What is the value? The answer is, the amount the stock will realize when sold, and as paid up stock will sell for more than partly paid up stock, that fixes the value.

M. D. Fraser, for the defendants, the Masonic Temple Company. The plaintiffs do not shew any request to the defendants to call a meeting of shareholders to ascertain their will: *Fountaine* v. *Carmarthen R. W. Co.*, L. R. 5 Eq. 316; *McDougall* v. *Lindsay Paper Mill Co.*, 10 P. R. 247; *Gray* v. *Lewis*, L. R. 8 Ch. 1035.

Rowell, for the defendants, the Ontario Loan and Debenture Company. There was a by-law for a former loan, and we are entitled to the benefit of it. The present loan is not a new borrowing, but an extension of the old one already authorized by a by-law: *Blackburn Building Society* v. *Cunliffs, Brooks & Co.*, 22 Ch. D. at p. 71; *Baroness Wenlock* v. *The River Dee Co.*, 19 Q. B. D. 155, and in any case no such action will lie at the suit of a stockholder, etc. The act complained of is not *ultra vires* the company, but at most is only *ultra vires* the directors. It is an act that the stockholders can ratify, and under such circumstances the Court will not interfere. Two-thirds in value means full value.

November 12, 1892. BOYD, C.:—

I disposed at the trial of the matters of fact arising upon the record, and in effect adjudicated upon the merits of the

Judgment.

Boyd, C.

case, but I reserved consideration of the legal point raised as to the competency of the plaintiffs to come before the Court. This is usually presented by way of demurrer so as to arrest litigation at the outset, and avoid the expense of a trial of the questions of fact.

So far as I have the history of the Masonic Association before me, the right to mortgage depends upon the observance of the 38th section of the General Act of Incorporation, R. S. O. ch. 157.

Power had been given to create a mortgage for the purposes of the company under that section, but the mortgage having fallen due by lapse of time it became needful to provide for its payment or extension. There was a difference of opinion as to whether arrangements should be made for taking up this mortgage by means of a loan from another company, or whether sufficient of the uncalled stock should not be realized upon, in order to wipe out the obligation. This it strikes me is purely and simply a matter of internal economy as to which the company must be left to settle its own course. The adoption of either plan would not be properly matter for judicial investigation in the Courts.

If two-thirds in value of the shareholders authorize the continuance of the security, or the substitution of an equivalent they can do so unchallenged. No such sanction was given in the present case; but if it can be obtained, the rule of the Court is not to interfere. I may quote the language of Mellish, L. J. (which according to another eminent judge Jessel, M. R., cannot be improved upon: *Mason* v. *Harris*, 11 Ch. D. at p. 107). "If the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes": *McDougall* v. *Gardiner*, 1 Ch. D. at p. 25.

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In this case more than a majority, a two-thirds vote is needed and it is not disputed that such a vote may be obtained if the voting is upon the number of shares held according to their face value. But it is argued that the plaintiffs are the holders of so much paid up stock, that a two-thirds vote cannot be had against them if the "two-thirds in value" fixed by the statute is to be computed upon the total amount which has been called and paid.

This latter limited meaning, is not, in my opinion, the meaning to be attributed to the words of the statute. The statute speaks of the capital stock taken up and of the amount paid in on stock taken; and also speaks of the number and value of the shares—obviously meaning face value: secs. 7, 18 and 20.

The statute again contemplates the incorporation of a company in which nothing has been paid upon the stock (sec. 7), and yet gives such a company power to do certain things upon a vote of two-thirds in value of the shareholders: secs. 21, 35, 38 and 39.

But above all, sec. 33, sub-sec. 3, provides that at all general meetings every shareholder shall be entitled to as many votes as he owns shares in the company; and that he may vote by proxy, provided, however (sec. 49), that he shall not be entitled to vote if in arrear as to any call.

The stock in this company is to some extent fully paid up: to a greater extent uncalled, except as to ten per cent. But each share taken represents a vote, which the statute gives as a right of property to the holder. The measure of its value for voting is not therefore determinable by reference to what has been paid upon it, provided there has been no default after call. I find no decision, but *Whittaker* v. *Lowe*, L. R. 1 Ex. 74, is analogous.

Having regard to the course of procedure in this case, and my finding at the hearing, I dismiss the action without costs, and without prejudice to any further action the plaintiffs may think open to them.

G. A. B.

[CHANCERY DIVISION.]

RE WARTMEN.

Legacy — Vested interest in — Assignment of — Payment before period of distribution, to assignee.

Two devisees of full age having a vested interest absolute in a definite fund in Court, although not divisible by the terms of the will until a third devisee attained twenty-one, having assigned their interest in the fund to a purchaser, the Court, the estate having been otherwise wound up, made an order for payment out to the assignee, without waiting for the period of distribution.

Statement.

THIS was an application by way of petition by Zara Vanluven and Franklin Secord Wartmen as assignees of all the interest of two devisees under the will of Charles Henry Wartmen, deceased, for the payment to them of the amounts coming to said devisees without waiting until the time of distribution fixed by the will.

The petition set out the will of which the clause in question was as follows; "My mill privilege * * and all of my property of any kind not previously mentioned in this my will to be sold, and all of my outstanding accounts, notes, and mortgages, to be collected as soon after my decease as possible, and the proceeds to be deposited in the bank until my daughter Lizzie becomes twenty-one years old, then to be equally divided between my sons George Lester Wartmen and Charles Wesley Wartmen, and my daughter Lizzie Wartmen": also, that the petitioners were the purchasers and assignees respectively, of all the interests of George Lester Wartmen and Charles Wesley Wartmen: that all other legacies and charges on said estate were paid and the executors had passed their accounts and had $4,089.27 in their hands, which according to the terms of the will would have to be deposited in a bank* until Lizzie Wartmen, who was only seventeen years of age, had attained twenty-one, and the petition then prayed

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* On the first return of this application an order was made for the payment into Court of the money, and it was paid in.—REP.

Statement. that an order might be made that the executors pay to the petitioners the two-thirds of the estate assigned to them.

The petition was heard in Chambers on November 21st, 1892, before BOYD, C.

Hoyles, Q. C., appeared for the petitioners.

J. Hoskin, Q. C., Official Guardian for the infant. The following references were cited, Williams on Executors, 7th ed. 1397, 1398, and *Saunders* v. *Vautier*, 4 Beav. 115.

November 22, 1892. BOYD, C. :—

I should not go counter to the rule laid down in *Saunders* v. *Vautier*, 4 Beav. 115, and followed in other cases, though I question whether the Court would now accelerate payment without special reason against the direction of the testator.

That rule is best explained and justified in *Curtis* v. *Lukin*, 5 Beav. at p. 155, where the M. R. says: "It has frequently happened in this Court, that a testator has given to an individual an absolute vested interest in a defined fund, so that, according to the ordinary rule of law, he would have a power, of his own authority, to receive or dispose of it immediately on his attaining legal age; but having given such a vested interest, the testator has, nevertheless, postponed the time of giving him possession, till a period subsequent to the legatee's attaining twenty-one, although in such cases, the party having attained the age of twenty-one cannot, according to the direct intention of the will, obtain possession, yet he has everything but possession; he has the legal power of disposing of it, he may sell, charge, or assign it, for he has an absolute, indefeasible interest in a thing defined and certain; the Court, therefore, has thought fit (I don't know whether satisfactorily or not), to say, that since the legatee has such, the legal right and power over the property, and can deal with it as he pleases, it will not subject him to the

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Boyd, C.

disadvantage of raising money by selling or charging his interest, when the thing is his own, at this very moment. The Court has, in such cases, ordered payment on his attaining twenty-one."

These conditions exist in this case: a definite fund derived from the sale of certain chattel property directed to be sold and now in Court, divisible among three when one of the three (the daughter) becomes twenty-one. The other two now of age have a vested interest absolute, which under the above rule of the Court warrants an order for present payment.

G. A. B.

[CHANCERY DIVISION.]

LEYS V. THE TORONTO GENERAL TRUSTS COMPANY.

Will—Devise—Division of corpus after death of wife—Dower—Election.

A testator having by his will blended his real and personal estate into a fund from which payments of income were to be made to his wife and other devisees, postponed the division of the *corpus* until after the death of the wife:—

Held, that the wife was not bound to elect between her dower and the testamentary bestowments.

Re Quimby, Quimby v. *Quimby*, 5 O. R. 744, distinguished.

The testator also gave a house for the residence of his wife during her life, and also another house for the use of certain nephews and nieces until the youngest attained twenty-one, or until they married:—

Held, that this right of personal occupation of the nephews and nieces was, while it lasted, inconsistent with a claim of the widow to have one-third of the house set apart for her use as dowress, but that the deprivation of dower for a time in part of the real estate was not sufficient to put her to her election as to the residue of the estate.

Cowan v. *Besserer*, 5 O. R. 624, followed.

The widow was held put to her election as to both houses.

The judgment in *Amsden* v. *Kyle*, 9 O. R. at p. 441, corrected.

Statement.

THIS was an action brought by the widow of one John Leys, for the construction of his will, the question being whether she was put to her election between the benefits devised to her under the will and her dower.

The parts of the will in question were:

Statement. "4. All the rest, residue, and remainder of my estate, real and personal, I give, devise, and bequeath to my executors * * upon the trusts * * . To permit and allow my wife to reside in the house which I shall occupy at the time of my death during the remainder of her life, free from any charge or rent, and from and out of the income of my estate to pay * * (taxes, insurance," etc.)

"5. To permit and allow my nephews and nieces to reside in the house * * on Huntley street * * rent free, and to use and enjoy the furniture therein until my youngest niece shall attain the age of twenty-one years, provided always that as my nephews and nieces shall marry, they shall respectively cease to have the right to the use of the said house and furniture.

"6. From and out of the income of my estate to pay to my said wife during the remainder of her life, the sum of $5,000 per annum," etc.

The action came on by way of motion for judgment, and was argued on November 23rd, 1892, before BOYD, C.

Wallace Nesbitt, for the plaintiffs. The will gives the widow an income of $5,000 a year, and a right to live in the testator's house. It also gives the use of another house to certain nephews and nieces.

The widow claims she is not put to any election as between her dower in the testator's lands and the benefits given her by the will. There is no intention expressed in the will that she should elect: *Rudd* v. *Harper*, 16 O. R. at p. 426. She does not, however, claim dower in the residence which she has the use of. Exclusion of dower in one part of the will does not exclude in all the rest: *Laidlaw* v. *Jackes*, 25 Gr. at pp. 299, 300; *Birmingham* v. *Kirwan*, 2 Sch. & L. 444; *Marriot* v. *McKay*, 22 O. R. 320. There is no paucity of estate here as in *McLellan* v. *McLellan*, 29 Gr. 1. Even the right of occupation of the Huntley street house given to the nephews and nieces, does not exclude dower. [BOYD, C.—But the right to occupy given to

Argument.

them must prevent the dowress getting one-third of the premises.] I also refer to *Cowan* v. *Besserer*, 5 O. R. 624; *In re Biggar, Biggar* v. *Stinson*, 8 O. R. 372; *Ripley* v. *Ripley*, 28 Gr. 610.

A. Hoskin, Q. C. The will has amply provided for the widow, and shews an intention to dispose of the estate excluding the right to dower, so she must elect. The income arises from a blended fund of both realty and personalty, and all the benefits provided by the will are provided out of the income as the source. Even if the widow is not excluded as to dower generally, she certainly is as to the house devised to the nephews and nieces. I refer to *Villareal* v. *Lord Galway*, Amb. 682; *Parker* v. *Sowerby*, 1 Dr. 488, and 4 D. M. & G. at p. 325; *Miall* v. *Brain*, 4 Mad. 119; *Holdich* v. *Holdich*, 2 Y. & C. Ch. 18.

Nesbitt, in reply, referred to *Bending* v. *Bending*, 3 K. & J. 257; *French* v. *Davies*, 2 Ves. Jr., at p. 577; *Thompson* v. *Nelson*, 1 Cox 447; *Dickson* v. *Robinson*, Jacob's R. 503.

November 25th, 1892. BOYD, C.:—

The testator blends the real and personal estate not for the purpose of its equal division, but in order to obtain an income out of which payments are to be made annually to his wife and other objects of his bounty, and the residue of such income to go equally during the life of his wife to his nephews and nieces. The division of the *corpus* is not to be made till after the wife's death. This distinguishes the present case from *Re Quimby, Quimby* v. *Quimby*, 5 O. R. at p. 744, where the blended estate was to be divided between the wife and others in equal proportions. No election arises by virtue of this provision as between the wife's dower and the testamentary bestowments: *Greatorex* v. *Cary*, 6 Ves. 615.

The testator gives his house on Huntley street for the residence of his nephews and nieces, rent free, till the youngest attains twenty-one years of age, (with cesser as

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Boyd, C.

to each who marries) when it is to be sold. This right of personal occupation from the given period is, while it lasts, inconsistent with a claim of the widow to have one-third of the house set apart for her use as dowress. But what if she survives till after the youngest niece is twenty-one? Is the deprivation for a time in a part of the real estate sufficient to put the widow to her election as to the residue of the land, and as to the particular part of the land after the exclusive possession ends. *Birmingham* v. *Kerwan*, 2 Sch. & L. 442, is on the very point that the exclusion by construction from one part of the testator's lands should not be extended so as to imply that she is not to have dower in another part of his estate, separately devised.

This decision was followed with approval by Plumer, V. C., in *Lord Dorchester* v. *Earl of Effingham*, G. Coop. 319 (1815).

The same view of the cases was enunciated by Knight Bruce, V. C., in *Holdich* v. *Holdich*, 2 Y. & C. Ch. at p. 22, thus "A gift of a portion of ~~the~~ real estate to the widow, whether for life or during widowhood, is not sufficient, as to the residue of the estate, to put the widow to her election in respect of dower," (1842). Almost concurrently with this, Sugden, L. C. of Ireland, said, in *Hall* v. *Hill*, 1 Dr. & W. 104, (1841): "The point cannot now be disputed, that a mere devise to a wife of a portion of an estate, out of which she, as ~~a~~ widow, would be dowable, does not prevent the claim of dower out of the residue of the estate."

If, however, the whole real property were to pass by one devise, it may well be that the exclusion of dower in any part would be sufficient to indicate its exclusion in the whole. This was pointed out by Proudfoot, V. C., in *Laidlaw* v. *Jackes*, 25 Gr. at p. 300. I concur in thinking it a valid ~~dis~~tinction which was not adverted to in *Stewart* v. *Hunter*, 2 Ch. Chamb. 336. As against *Stewart* v. *Hunter*, I prefer to follow the decision of the same Judge (Proudfoot, J.), in *Cowan* v. *Besserer*, 5 O. R. 624, in holding that in the case of separate devises, though the wife may be barred of her dower in one property, she is not therefore barred in the other.

Judgment.

Boyd, C.

As to the house on Huntley street, I am of opinion under the holding in *Taylor* v. *Taylor*, 1 Y. & C. Ch. 727, that the widow is put to elect. But with that exception, and the further exception of the house reserved for her use, she has dower in the rest of the land.

In the report of *Amsden* v. *Kyle*, 9 O. R. at p. 441, I notice a misstatement of law. The first sentence in the judgment: "The devise of one-third of the testator's land during widowhood, would not *per se* interfere with the widow's right as dowress to claim another third for life," should be corrected. I cannot find any manuscript of the judgment to compare with the printed text, but as it stands, it misleads. The devise of one-third for widowhood in one part, would not interfere with a claim for dower in another part, but it would be inconsistent with having the two estates in the same land concurrently. See *Westacott* v. *Cockerline*, 13 Gr. 79.

G. A. B.

[CHANCERY DIVISION.]

ARNOLD ET AL. V. PLAYTER ET AL.

THE WATEROUS ENGINE WORKS COMPANY CLAIM.

Conditional sale—Resumption of possession—Resale after judgment for purchase money—Absence of condition that purchaser is to remain liable.

The defendants purchased machinery from a company under a conditional contract of sale in writing, providing that the property should remain in the company until payment of the price in full, with the right to resume possession and resell on nonpayment, but without any provision that in such latter event the purchase money was to be applied *pro tanto*, and the defendants remain liable for any balance. On default after certain payments had been made, the company obtained judgment on notes which had been given for the purchase money, and subsequently seized and sold the machinery, and applying the proceeds sought and were allowed to prove a claim in the Master's office for the balance due on the judgment:—

Held, that the whole matter was examinable in the Master's office, although judgment had been recovered, and as the consideration for the judgment had disappeared by the intentional act of the company in taking possession and selling, the claim should have been disallowed. *Sawyer* v. *Pringle*, 18 A.R. 218, followed.

Statement. THIS was an appeal from a certificate of the Master in Ordinary, who had allowed to the Waterous Engine Works Company a claim made by them in respect of a balance claimed upon two judgments recovered by them against the firm of Playter & Co., and filed in his office.

It appeared that the defendants John L. Playter and Samuel Arnold, trading under the firm name of Arnold & Playter, had purchased some machinery from the company under an order in writing from the defendants to the company to manufacture and deliver the machinery, which contained the following stipulation:

"And the said proposed purchaser hereby agrees with the said company that, notwithstanding anything contained in the 'Act respecting Conditional Sales of Chattels, ch. 19 R. S. O.,' * the said company may immediately on default, remove the said chattel property for sale to * * and may either dispose of the same by public auction or private sale * * *.

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* Evidently a mistake for 51 Vic. ch. 19 (O.).—REP.

TERMS AND CONDITIONS OF THIS SALE

The title to the above mentioned machinery is to remain in (the company) till purchase money, all repairs thereon and any other indebtedness to the said company incurred during the currency of notes given for purchase money, are paid; and in default of payment in full, vendors * * may resume possession and remove the same, after default," etc. **Statement.**

The price of the machinery was $900, of which the defendants had paid $200 at the time of giving the order, and afterwards gave two notes for $350 each, on which $125 was paid. The company recovered judgment for $575, the balance due on the notes, and realized $101 by execution, and then took possession of the machinery and resold it for $425, charging the defendants $140.25 as the costs of same, and sought to prove a claim in the Master's office for $300, which the Master allowed.

From this allowance, the defendants appealed, and the appeal was argued on November 22nd, 1892, before BOYD, C.

Bristol, for the defendants, who appealed. This is a case of an executory contract of sale. There was no provision in it that the company could keep what was paid, and after retaking and reselling the machinery, proceed and collect the balance of the price. If they had the right to take it and resell they ended the contract and there was no further liability on the part of the defendants. If the taking was tortious, then the defendants were entitled to the full value of the machinery when seized, as damages. In either case, the company have no claim against the defendants, and the Master should not have allowed any: *Sawyer* v. *Pringle*, 20 O. R. 111; 18 A. R. 218.

Hoyles, Q. C., contra. The company had the right to prove the claim; *Sawyer* v. *Pringle*, does not apply. The company have recovered judgment, and that judgment is

Argument. on the notes, not on the contract, and there is no merger. Here there was a right to resell under the contract, which was not the case in *Sawyer* v. *Pringle.* There was no breach of the contract by the company, and no tortious act. I refer to *Discher* v. *Canada Permanent Loan and Savings Co.*, 18 O. R. 273.

Bristol, in reply. The notes are an integral part of the contract, and the company have put it out of their power to carry out their contract.

November 24th, 1892. BOYD, C.:—

This claim is, I think, governed by the law as expounded in *Sawyer* v. *Pringle*, 18 A. R. 218. It is a case of conditional or executory contract for the sale of machinery, wherein the property was to remain in the company selling till the full price was paid. Provision is made in the contract for resuming possession in case of default of payment (or otherwise), and for selling the machinery. But it does not go further and provide that the purchase money is to be applied *pro tanto* on what is due, and that the purchasers are to remain liable for the difference. That, as I read *Sawyer* v. *Pringle*, is an essential provision without which no action for any part of the price can be maintained if the vendors have taken possession of and sold the machinery.

This kind of contract is said, by the Court of Appeal, to mean: pay the price and get the machine (both possession and property); but till you pay, the machine is ours (the vendors), it is our property—we can take possession, and we have the right to sell, because it is our property. The permission to sell, therefore, is immaterial—it expresses the right in law which the vendor has by virtue of the property and the resumption of possession; and it would seem not to add any ingredient which essentially differs the case from *Sawyer* v. *Pringle.* As said by Mr. Justice Burton, the election to sell was an election to abandon the contract by the vendors; whereupon the vendees

Judgment.

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acquired a clear right to abandon it also; or rather, I suppose, to treat it as abandoned.

That was the first point of distinction alleged by Mr. Hoyles: the expression of a right to sell, which, as I have said, does not appear to carry the case far enough to exempt it from the law of *Sawyer* v. *Pringle.*

The second point of distinction was the recovery of judgment on the notes given for the price. But that judgment being recovered by the same company who exercised the right to sell—it appears to me that the whole matter is examinable in the Master's Office, though judgment be recovered. He can go behind the judgment, if, for example, it had been paid, and this transaction of sale subsequent to the judgment, shews that the consideration for the judgment has disappeared by the intentional act of the vendors—the judgment creditors.

No question of merger appears to arise whatever might be its effect. The company seized under the power given by their contract and in assertion of their lien. They then proceed to sell under the same contract—though apart from this they could have sold—that which was their own machine, and then they would collect the amount of the judgment. This again seems to be in the teeth of *Sawyer* v. *Pringle*, though in formal circumstances different.

I have to reverse the Master—bowing to what I conceive to be the real decision in *Sawyer* v. *Pringle*, and declare that the claim on the judgment is invalid.

Costs to the appellant.

G. A. B.

[CHANCERY DIVISION.]

BALDWIN V. WANZER.

BALDWIN V. THE CANADIAN PACIFIC RAILWAY COMPANY.

Landlord and tenant—Covenant not to assign or sublet—Re-entry—License—Severance of the reversion—Registration—Notice—R. S. O. 1887, ch. 143, secs. 12 and 13.

Upon a lease made pursuant to the Short Form of Leases Act, containing a condition for re-entry on assigning or subletting without leave, when the lessor gives a license to assign part of the demised premises, he may re-enter upon the remainder for breach of covenant not to assign or sublet, notwithstanding that the proviso for re-entry requires the right of re-entry on the whole or a part in the name of the whole.

Sections 12 and 13 of the Landlord and Tenant Act, R. S. O. ch. 143, are to be read together, the former referring generally to all cases, and making licenses to alien applicable *pro hâc vice* only, the latter referring to specific cases of licensing the alienation of a part, and reserving the right of re-entry as to the remainder. Hence, where a lessor gave a license to alien part of the demised premises, it was *held*, that the license applied to the licensed arrangements only, and that upon subsequent alienation without leave, he might re-enter.

A lessee under such a lease, which contained also a covenant for renewal, sublet, and the sublease contained a covenant to renew for the term to be granted on the renewal of the superior lease less one month; and to this the lessors assented. On an assignment by the lessee, without leave, of his reversion expectant on the sublease:—

Held, that the lessors might re-enter as against the subtenant, notwithstanding their assent, for it must be deemed to have been an assent to the renewal of the sublease, provided that the superior lease was renewed.

A lessee under such a lease created a number of subtenancies on part of the land with leave. He then assigned all the rents, etc., to an assignee. The head lessors assented to the assignment and covenanted with the assignee that so long as the rents reserved were paid and the covenants observed, they would not claim any forfeiture, as to the lands affected by the assignment, and that the rights of the assignee should not be prejudiced by any act of the original lessee, or any person claiming under him, or by any breach or non-observance by the lessee or any person claiming under him of the covenants or provisions contained in the original lease, such consent not, however, to operate as a waiver of the covenant against assigning and subletting. The original lessee afterwards assigned his reversion in the whole of the demised premises without leave, and for this the lessors brought an action to recover the demised premises, after the interest of the assignee of the rents had expired by lapse of time:—

Held, that in the absence of notice of the assignment without leave pending the existence of the interest created by the assignment of the rents, they were not precluded from maintaining the action.

After an assignment by the lessee without leave of part of a lot was registered, the lessors took a surrender of part of the same lot demised by another lease and registered it:—

Held, that the registration of the assignment without leave, was not notice of it to them, as they were not bound by the nature of the sur-

render to examine the register as to that part of the lot affected by the assignment without leave.

A tenant in fee simple conveyed land to the use of himself for life, and after his death to such uses as he might by will appoint. He with his grantees to uses, then made a lease of the land containing a covenant not to assign or sublet without leave, and a proviso for re-entry for breach of the covenant, and by will appointed the reversion to his seven children. After his death, an assignment was made by the lessee without leave, and subsequently one of the devisees conveyed his undivided one-seventh interest to trustees, to sell, lease, or mortgage. An action was brought to recover the lands for breach of the covenant against assigning:—

***Held*, that by the conveyance of the undivided one-seventh share, the reversion was severed and the condition destroyed, and therefore no recovery could be had for breach of the covenant occurring either before or after the severance.**

THESE were actions for the possession of certain lands, as upon a forfeiture for condition broken in a lease, under circumstances stated at length in the judgment. **Statement.**

The action came on for trial upon November 11th, 1891, before FERGUSON, J., when, after the evidence was taken, the argument was adjourned, and was afterwards had on February 13th, 15th, 18th, 19th and 20th, 1892.*

C. Robinson, Q. C., for the defendant Whitney. All the leanings of the law should be against a forfeiture in this case, because if there is a forfeiture it is harsh. There was no right to re-enter on the twelve feet, and so there could be no right to re-enter at all. There must be the right to re-enter on the whole or not at all in this case: *Burt* v. *Gray*, 1891, 2 Q. B. 98. The condition was one and indivisible; Leith's Real Property Statutes, p 2. In construing a statute such as R. S. O. ch. 143, secs. 12, 13, one is not to presume the making of a change in the common law. The 13th section leaves the part of the property not underlet just as at common law. It must be assumed that section 13 was passed, meaning what it says, and not merely to make the provisions of section 12 apply to an alienation of part: Third Report of Commissioners on Law of Real Property, pp. 49-50, 74. Section 13 must be

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*** The argument is only reported upon matters dealt with in the judgment.**

Argument. taken as excepting an alienation of part out of section 12: Watter's Real Property Statutes, p. 24; *Weatherall* v. *Geering*, 12 Ves. Jr. 504.

E. D. Armour, Q. C., on the same side. The remedy of re-entry rests in contract and is indivisible and cannot be severed. The condition was a unit and cannot be severed; Sheppard's Touchstone, p. 158. The conveyance to Henderson and Small destroyed the condition: Cruise's Digest, Tit. 13, ch. 2. sec. 56; Leith's Real Property Statutes, p. 10. The severance of the reversion destroyed the remedy now sought by the plaintiffs: Watter's Real Property Statutes, pp. 29, 30, 32. The condition has been divided and destroyed: Lewin on Apportionment, pp. 28, 48, 49; *Doe* v. *Chaplin*, 3 Taunt. 120; *Twynam* v. *Pickard*, 2 B. & Ald. 105; Co. Litt. p. 215 *a*, Resolution 5; *Dumpor's Case*, 4 Co. R. 119 *b*, is still the law, except for fragmentary legislation. Whitney's mortgage was registered, and Henderson and Small therefore took subject to it.

J. K. Kerr, Q. C., and *W. Macdonald*, for the defendants, Wanzer & Co. and Ince. There cannot be a forfeiture of an expired lease. The effect of a forfeiture is to give the right to re-enter as of the former estate, but this must be done during the term: Woodfall on Landlord and Tenant, 14th ed., p. 90; *Walsh* v. *Lonsdale*, 21 Ch. D. 9. We adopt the arguments of counsel for Whitney.

C. Moss, Q. C., and *Henderson*, for the plaintiffs. The assignment by way of mortgage to Patteson, was under the provisions of section 13, of R. S. O. ch. 143. The right to re-enter as to the rest remained; the license given did not operate to destroy it. Section 13 expressly preserves it. This case would have fallen under section 12 of R. S. O. ch. 143, if section 13 had not been passed. The old law was that the subletting of a part would forfeit the whole, and the license as to a part would dispense with the necessity for a license as to any other part or as to the whole. Section 13 applies in terms to the case here: Foa's Landlord and Tenant, p. 205; Maxwell on

Argument.

Statutes, 2nd ed., p. 65; *Wood* v. *Hurl*, 28 Gr. 146; Woodfall's Landlord and Tenant, 14th ed., p. 327. There is no case so far as we know, upon the construction of sections 12 and 13. See Sugden's Property Statutes, 2nd ed., p. 310; Smith's Leading Cases (9th Am. from 9th Eng. ed.), vol. 1, pp. 125-129. The reason of the rule in *Dumpor's Case*, was the right of the landlord to choose his tenant, but that cannot be said to apply here. As to the severance of the reversion, Henderson and Small became owners of part of the reversion in the whole property: *Wright* v. *Burroughes*, 3 C. B, 685; *Hyde* v. *Warden*, 3 Ex. D. 72; *Doe d. Lulham* v. *Fenn*, 3 Camp. 190; *Mayor, etc., of Swansea* v. *Thomas*, 10 Q. B. D. 48. One tenant in common can recover for possession of the whole of the land as against a stranger in possession; he can enter upon the whole for himself, and all the rest of the tenants in common: *Rice* v. *George*, 20 Gr. 221; *Doe d. Campbell* v. *Hamilton*, 13 Q. B. 977; R. S. O. vol. 1, p. 964, Sched. B. clause 9. The registration of the Whitney mortgage was not notice to the plaintiffs. It could not make a waiver out of the receipt of rent after such supposed notice: *Boucher* v. *Smith*, 9 Gr. 347; *Abell* v. *Morrison*, 19 O. R. 669; *Hodgson* v. *Dean*, 2 Sim. & St. 221.

Robinson, in reply. As to the true effect of sections 12 and 13 of R. S. O. ch. 143, see further: Prideaux's Prec: 14th ed., vol. 2, pp. 23-4. If section 12 applies to a license as to part, there can be no occasion for section 13. The rule is, that particular provisions carve their case out of what would or might have fallen under the general provisions. If you cannot account for section 13 at all, except by giving it a certain construction, you must give it that construction. As to entering a part in the name of the whole, how can you do that when you have lost your right to enter on the whole. I also cite Maxwell on Statutes, 2nd ed., p. 96; *Crowe* v. *Steeper*, 46 U. C. R. 87.

Armour, also, in reply. The condition can be apportioned by act of God, or in cases of descent, but it cannot be divided by a conveyance: *Stevenson* v. *Lambard*, 2

Argument. East 575. Henderson and Small, moreover, purchased subject to Whitney's mortgage, because they were bound to examine the registry.

July 1st, 1892. **Ferguson, J.** :—

The action is for (amongst other things) the possession of certain lands on the north side of King street, in the city of Toronto. It is brought upon an alleged right of re-entry arising, as is said, upon a breach by the tenant of a covenant not to assign or sub-let without leave.

The facts and circumstances, so far as it is deemed necessary to state them, seem to be as follows :—

On the 8th of December, 1868, William Augustus Baldwin, Henry St. George Baldwin, and Robert Russell Baldwin, by an indenture made in pursuance of the Act respecting Short Forms of Leases, demised and leased to one James Walsh, lands being 175 feet frontage, on the north side of King street aforesaid, for the period of twenty-one years, to be computed from the first day of July then next.

The lease contained a provision that the lessors should be at liberty to purchase the buildings that might be erected by the lessee by giving certain notice before the expiration of the term, the value to be fixed by arbitration, if the parties could not agree as to it. And in case the lessors should not elect to do so, then that there should be a renewal of the lease for other twenty-one years, the rent in such case to be fixed by arbitration.

The plaintiffs claim to be the representatives in title of the lessors in the said lease. The term of twenty-one years expired on or about the first day of July, 1890.

The lessors did not elect to purchase the buildings erected on the land by the lessee or those having subleases from him, which buildings are assumed to be, and, no doubt are, of great value.

On the 10th of December, 1889, the lessee Walsh, in pursuance of the terms of the lease in this respect, gave

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written notice to the plaintiffs requiring a new lease of the premises for the further term of twenty-one years, to be computed from the end of the then existing term, naming an arbitrator on his behalf.

On the 28th of June, 1890, the solicitors for the plaintiffs wrote the solicitors for Walsh, saying, amongst other things: "Referring to the notice claiming a renewal lease, served on us by you on behalf of Mr. James Walsh, regarding his lease of 175 feet on the north side of King street, we beg to put in writing what we think we have before intimated to you, that Mr. J. Herbert Mason is appointed arbitrator on behalf of the lessors."

Matters were being proceeded with towards the arbitration for the purpose of fixing the rent, to be reserved by the contemplated renewal lease for the further period of twenty-one years aforesaid, when on or about the 30th day of October, 1890, the plaintiffs accidentally discovered what they have set up as an assignment by Walsh without the required assent, contrary to the covenant, in this respect, contained in the lease, and thereupon declined further to proceed with the then contemplated and pending arbitration aforesaid; and by letter dated the first day of November, 1890, notified Walsh that they forfeited the lease and all his rights of renewal and privileges thereunder; and that a writ would forthwith be issued for the possession of the lands, which proceeding, if successful, would have the effect of taking from the sub-lessees of Walsh, who occupied positions that I will hereafter refer to, buildings and improvements of very great value indeed.

The alleged cause of forfeiture, a mortgage dated the 8th day of March, 1886, made by Walsh to one Whitney, without leave obtained from the lessors or their representatives, will also be hereafter referred to.

In order that matters should be made intelligible, I deem it necessary now to state as briefly as I can (though it cannot be done in a very small space), what was and is the position of these defendants, the Canadian Pacific Railway

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Company as sub-lessees of Walsh; and, in doing this, reference will necessarily be made to the position of other sub-lessees of Walsh, under this same original lease. Some of these matters and transactions are so interwoven with transactions with, and affecting sub-lessees of Walsh as lessee under another original lease from the same lessors, that it will be necessary also that some of these should be referred to.

The lands embraced in the original lease now sought to have declared forfeited are 175 feet frontage on King street running eastward from the westerly limit of the building, at present containing the offices of these defendants the Canadian Pacific Railway Company, the building formerly known as the United Empire Club Chambers.

The other original lease to Walsh embraced 125 feet frontage on King street lying immediately east of this 175 feet. The two original leases seem to have been alike in every respect, or almost in every respect, except that the lease of the 125 feet bears date the 19th day of August, 1868, and was for a term of twenty-one years to be computed from the first day of January then next. The term granted by the lease commenced six months earlier and ended six months earlier than the term granted by the lease of the 175 feet. Each contained the contract for the renewal of the lease for a further term of twenty-one years. Under the provisions of the lease of the 125 feet an arbitration as to the amount of the rent to be paid upon such renewal lease had taken place, and the renewal lease for the twenty-one years granted before the present trouble arose.

As to the westerly 12 feet of the land occupied by these defendants—parcel of the 175 feet—this was embraced in a mortgage made by Walsh and one Loveys, who was another lessee (of the lands lying immediately to the west) of the same lessors, upon 25 feet in favour of Mr. T. C. Patteson. Default having been made in payment of the mortgage money, proceedings were had upon the mortgage, and resulted in a sale of the land; and after some assign-

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ments of interests arising at and after the sale, an order was made vesting the 25 feet in the trustees of the United Empire Club. It was conceded that there had been virtually a sufficient consent to this mortgage, embracing this 12 feet, and though it is embraced in the pleadings it was not at the trial claimed that there was, or could have been any forfeiture as to it. The plaintiff's counsel applied and an amendment was allowed, the effect of which was to shew that the plaintiffs made no claim as to this 12 feet, part of the 175 feet embraced in the original mortgage.

On the 7th day of April, 1874, Walsh leased to Young the easterly 30 feet of this 175 feet for the then remaining part of the term in the original lease, excepting the last day thereof, and this sub-lease was duly assented to by the original lessors.

On the 3rd day of June, 1874, Walsh leased to Brisley 70 feet lying immediately west of Young's 30 feet, for the then remainder of the original term, excepting the last day thereof.

On the 13th day of January, 1875, Walsh leased to the trustees of the United Empire Club 62 feet 9½ inches lying immediately west of Brisley's 70 feet for the then remainder of the original term excepting the last day thereof, and his lease was duly assented to by the original lessors. The vesting order above referred to was made on the 18th day of September, 1875.

The 12 feet, this 62 feet 9½ inches, Brisley's 70 feet and Young's 30 feet made 174 feet 9½ inches. The 2½ inches difference between this and the 175 feet I do not see the way of accounting for, but it does not seem material on any question here.

On the 10th day of June, 1873, Walsh leased to Toulman the westerly 40 feet of the block of 125 feet for the then remainder of the term granted by the original lease of this 125 feet, excepting the last day thereof, and this was duly assented to by the original lessors.

On the 1st day of October, 1874, Walsh leased to Quinn, 35 feet lying immediately east of Toulman's 40 feet, subject to a certain right of way for the then remaining part of the term in the original lease, except the last day thereof, and this was duly assented to. There were some conveyancing complications in respect to this sublease, but they do not seem material here.

The original assents of the lessors to these last two documents, I have not my hand upon now. They are, however, recited in subsequent documents, executed with the proper consent of the original lessors, and are not questioned. On the 25th day of February, 1873, Walsh mortgaged to the Trust and Loan Company all his interest in the whole 300 feet excepting the 12 feet aforesaid, and excepting the last days of the respective terms, to secure $35,000, and this mortgage was duly assented to by his lessors.

On the 30th day of August, 1875, the trustees of the United Empire Club then having their interest in the 62 feet 9½ inches, the 12 feet and the 13 feet immediately west of it, mortgaged all this to the Western Canada Loan and Savings Company to secure $20,000, and this mortgage was duly assented to by the original lessors. This mortgage does not reserve or except, so far as I see, the last day of the term. It is, nevertheless, assented to. It is, however, apprehended that both the mortgage and consent are confined to what the trustees had the power to mortgage.

The trustees of the United Empire Club made default in respect of the payment of the mortgage money, and on the 1st day of October, 1883, the Western Canada Loan and Savings Company, in the exercise of their power of sale as mortgagees, conveyed to these defendants, the Canadian Pacific Railway Company, all their interests in the 87 feet 9½ inches for the expressed consideration of $25,000. This conveyance was duly assented to by the original lessors. Walsh had, as well, assigned to the Trust and Loan Company, (1) His interest in the lease to Toulman, which was to be reassigned on payment of $6,000. (2) His interest in the lease to Brisley, which was to be

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reassigned on payment of $5,000. (3) His interest in the lease to Quinn, which was to be reassigned on payment of $2,000. (4) His interest in the lease to the trustees of the United Empire Club, which was to be reassigned on payment of $8,000, and (5) His interest in the lease to Young, which was to be reassigned on payment of $3,000.

The Canada Life Assurance Company having, for Walsh, paid all these moneys to the Trust and Loan Company, they (the Trust and Loan Company) at the request of Walsh, assigned all these leases (five in number) to the Canada Life Company, for the expressed consideration of $20,000. This assignment bears date the 5th day of December, 1877.

By an indenture dated the 4th day of December, 1877, which recites, amongst other things, the two original leases, and the above five leases which had been assigned to the Trust and Loan Company, Walsh assigned all his interest in these five several leases, and in another indenture, dated the same 4th day of December, 1877, to the Canada Life Company for the expressed consideration of $25,070.81.

The original lessors by deed poll dated the same 4th day of December, 1877, after reciting the two original leases to Walsh, and the five leases from Walsh to Toulman, Quinn, Young, Brisley and the trustees of the United Empire Club respectively, and the indenture of the same date (the 4th December, 1877), assented to the assignment of that date from Walsh to the Canada Life Company, and stated (covenanted I think) that so long as the original rents were duly paid, and the covenants in the original leases observed, so far as the same affected the lands embraced in these five leases, they would not claim any forfeiture or right of forfeiture of the original leases, or either of them, or any right of re-entry on the lands mentioned in these five leases, or any part thereof, and that the rights of the Canada Life Company should not be prejudiced by any act or default of Walsh or of any person or persons claiming under him any estate or interest in the lands leased to

Walsh and not described in these five leases, or by any breach or non-performance or non-observance by Walsh or such person or persons, if any, of the covenants or provisos contained in the original leases, the consent, however, not to operate as a waiver of the covenant (as it is expressed).

The lands in respect of which it is now claimed that there has been a forfeiture are those embraced in the Young lease (30 feet) the 62 feet 9½ inches embraced in the lease to the trustees of the club, and now in the hands of the defendants the Canadian Pacific Railway Company, and the 70 feet embraced in the Brisley mortgage (though so far as I am aware no action has been brought or entry made in respect of this 70 feet). These lands are all embraced in the assignment to the Canada Life Company, and it seems to me that during the continuance of the interests of the Canada Life Company the plaintiffs were debarred from claiming as against them a forfeiture by reason of any act of Walsh. This interest was, however, limited to the original term less one day. It seems that throughout, so far as expressed in the documents, and except as to the 12 feet, this one day remained. A somewhat curious feature is that in the underlease from Walsh to the trustees of the United Empire Club there is an agreement respecting the granting of a new lease for a period of twenty years and eleven months to be computed from the termination of the term by this underlease granted, which necessarily included the last day of term in the original lease, and to this document the original lessors consented without any qualification whatever.

A similar agreement respecting a lease for a further term seems to be in each of the underleases made by Walsh to which I have had occasion to refer.

It appears that the Trust and Loan Company after the transaction with the Canada Life Company still held their mortgage of the 25th of February, 1873, and that there was a balance due them upon it of $1,057.50. Whitney had for years been acting as agent for Walsh. It was he who in fact had paid the moneys over to the Trust and

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Loan Company in the transaction of the assignment of the five leases. On the 8th of March, 1886, he (Whitney) took a mortgage from Walsh upon all Walsh's interest in both the original leases for the sum of $1,060, and on the following day paid the $1,057.50 to the Trust and Loan Company, and procured and had registered a discharge of their mortgage.

This was as I think upon the evidence clearly an advance made by Whitney for the purpose of paying, and which was applied in paying off the balance owing upon a mortgage made by Walsh to the Trust and Loan Company, with the full and unqualified consent of the original lessors. The mortgage to the Trust and Loan Company excepted the last days of the terms, but the mortgage to Whitney does not do so. The mortgage to Whitney is still unpaid and unsatisfied.

This mortgage of the 8th of March, 1886, made without the consent of the lessors is what is relied upon in this action as a breach of the covenant, occasioning a forfeiture and enabling the plaintiffs to avail themselves of the proviso for re-entry, to the end that they may repossess the lands as of the former estate and take and have all the buildings and improvements of the sub-lessors for no consideration whatever. It should be stated that I have spoken of this land for convenience as so much frontage on King street. It is not to be supposed from this that the underleases covering their respective frontages on King street embraced all the land having the same frontage in the original leases. The land contained in the latter extended to Boulton street, now Pearl street. Some of the underleases embraced the land from one street to the other, but some did not, and some land on Pearl street (though not a valuable portion) is embraced in the mortgage to Whitney, which is not embraced in any of the underleases having their frontages on King street. The mortgage, however, to the Trust and Loan Company of which Whitney procured the release and discharge did embrace the land on Pearl street.

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At the trial it was conceded, and, after the amendment aforesaid, it must now be taken as clear, that there cannot be a re-entry by the plaintiffs in respect of the aforesaid twelve feet of the land embraced in the original lease.

The proviso for re-entry is, I think, the one that is found in the Consolidated Acts of Upper Canada, of 1859, at page 914, which is that in case of a breach it shall be lawful for the lessor at any time thereafter, into and upon the demised premises or any part thereof in the name of the whole to re-enter, and the same to have again, re-possess and enjoy, as of his or their former estate.

It will now be convenient to state as briefly as possible the manner in which the plaintiffs claim title, and the right of re-entry upon the lands.

The late William Augustus Baldwin was the owner of the lands in fee. Desiring for some reason to make a provision for the children of his first marriage, on the 23rd day of February, 1852, he executed a conveyance by way of lease and release, by which he granted, bargained, sold, released and conveyed these and other lands to the late Hon. Robert Baldwin and the late Lawrence Heyden (called trustees, and who, in certain events, would have become trustees), and their heirs and assigns for ever, to have and to hold to the use of him, the grantor, William Augustus Baldwin, for and during his natural life, and to the further uses of such appointment or appointments either by deed or deeds, or will or wills, as he, the said William Augustus Baldwin might, at any time, make to and among the children or the issue of the children of his marriage before referred to; and in default of such appointment, then to the use of the said Hon. Robert Baldwin and Lawrence Heyden in trust for the same children, share and share alike.

The late William Augustus Baldwin by his will, made a devise of these, amongst other lands, to the same children, seven in number, which it was not questioned, was a good and sufficient appointment pursuant to the provisions of

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the conveyance to the Hon. Robert Baldwin and Lawrence Heyden.

I need not, I think, refer further to this conveyance which contains special provisions, or to the will. It was not disputed that in this way these seven children became entitled to the reversion in these lands. Henry St. George Baldwin and Robert Russell Baldwin were appointed, pursuant to provisions contained in the deed of the 23rd of February, 1852, in the room and stead of the Hon. Robert Baldwin and Lawrence Heyden, and they and William Augustus Baldwin in accordance with provisions in that behalf in the same deed, made the original leases by an alleged breach of covenants in which the present trouble arises. No question is raised as to these matters.

These seven children of the late William Augustus Baldwin (with the exceptions, that will hereafter appear) are the plaintiffs.

It was suggested on behalf of the plaintiffs, but, as I thought, not strongly urged, that these seven children did not, under the circumstances, take the legal estate, but only an equitable interest. I am not of this opinion, I think these seven children took the legal estate in fee.

William Augustus Baldwin died on the ninth of June, 1883, and upon his death these children took their interests. They then, as I think, became tenants in common in fee, subject to the leases; that is to say, owners in fee in the reversion, they having the legal estate, and holding as tenants in common.

By an indenture made on the 18th day of February, 1888, James Buchanan Baldwin, one of these seven children conveyed his undivided one-seventh share or interest in these as well as other lands, embracing the 125 feet above mentioned, to Elmes Henderson and John T. Small, to have and to hold to them, their heirs and assigns, to and for their sole and only use forever, as joint tenants, and not as tenants in common.

On the same day, the 18th day of February, 1888, Henderson and Small executed an indenture called a "Declaration of Trust."

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This recites that Elizabeth Baldwin, the wife of James B. Baldwin, had conveyed to Henderson and Small as joint tenants, certain other lands and premises.

According to this document, Henderson and Small were to stand possessed of all such lands and premises upon the trusts therein set forth, which stated shortly were: At their discretion to sell, lease, mortgage and collect the whole or any part; to receive all moneys so arising, and after paying expenses to pay and apply the same as James B. Baldwin and his wife, should respectively direct with regard to their respective properties, and the respective proceeds thereof; and at any time after the expiration of four years from the date of the document "at the direction" of James B. Baldwin and his wife respectively, to reconvey, reassign, and retransfer to them respectively, all or any such portion or portions of the property as should remain unsold or undisposed of. And in the event of the decease of James B. Baldwin and his wife, or either of them, then in such manner as they should respectively desire or appoint with regard to their respective properties by deed or will; and in default of any such devise or appointment then in trust for those who should be entitled according to the laws of descent affecting the property.

Henderson and Small have not sold or otherwise disposed of the one-seventh interest in this reversion. They still hold it as it was conveyed to them. They are parties plaintiffs. They executed the renewal lease that was made of the 125 feet, and James B. Baldwin did not do so. James B. Baldwin, was made a party by amendment after the trial. He was not a party to the action in the beginning. Nor was the indenture called the Declaration of Trust in evidence till after the trial. It was received at the time of the amendment by which James B. Baldwin became a party.

The doctrine of *Dumpor's Case* 4 Co. R. 119*b*, in regard to licenses by lessors to lessees authorizing alienation by the latter, notwithstanding the covenant not to assign or sublet and the proviso for re-entry, though sometimes spoken of with disapproval, was doubtless the law of England on the subject till the passing of 22 & 23 Vict. ch. 35, secs. 1 and 2; and the law on the subject in this country till the passing of 29 Vict. ch. 28, secs. 1 and 2, now, sections 12 and 13 of ch. 143, R. S. O. 1887.

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In an edition of Woodfall's Landlord and Tenant before the passing of that Act in England, it is said to have been long before laid down that if the lessor license the lessee to alien part, he may alien the residue without license; for the lessor cannot enter, because if he should enter for the condition, he should enter upon the entire as it was limited; and if he should enter upon the entire, he would destroy that which he had licensed to be aliened, which he cannot do, and therefore upon a proviso that a lessee and his assigns shall not alien without license, if the lessor give license, the condition is entirely destroyed and the assignee may afterwards assign or demise the whole or any part of the term without license, for the condition is considered as gone. There is also a reference to *Brummell* v. *Macpherson*, 14 Ves. Jr. 173, as well as to *Dumpor's Case*, and if the law had remained as it formerly was, I apprehend the plaintiffs could not avail themselves of this alleged breach of the covenant.

In a subsequent edition of the same work (1881), at p. 627, it is said: "The unreasonable doctrine of *Dumpor's Case* that a license to assign or sublet, operated as a total waiver of the condition against assigning, or subletting, such condition being considered as an entire thing, not capable of being waived or released as to part only, was never overruled. It was however abrogated by statute 22 & 23 Vict., ch. 35, which, it will be observed, applies to all kinds of license." As I understand their argument on this immediate subject, the difference between counsel is as to the meaning of section 13, the former section 2, which is in respect of the restricted operation of partial licenses. For the defendants it is contended that this section 13 being one providing for a particular case or class of cases, should be read by itself, and not in conjunc-

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tion with section 12, and that when so read the meaning is that when there has been a license as to part, the residue or remainder of the property is, in respect to licenses of the lessor, as it was at common law, and before the passing of the Act. On behalf of the plaintiffs, the contention is, that the two sections 12 and 13, should be read together in dealing with a case of partial licenses; and further, that, even if in such case section 13 must be read by itself, the meaning is that the license given is confined, in its effect, to the actual matter specifically authorized to be done.

Section 12 provides that, Where a license to do any act, which without such license, would create a forfeiture, or give a right to re-enter under a condition or power reserved in a lease heretofore granted, or to be hereafter granted, has been, at any time since the 18th day of September, 1865, given to a lessee or his assigns, every such license shall, unless otherwise expressed, extend only to the permission actually given, or to any specified breach of any proviso or covenant made, or to be made, or to the actual assignment, under-lease, or other matter thereby specifically authorized to be done, but not so as to prevent a proceeding for any subsequent breach (unless otherwise specified in such license), and all rights under covenants and powers of forfeiture and re-entry in the lease contained, shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter not specifically authorized or made dispunishable by such license, in the same manner as if no such license had been given; and the condition or right of re-entry shall be, and remain in all respects, as if such license had not been given, except in respect of the particular matter authorized to be done.

Section 13 provides that, Where in a lease heretofore granted, or to be hereafter granted, there is a power or condition of re-entry on assigning, or underletting, or doing any other specified act without license, and at any time since the 18th day of September, 1865, a license has been or is given to one of several lessees or co-owners to

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assign or underlet his share or interest, or to do any other act prohibited to be done without license, or has been or is given to a lessee or owner, or any one of several lessees or owners, to assign or underlet part only of the property or to do any other such act as aforesaid in respect of part only of such property, such license shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees or owner or owners of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests or remaining property; but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such license.

It was conceded that if section 12 properly applies to cases of partial licenses, such as the present one, there would not be ground for contending that the license as to part would extend in its effect to anything but the permission actually given, or to any matter not specifically authorized or "made dispunishable" by the license; and, assuming this to be so, a license as to a part could not be made available to the lessee or his assignees in answer to an action for any other or subsequent breach of the covenant.

The argument, however, as I have already said, was that section 12 does not so apply, and that in the case of a license or licenses as to part only, the provisions of section 13 alone apply.

When the parts of section 13 that apply to cases in which the lessor, or all the lessors together, have given a license to a single lessee, or all the lessees together, in respect of an alienation of part only of the property leased are extracted from the body of the section, they seem to me to read thus:

"Where (the lease being of the character described) a license has been given by the lessor to the lessee to assign or underlet part only of the property leased, such license

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shall not operate to destroy or extinguish the right of re-entry, in case of any breach of the covenant or condition by the lessee, over or in respect of the remaining property; but such right of re-entry shall remain in full force over and in respect of the property not the subject of such license."

It is suggested in Watter's Property Statutes, at p. 13, that the first section of the English Act, which is the same in effect, if not identical in words, as our section 12, might conveniently be made much shorter without destroying or changing the real effect, and if one should treat our section 12 in the way suggested, it would read thus: "Where a license to do any act which without such license would create a forfeiture, or give a right to re-enter under a condition or power reserved in a lease heretofore granted, or to be hereafter granted, has been at any time since the 18th day of September, 1865, given to a lessee or his assigns, the condition or right of re-entry shall be and remain in all respects as if such license had not been given except in respect of the particular matter authorized to be done."

One may, as I think, for the purposes of the present case, look at these abbreviations of the two sections as and for the sections themselves.

The author of the same work after pointing out the difficulties in construing section 2 (13), and the absence of any apparent necessity for it, says, it must be admitted that the section by providing that the right of re-entry should remain in full force over or in respect of the property not the subject of the license in the event of a breach of condition by the owner or owners of such remaining property has favoured the inference that the property which was the subject of the license was not to be liable to forfeiture for breach of condition with respect to the remaining property, and that the lessor's right of re-entry over the remaining property was only to accrue in the case of a breach of condition by the owner or owners thereof in relation to such property. In other words, that the object of the legislature in the section was to create a severance of the condition as between the assignee of the part assigned with license and the owners of the remaining part. The author then expresses the opinion that the consequences that would result from such a construction are sufficient to preclude the notion that it could have been intended by the legislature, and says, that it would, in fact be needful, in such a view, altogether to withdraw the case of a license granted to a part owner from the operation of section 1 (12), the effect of which would necessarily be to leave the lessor without any right of re-entry in respect of such part. And after again pointing out that the section is unskilfully framed, says that it would probably be held to amount to no more than an informal affirmance of the application of section 1 (12) to the case of a license granted to a part owner of leaseholds, or to the owner of the entirety in respect of a part only of the demised property.

In Edward's Law of Property in Land, 2nd ed. (1891), the author says, at p. 105: "And a license to do an act which, without such license, would create a forfeiture or give a right to re-enter is (unless otherwise expressed) to extend only to the permission actually given, or to the matter thereby specifically authorized, and is not to prevent any proceeding for any subsequent breach. And the operation of a license given to one of several lessees or in respect of a part of the land is similarly restricted," the author referring to both sections of the Act.

What is said in Redman and Lyon's Law of Landlord and Tenant, 3rd ed., 1886, at p. 345, indicates the view that notwithstanding a license to assign as to part of the property and an assignment of such part, the right of re-entry remains (on breach of covenant or condition), as to the remaining part of the property. One may, I think, fairly say that the general silence of the books, in regard to the meaning of section 2 (our section 13), is remarkable, seeing that the section has existed since 22 & 23 Vict. ch. 35, in England.

In Maxwell on the Interpretation of Statutes, 2nd ed.

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p. 96, the author in speaking of presumptions in interpretation says: "One of these presumptions is that the legislature does not intend to make any alteration in the law beyond what it explicitly declares either in express terms or by unmistakable implication; or in other words beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed."

Much difficulty as there may be, and no doubt is, in discovering the full meaning and operation of this section 13, it seems to me that it does expressly and unequivocally say this much: that when the lease is of the character mentioned, and there has been a license by the lessor as to part of the property leased, in respect of an alienation of such part the right of re-entry nevertheless remains in full force over or in respect of the remaining property, not the subject of the license.

It is conceded that there has been such a license in respect of the 12 feet of this property that the lessors are precluded from re-entering upon this part. The plaintiffs say that they have nevertheless the right, on breach, to re-enter upon the remainder of the property not the subject of such license.

This the defendants deny, saying, amongst other things, that there cannot be a re-entry upon a part of the property only because the proviso is for a re-entry into and upon the demised premises, or any part thereof, in the name of the whole, and the same to have again repossess and enjoy as of the former estate, etc.

This proviso by contract must, as I think, be read in conjunction or connection with, or in the light of the statute, and when the occasion arises where, as here, it is contended that there is the right of re-entry upon the remaining part of the premises not the subject of the license, such part becomes for the purposes of re-entry the whole, for it is in respect of this part that the right of re-entry according to the words of the statute remains in full force.

I therefore think that notwithstanding the license or consent as to the 12 feet there may be the right to re-enter upon the remaining part of the property leased, it being considered for such purpose as the whole.

For the defence it was further contended as I understood the argument that where there has been an alienation of part of the property leased authorized by a license of the lessor, the remaining part of the property is as at common law.

This contention must, as it appears to me, rest upon the ideas that the 13th section alone applies to the case of a license and alienation of part of the property; that section 12 has no application to such a case, and the fact that section 13 nowhere on its face says that the effect of the license shall be restricted to the act specifically authorized as does section 12.

This view as to the meaning of section 13, and the consequences following, that the remaining part of the property leased is left as at common law, notwithstanding the passing of the Act, when placed side by side with the admitted meaning of section 12, seems to present a state of the law, or rather, a supposed state of the law, that I cannot think was ever intended by the legislature. I cannot see any reason why, in a certain event, which may be comparatively trifling and unimportant, nearly the whole of the estate under lease should be left as at common law when one looks at the spirit of the legislation as manifested by the provisions of section 12, the same as section 1 of the English Act.

The argument that as section 13 seems to apply itself to a particular case or class of cases, its provisions alone, to the exclusion of the provisions of section 12, should be looked at in considering such case, or any case of such class, seems very forcible. This and the presumption above mentioned referred to in Maxwell on Statutes, at p. 96 that, the legislature does not intend to make any change in the law beyond what it explicitly declares either in express words or by unmistakable implication, in other words, beyond the immediate scope and object of the statute as well as some decided cases expressing the same thing were employed in support of the contention.

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Where the words of an Act are clear, they must be followed, though they lead to an absurdity. If they admit of two or more interpretations, then they are not clear, and if one interpretation would lead to what is very unreasonable or absurd and the other would not, the interpretation that would not lead to or towards a very unreasonable or absurd thing should be adopted. It is conceded that the words of section 13 are not clear. As to this I cannot do better than refer to the comments of Mr. Watters on section 2 of the Imperial Act. The question here, however, is not so much as to the true interpretation of either section as whether or not the two sections should be read together, so that the provisions of both may in certain cases apply.

It seems to me that leaving nearly the whole of the estate embraced by the lease, as at common law, in the circumstances above, where one takes into consideration the admitted meaning and effect of section 12, and that it would have been sufficient to meet all cases if section 13 had not been passed at all, and what seems to have been the motive or object in changing the law by passing the statute, would be a very unreasonable thing indeed, and might, as I think, be fairly said to be absurd.

In the present case, the assent of the lessor was as before stated, respecting 12 feet only of the 175 feet. According to what is contended for, the remaining 163 feet would be left as at common law. I feel delicacy in offering an opinion, but the conclusion at which I have arrived is, that section 13 is a thing additional to and in aid of section 12, and that the provisions of both sections may be employed in a case presenting facts rendering it needful so to do, and that, in the present case, the provisions of both sections are to be read, and so far as needful, applied, though the assent or license has relation to the small part only as above.

As to the assent to the grant by Walsh of the underlease to the trustees of the United Empire Club containing an agreement for the granting by Walsh to them of a new

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Ferguson, J.

or renewal underlease for the term of twenty years and eleven months, to be computed from the end of the term by that underlease granted, which period or term would necessarily include and comprehend the one day of the original term not embraced in the underlease then granted to these trustees, this seems to me only an assent, in addition to the license to grant the underlease for the term mentioned in it, to the creation of an interest in the nature of an *interesse termini*, dependent upon the contingencies mentioned in the underlease, and those contained in the original lease, the contemplated period of which interest would terminate one month and one day prior to the determination by effluxion of time of the term of a renewal lease to Walsh, should the same be granted in pursuance of the provisions in that behalf in the original lease. It was not an assent to the granting of any estate in the land beyond the term of the underlease, and I do not see that, as against the plaintiffs, in their contention here, it adds anything to the force of the assent to the granting of the underlease, if it had not contained this provision or agreement.

It was, on behalf of the defendants, contended that the action to recover possession by reason of a forfeiture, and the right of re-entry does not lie, or cannot be maintained when brought after the expiration of the term granted by the lease for an alleged breach during the term so granted. That this contention cannot prevail in cases where the lease contains an agreement or covenant for the granting of a renewal lease for a further term, seems clear from the case *Thompson* v. *Guyon*, 5 Sim. 65; see also Foa's Landlord and Tenant, p. 229.

Counsel for the defendants did not dispute the general proposition that the titles of sub-lessees who claim under the original lessee are liable to be defeated by an act or default of the original lessee, occasioning a forfeiture and giving the right to re-enter when taken advantage of by the original lessor. Yet authorities were cited in support of the proposition: *Creswell* v. *Davidson*, 56 L. T. R. 811; *Fildes* v. *Hooker*, 3 Madd. 193, 2 Mer. 424; *Sheard* v. *Ven-*

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ables, 36 L. J. Ch. 922, 15 W. R. 1167; *Webber* v. *Smith*, 2 Vern. 103; *Blake* v. *Phinn*, 3 C. B. 976 (note); *Haggard* v. *Criddle*, 22 Beav. 477.

The contention of the defendants that the assent of the lessors to the assignment to the Canada Life Company, containing the agreement or covenant of the lessors before alluded to, prevents the plaintiffs from taking advantage now of the alleged forfeiture, cannot I think prevail. The interests of that company came to an end one day before the expiration of the term granted by the original lease. As against them there could not have been a re-entry for breach during the continuance of their interest, but I do not perceive why such should continue to be the case after their interest ceased as against others in whose favour there was no such agreement or covenant of the lessors. If the plaintiffs had had notice of the alleged forfeiture during the continuance of the interest of the Canada Life Company their position would have been embarrassing, for their agreement not to take advantage of such a breach as against that company was binding upon them, and there would be difficulty, at least, in their recovering the rents with notice without waiver of the breach. Unless, however, it is made appear that they had such notice the embarrassing case did not arise. I do not think it a case of the right of action being suspended by act of the parties, and therefore gone. It was also contended for the defendants that the notice and appointment of an arbitrator for the purpose of determining the amount of the rent to be reserved by the contemplated renewal lease was an unequivocal act of the plaintiffs, and was an election not to take advantage of the now alleged cause of forfeiture. The acts, as acts, were I think of an unequivocal character. I am, however, not able to see how there could be an election unless at the time the plaintiffs had notice or knowledge of the alleged cause of forfeiture. It was endeavoured to be shewn that there was notice to the plaintiffs' solicitor by reason of his having made or caused to be made certain searches in the registry-office in respect to matters pertaining to the arbitration respecting the lease of the 125 feet, and otherwise. I think, however, that the defendants failed in this effort.

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Ferguson, J.

It was contended that the plaintiffs were affected with notice of the mortgage to Whitney, the alleged cause of forfeiture, which was registered as aforesaid in 1886, because they, the plaintiffs, had on the 16th day of June, 1890, caused to be registered a surrender of lease from one W. H. C. Kerr, and another surrender from one Wm. Cotterill on the 7th day of August, 1890, these leases having been upon respective parts of the original lots or one of them embraced in the Whitney mortgage, the alleged cause of forfeiture.

In the case *Boucher* v. *Smith*, 9 Gr. at p. 353, the law on the subject seems to be concisely stated by the late Vice-Chancellor Esten. He said that registration is notice of the thing registered for the purpose of giving effect to any equity accruing from it; but it can be notice of any given instrument only to those who are reasonably led by the nature of the transaction in which they are engaged, to examine the register with respect to it.

Adopting this as the rule, I think this contention should fail.

The lease of the 175 feet expired on the first day of July, 1890. There was notice to the plaintiffs of the Whitney mortgage, now relied on as a cause of forfeiture on the 30th day of October, 1890, and, I think, not sooner.

The defendants contended that by the conveyance of the 18th of February, 1888, from James B. Baldwin to Henderson and Small, there was a severance of the reversion, and that as a consequence of this the right of re-entry for condition broken was destroyed.

It will be remembered that the lessors were William Augustus Baldwin, Robert Russell Baldwin, and Henry St. George Baldwin.

No objection was taken in respect of the reversion passing from these to the seven children of William Augustus Baldwin, nor could there be, for it came to them by devise

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which was said to be an act of law. This was conceded. I have before said that, in my opinion, the seven children were the legal owners in fee of this reversion. This was, as I think, the effect of the original conveyance and the devise or appointment.

The contention is based upon the fact, as stated, that there was a severance of the reversion by a conveyance, the act of the parties.

In *Dumpor's Case*, Smith's L. C. 8th ed., Vol. I., pp. 49 and 50, it is said that there could not be an entry for the condition broken, because the condition being entire, could not be apportioned by act of the parties, but by the severance of a part of the reversion, it is destroyed in all. It is, however, also laid down that the condition might be apportioned in two cases: (1) By act of law; and (2), by act and wrong of the lessee.

Further on in the same case, p. 50, it is said that he who enters for a condition broken, ought to be in of the same estate which he had at the time of the condition created, and that he cannot have when he has parted with the reversion of part: Co. Litt. 80 *b*.

In the case *Wright* v. *Burroughs*, 3 C. B. p. 699, Wilde, C. J., speaking of some authorities that were cited, said: "Most of them are applicable to assignments of the reversion of part of the property. It is clear that an assignee of part of the reversion in that sense cannot take advantage of condition broken. But here the whole reversion came to the defendant." What the case decided was that the grantee of part of the grantor's reversionary interest in the whole of the property is an assignee of the reversion within 32 Hen. 8, ch. 34, but the grantee of the whole reversionary interest in part of the property is not such an assignee.

In Leith's Real Property Statutes, at p. 10, the learned author says: if the party claiming the benefit of a condition giving the right of entry have conveyed the reversion of part to a stranger, the condition is destroyed *in toto*. See also *Knight's Case*, Coke, part 5, p. 113. Sections one and two of 22 & 23 Vict. ch. 35, did not affect

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this proposition, nor did or do our corresponding sections 12 and 13 before referred to. Section 3 of 22 & 23 Vict. ch. 35, to which section 7 of our present Landlord and Tenant Act, ch. 143, corresponds, provides for cases of severance of the reversion where the rent or other reservation has been apportioned, and gives the benefit of conditions or powers of re-entry for nonpayment of original rent or other reservation, but does not extend to or provide for re-entry in case of severance of the reversion, for condition broken by assigning or subletting without leave or otherwise than by nonpayment of the original rent or other reservation.

The law on the immediate subject in England seems to have remained in this condition until the passing of the Conveyancing and Law of Property Act of 1881, 44-45 Vict. ch. 41, the 12th section of which provides that "notwithstanding the severance by conveyance * * of the reversionary estate in any lands comprised in a lease and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry and every other condition contained in the lease shall be apportioned and shall remain annexed to the several parts of the reversionary estate as severed, etc."

There is, I think, no such enactment as this 12th section of the Imperial Act of 1881 in this country; and, I think, I may venture to say that the law here on the immediate subject is the same as the law was in England immediately before the passing of this 12th section of the Imperial Act of 1881.

The case then is that these seven persons, tenants in common of the reversion, holding equal shares thereof, and having the legal estate, one of them, James B. Baldwin, makes this conveyance (the contents of which I have before referred to) to the plaintiffs Henderson and Small of his interest, to be held by them as joint tenants, and not as tenants in common. Henderson and Small so holding this undivided one-seventh part of the reversion, join with those

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respectively holding the remaining six undivided one-seventh parts of the reversion in bringing this action. Even the four years mentioned in the conveyance had not expired when the action was brought, if this would make a difference.

At the time the action was commenced Henderson and Small had the legal estate in this one-seventh as joint tenants. The amendment before referred to, made after the trial, was for the purpose of putting in evidence a document called a Declaration of Trust in favour of James B. Baldwin, and making him a party plaintiff, to the end, as I supposed, that all persons having any interests, legal or equitable, in this reversion, should be before the Court. I cannot, however, see that this Declaration of Trust can make a difference, or undo that which I cannot but think, was done by the conveyance to Henderson and Small, namely, a severance in fact and in law of this reversion.

It was contended that the evils, or the inconvenience and wrong to the lessee, which were said to be the reason for the rule of law in cases of the severance of the reversion, could not arise in the present case, because any one of the tenants in common of the reversion could recover in ejectment for the whole, and that the Court would relieve against any subsequent trouble to the lessee that might arise, the case *Doe d. Lulham* v. *Fenn*, 3 Camp. 190, being referred to as to such relief. (*a*.)

In the case *Bornier* v. *Bornier*, tried before myself very recently, I was called upon to decide the single question as to whether or not a tenant in common can recover in ejectment against a trespasser in possession for more than his own share of the land, and I felt bound by the authorities, as I understood them, to decide that he cannot, which I did, and I do not see that I need go over the authorities on the subject again here.

The case *Doe d. Lulham* v. *Fenn*, was, as it appears to me, not at all like the present case, and I do not think the remarks of Lord Ellenborough in that case can be made to apply here.

(*a*) **Unreported.**

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Ferguson, J.

Then the mortgage to Whitney, the alleged cause of forfeiture, was made in 1886. The conveyance by James B. Baldwin to Henderson and Small, was in 1888, and assuming that there was a breach which gave the right of re-entry, this right was in existence before and at the time of the conveyance. It was a right of entry for condition broken, the condition being the one referred to. Such a right of entry as the one contended for by the plaintiffs might pass by devolution: See R. S. O. ch. 108, sec. 11, or by devise, see *ib.* ch. 109, sec. 10; but, as I understand the matter, it would not pass by a conveyance of the land, or interest in the land. It seems that such a right of entry is not included or embraced in the provisions of sec. 9 of ch. 100, R. S. O.: *Hunt* v. *Bishop*, 8 Ex. 675, at p. 680; *Hunt* v. *Remnant*, 9 Ex. 635, at p. 641; Leith's Real Prop. Statutes, pp. 72 and 73.

This right of entry (assuming that it existed) did not, as I think, pass to Henderson and Small by the conveyance of the interest in the reversion, and there is no writing whatever other than the conveyance (which does not mention it at all) by which it could have been assigned to them even if it were, for a moment, assumed to be possible to assign such a right founded on a past breach.

The right of entry (assuming that it existed and continued to exist) remained with James B. Baldwin, that is to say, it was not assigned by him, but he parted with the estate that he had. Under the terms of the conveyance made by him and the document called the Declaration of Trust, he would not be the one entitled to the possession. In these circumstances I can arrive at no conclusion but the one, that there was such a severance of the reversion as operated a destruction of the right of re-entry for condition broken (such condition being the one in question here) even if it be assumed that the right of re-entry would otherwise have existed, and, for this reason, if there were none other, I am of the opinion that this action fails and should be dismissed so far as it has relation to entering upon the demised premises for or by reason of the alleged forfeiture.

The other case, *Baldwin* v. *Wanzer*, tried with this one rests mainly upon the same facts, but there are some differences. *Baldwin* v. *Wanzer* is in respect of that portion of the 175 feet sublet by Walsh to Young, and now apparently in the hands of the defendant Ince, the lessor to or landlord of the defendants, R. M. Wanzer & Co.

In the plaintiffs pleading they say that neither they nor any person on their behalf consented to the assignments or sub-leases under which these two defendants claim, and that they, R. M. Wanzer & Co., and Ince, are not entitled to any interest in the lands or the possession of the same.

At the trial, it was a matter of contention, whether or not this pleading—the statement of claim—sufficiently alleged as a breach or breaches, or cause or causes of forfeiture, the fact that the assignments and underleases under which these defendants professed to hold were made and executed without the assent of the original lessors or the plaintiffs. The defendants contended that the pleading does not do this, but only refers to the mortgage to Whitney as the cause of the alleged forfeiture, and besides that no such consents were necessary, because the covenant of the original lessee, Walsh, was not a covenant that neither he nor his assigns would assign or sublet without the assent in writing of the original lessor, and there was the assent to the subletting by Walsh to Young.

If, however, the view that I have taken regarding the severance of the reversion and the effect of it in the other case, *Baldwin* v. *The Canadian Pacific Railway Company*, is the correct one, it is not necessary, so far as I see, that I should determine either of these questions.

The lease from Walsh to Young was on the 7th April, 1874, and was duly assented to. The transfer from Young to Clark was about the first day of April, 1876. The transfer from Clark to Mulock was about the first day of October, 1878. The transfer from Mulock to Kerr was about the twentieth day of April, 1886. These documents are not before me, but there are recitals of them in the transfer from Kerr to Ince, a copy of which I have.

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Ferguson, J.

Assuming, in favour of the plaintiff's contention, that such assignments or underleases being made by these respective sub-lessees without the assent in writing of the original lessors or those representing them were breaches of the covenant not to assign or sublet, etc., and that the plaintiffs' pleading is sufficient to set them up as causes of forfeiture, they, and each of them, occurred at a date prior to the conveyance from James B. Baldwin to Henderson and Small, and each of them stands with respect to the alleged right of re-entry in the same position as does the mortgage to Whitney, a matter dealt with in what I have said in the other action, *Baldwin* v. *The Canadian Pacific Railway Company.*

The assignment or underlease from Kerr to Ince bears date the 20th day of February, 1889 (after the date of the conveyance from James B. Baldwin to Henderson and Small). This fact does not, however, occasion any difference in the conclusion, if I am right respecting the severance of the reversion, because this would be destructive of the rights of re-entry for conditions broken regardless of whether the breach occurred before or after the date of the conveyance that operated the severance, although the assignee of a reversion not severed could take advantage of a breach of condition occurring after the assignment to him, but not of one occurring before such assignment to him.

There may be other minor differences between the two actions, but not, I think, such as to affect the result.

The severance of the reversion seems to me to have the same effect in both these actions. It was destructive of the right of re-entry for condition broken.

I am also of the opinion that this action of Baldwin and Wanzer, so far as it has relation to entering upon the demised premises, for, or by reason of the alleged forfeiture fails, and should be dismissed.

In each of the actions, a claim is made for arrears, or

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Ferguson, J.

alleged arrears of rent, for use and occupation and for mesne profits. Much was not said as to the particulars of these at the trial. I did not understand that any rent that accrued during the term of the original lease, the twenty-one years, was unpaid. Assuming that there was not, and that the view I have taken as to the alleged forfeiture, is correct, I do not see how either rents, use, and occupation, or mesne profits, can be recovered by the plaintiffs in either actions.

There is in such case simply the right to the renewal lease, at a rent to be fixed by arbitration according to the original contract in that behalf.

Other questions of an important character were raised and argued at the trial, such as the effect of the plaintiffs having received certain moneys from the defendants, the Canadian Pacific Railway Company, as rent of the demised premises or part of them, after and with full knowledge of the now alleged cause of forfeiture, the mortgage from Walsh to Whitney, the power of the Court under the provisions of a certain statute to relieve against such a forfeiture as the one alleged, the propriety of this being done if the power were thought to exist, etc. But being of the opinion I have stated above, I do not see that it is necessary that I should consider these matters.

I am of the opinion, that both the actions should be dismissed, and they are dismissed with costs.

Both actions dismissed with costs.

Order accordingly.

A. H. F. L.

[CHANCERY DIVISION.]

GRANT V. THE NORTHERN PACIFIC RAILWAY COMPANY.

Railways—Connecting lines—Misdelivery of goods owing to mistake on connecting line—Principal and agent—Consignor and consignee.

The purchaser in Victoria, B. C., of goods from the agent of the plaintiffs there, ordered their shipment by the plaintiffs from this Province through an agent of the defendants in Victoria, the latter furnishing on behalf of his company a tag marked "*Via* Grand Trunk Railway, and Chicago & North Western, care of Northern Pacific Railway, St. Paul." The defendants' agent in Victoria sent this order and tag to their contracting freight agent in Toronto, who communicated with the plaintiffs in this province, and the latter shipping the goods to their own order at Victoria, drew through a bank on the purchaser against the shipment with a shipping bill attached, marking the goods as above with the addition "notify," naming the purchaser, and advised the defendants' agent in Toronto, who undertook to have the shipment looked after. The Grand Trunk Railway forwarded the goods in their own car, which went through; each successive forwarding company signed a fresh shipping bill and paid all charges up to the time of receipt, to the company from whom they received the goods. Before the goods reached the defendants' own line, owing to a mistake in copying the waybill, another name was substituted for that of the plaintiffs, and in the defendants' waybill the word "order" was left out. These mistakes were continued in the shipping bills over the other lines, until the shipment reached Victoria, when the goods were delivered to the purchaser, who refused to pay for them, and shortly afterwards failed.

Held, **that the goods were received by the defendants in this province by the Grand Trunk Railway Company, as their agents, upon a through contract to deliver them to the order of the consignor at Victoria, and that they were liable to the plaintiffs for their wrongful delivery.**

Statement.

THIS was an action brought to recover the value of certain goods under the following circumstances:—

The plaintiffs are pork packers, carrying on business at Ingersoll, Ontario; one Mitchell in Victoria, British Columbia, was their agent there. He contracted to sell to one W. W. Evans, a butcher there, for the plaintiffs, a quantity of hams and bacon. E. E. Blackwood was the agent at Victoria, B. C., of the defendants' company, and through him Evans arranged for the shipment of the goods by a letter drawn up by Blackwood and signed by Evans, as follows:—

Statement.

"NORTHERN PACIFIC RAILROAD CO.
"*Victoria, B. C., Station, June 10th*, 1889.

"JAMES GRANT & CO., Ingersoll, Ont.

"*Dear Sirs:*—Please deliver my shipment of bacon ordered through Mr. James Mitchell, to the Grand Trunk Railway Co., to be shipped as per tag below.

"Yours truly,
"W. W. EVANS."

A printed tag was attached by Blackwood at the foot of the letter in the following words: "Mark and ship this freight

"Via Grand Trunk Railway
"and Chicago and North Western,
"care Northern Pacific Railroad,
"St. Paul.
"Be particular to mark in full as above."

This order, with the tag attached, was forwarded on 11th June, 1889, by Blackwood to W. E. Belcher, at Toronto, Ont., enclosed in the following letter:—

"NORTHERN PACIFIC RAILROAD CO.
Victoria Station, June 11th, 1889.

"W. E. BELCHER, ESQ., N. P. Ry.—Dear Sir:

"Acc. W. W. Evans' shipment of bacon. Order att. Please look after this shipment at once and see that we get it.

"Yours,
"E. E. BLACKWOOD."

Mr. Belcher was at this time the contracting freight agent for the Northern Pacific Railroad, with office at Toronto, Ont., and his appointment had been notified by circular.

Upon receipt of the order from Mr. Blackwood, Mr. Belcher wrote to the plaintiffs enclosing the order in the following letter:—

"NORTHERN PACIFIC RAILROAD,
"*Toronto, June 18th*, 1889.
"W. E. Belcher, Contracting Freight Agent,
"Office 64 Bay st., Toronto.

"JAS. GRANT & CO., Ingersoll, Ont.

"GENTLEMEN: I beg to enclose order from W. W. Evans,

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of Victoria, B. C., to ship bacon ordered by that firm through Mr. James Mitchell. I also enclose you card of advice, and if you will kindly fill up when you make the shipment send to me, I will trace and hurry it through, and advise you of delivery to consignees. Hoping to see you soon, beg to remain,

"Yours truly,
W. E. Belcher, C. F. A."

On 27th June, 1889, the plaintiffs shipped the goods in question to their own order at Victoria, B. C., marked "Notify W. W. Evans" by Grand Trunk Railway Company at Ingersoll, marked as directed, "*Via* Grand Trunk Railroad and Chicago and North-Western, care Northern Pacific Railroad, St. Paul." They invoiced the goods to W. W. Evans, at $1,559.13, and drew on him at thirty days' date for the amount, attaching the draft to the shipping bill, and indorsing the shipping bill to the Imperial Bank of Canada, who indorsed and sent both documents on to the Bank of British Columbia at Victoria, B. C., with instructions to give up the shipping bill on payment of the draft. On 27th June, 1889, the plaintiffs wrote Mr. Belcher advising him of the shipment and of the number of the car, and enclosing a copy of the shipping bill, and saying, "We gave instructions to reice car at Chicago, and if it does not cost over $2.50 each time we would like it iced at least twice between Chicago and Victoria. Can you arrange this? the Grand Trunk Railway have only instructed icing at Chicago."

On 28th June, 1889, Mr. Belcher replied acknowledging receipt of copy of shipping bill, and saying, "I have instructed our agent at Victoria as to the lard delivery, and requested him to make prompt report of its arrival and condition. I have also requested our agents at the different points west to see that the car gets proper despatch, and that it is properly iced as it requires it. I have also asked our General Freight Agent at St. Paul to see that the icing is as moderate as possible, and to advise me of the probable cost on future cars, and upon receipt

Statement. of this information I will be happy to hand it to you. You may rest assured that we will do everything for your interest in this business, and I hope to make a handsome record on this car as we have done in other cases not so perishable. Yours truly, W. E. BELCHER, C. F. A."

The car was iced several times on its way, and the expense of doing so was charged to the freight account.

On 28th June, 1889, Mr. Belcher wrote Mr. Blackwood, agent N. P. R. R., at Victoria: "I beg to advise you of G. T. R. car 3334, loaded with lard and bacon by James Grant & Co., Ingersoll. I have requested our western connections to reice this car when required and give it good despatch. I trust you will be able to report favourably on its condition and time. I enclose copies of shipping bills for your private information."

The Grand Trunk Railway Co. by their shipping bill, limited their liability as usual to the extent of their own line. They shipped the goods in car No. 3334 of their own line and sent with them a waybill describing the goods. Under the heading, "Consignee and Destination," was written: "Order Jas. L. Grant & Co., Victoria, B. C., viâ Chicago and North-Western c/o Northern Pacific R. R. at St. Pauls," and in red ink, "advise W. W. Evans, Victoria, B. C.;" and under the heading of "Rate," was written, "Through rate Ingersoll to Vic. B. C., $1.95 per 100 lbs. governed by Trans. Cont'l. Tariff, No. 18, for Pacific Coast points." Another memorandum shewed the Grand Trunk's proportion of the rate to be twenty cents per 100 lbs., and $40 as the total amount of freight to be collected on their account upon the total weight of 20,000 lbs. The next waybill is that of Chicago and North-Western Railway, who took over the goods from the Grand Trunk at South Branch Station. The clerk who copied from the Grand Trunk waybill in order to make a new waybill over the Chicago and North-Western Railroad, appears to have made a mistake, and under the head "Consignee," wrote "Ord. Jas. L. Ward & Co., Victoria, B. C., advise W. W. Evans, c/o Chicago and North-Western and Northern Pacific. The

Statement.

Chicago and North-Western Railroad proportion of the freight was $52 upon a weight of 20,000 lbs. This waybill is dated 21st June, 1889.

The next waybill is, that of the Northern Pacific, dated July 3rd, 1889. In this the word "order," is left out altogether, and under "consignee," appears simply "Jas. L. Ward & Co., Victoria, B.C. Advise W. W. Evans." The Northern Pacific's share of the freight appears to be $319.21 from St. Paul to Tacoma. At Tacoma the Northern Pacific Railroad handed the goods over to the Oregon Railway and Navigation Company, whose waybill to Victoria, B.C., follows that of the Northern Pacific Railroad. At Victoria, B.C., the Oregon Railway and Navigation Company handed the goods, with the waybill, over to their agents there, Messrs. Turner, Beeton & Co. Each of the railway companies and persons through whose hands these goods passed, paid to the company from whom they received them, according to custom, all the freight charges down to the time of their receipt of the goods, and Messrs. Turner, Beeton & Co., therefore paid to the Oregon Railway and Navigation Company the whole freight charges from Ingersoll to Victoria—$454.75 in all.

No such firm as Jas. L. Ward & Co., existed in Victoria, B. C., and upon the arrival of the goods, Messrs. Turner Beeton & Co. advised W. W. Evans, and a day or two afterwards on his paying them the freight and their charges, they delivered the goods to him without further enquiry. He refused to pay the draft for the price of the goods and subsequently failed.

On 13th August, 1889, the plaintiffs wrote Mr. Belcher informing him that Evans had obtained the meat without paying for it and without their order, and notifying him that they would look to the railroad company for payment of their goods. On 4th September, 1889, Mr. Belcher wrote to the plaintiffs, saying the goods were "handed to the Oregon Railway and Navigation Company in good order, and if delivered contrary to instructions, we are responsible to you and they to us." The defendants, how-

Statement. ever, subsequently denied any liability, and this action was brought to recover the value of the goods.

The action came on for trial at the Woodstock Autumn Assizes, 1892, and was adjourned to Toronto, where the evidence was taken, and the case tried in October, 1892.

Wallace Nesbitt and *Thomas Wells*, for the plaintiff, cited *Grand Trunk R. W. Co.* v. *McMillan*, 16 S. C. R. 543; *Gill* v. *Manchester etc. R. W. Co.*, L. R. 8 Q. B. 186, 191; *McGill* v. *Grand Trunk R. W. Co.*, 19 A. R. 245 *Muschamp* v. *Lancashire & Preston Junction R. W. Co.*, 8 M. & W. 421; Wood's Railway Law, 1885 ed., vol. 3, pp. 1571, 1573, and notes, 1578, 1588, 1590, 1594, 1602; *Mylton* v. *Midland R. W. Co.*, 4 H. & N. 615.

Bigelow, Q. C., cited no cases.

November 16th, 1892. STREET, J.: *—

Evans, the purchaser of the goods in British Columbia, having the right to name the mode of transit, arranged with Blackwood, the defendants' agent there, that it should be forwarded by Grand Trunk Railway and Chicago and North-Western Railroad to the defendants' care in St. Paul. The order to this effect having been forwarded by the agent at Victoria to Belcher, the defendants' agent in Toronto, was by him forwarded to the plaintiffs with a request that he would ship the goods marked in the prescribed manner, and the plaintiffs did as they were directed. It was therefore in accordance with an agreement entered into with the defendants' agent that the goods were shipped by the Grand Trunk Railway to the defendants' care. The motive of the defendants was plainly to secure the profit from carrying this freight across the continent to themselves instead of allowing it to go by one of the competing lines. The defendants, I think, must be taken to have received the

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* After setting out the facts of the case as above.

goods at Ingersoll by their agents the Grand Trunk Railway Company upon a contract to carry them and deliver them safely to the order of the consignor at Victoria, B. C. This contract was broken by their delivering the goods to a person other than the consignee, and the plaintiffs having lost the value of the goods by their having done so is, I think, clearly entitled to recover.

Mr. Belcher is clearly shewn to have been held out by the defendants as their contracting freight agent at Toronto, and to have held himself out to the plaintiffs as having that position. It must be taken that he had authority to contract with the plaintiffs for the carriage of their goods in the usual way. Tags similar to those attached to Evans' order are shewn to have been commonly in the hands of the defendants' freight agents, and shew the nature of the arrangements into which they were expected to enter in order to secure freight for the defendants' line from points beyond its limits.

The plaintiffs should have judgment for $1,559.13, with interest from July 31st, 1889, and full costs of this action.

A. H. F. L.

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* Upon motion made in this case before the Divisional Court upon January 14th, 1893, by way of appeal from the above judgment, BOYD, C., and ROBERTSON, J., composing the Court, the motion was dismissed with costs.—REP.

[CHANCERY DIVISION.]

REGINA V. DAVIS.

Criminal law—Jurisdiction of the Chancery Division in criminal matters.

On an appeal from an order for a *certiorari*, which the Judge (FERGUSON, J.) granting it, refused to make returnable in the Chancery Division:—

***Held*, per ROBERTSON, J., That the Chancery Division of the High Court of Justice has no jurisdiction in criminal matters.**

***Held*, per MEREDITH, J., That it has: and ought to exercise it.**

BOYD, C. While adhering to his view as expressed in *Regina* v. *Birchall*, 19 O. R. 697, that it has, thought that when there is an equally divided opinion for and against jurisdiction entertained by the individual Judges constituting the Division,* it would be unseemly that by a mere accident, such as the constitution of the Court, jurisdiction should be affirmed on one day and negatived on the next; and as there was jurisdiction in the other divisions of the High Court he agreed with ROBERTSON, J., that the motion be not entertained.

Statement. THIS was an appeal from a judgment of FERGUSON, J., who had made an order in Chambers for the issue of a writ of *certiorari* returnable in the Common Pleas Division of the High Court, he, refusing to make it returnable in the Chancery Division on the ground that the latter Division had no jurisdiction in criminal matters, as expressed in his judgment in *Regina* v. *Birchall*,* 19 O. R. 697.

The appeal was argued on June 11th, 1892, before a Divisional Court composed of BOYD, C., and ROBERTSON, and MEREDITH, JJ.

DuVernet, for the appeal. There is only one High Court now, and all the Divisions can exercise all the jurisdiction of the High Court, and the jurisdiction is general: O. J. A. secs. 35, 60. A decision of any one Division is a decision of the High Court: *Per* Patterson, J. A., in *Re Hall*, 8 A. R. 135; and that case was a criminal matter from the Chancery Division. The High Court is a Court, and the different Divisions are parts of that Court: *Regina* v. *Bunting*, 7 O. R. at pp. 124, 125. There is now no Court

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* FERGUSON, J., had held in *Regina* v. *Birchall*, *supra*, that there was no jurisdiction.—Rep.

Argument.

of Chancery. The Chancery Division is one of the Divisions of the High Court: *Re Board of Education of Napanee, etc.*, 29 Gr. at p. 397. Two Judges sitting are quite sufficient to constitute a Court for criminal matters: *Regina* v. *Runchy*, 18 O. R. 478. The cases are all collected in *Regina* v. *Birchall*, 19 O. R. 697.

[BOYD, C.—My brother Ferguson has exercised *a discretion* in refusing to make the writ returnable in this Division, and it is undesirable that a majority should overrule that discretion, and it would be equally undesirable that the Court should be equally divided, which might happen.] [MEREDITH, J.—But has he exercised any jurisdiction? Has he not rather considered himself bound by his former judgment in *Regina* v. *Birchall*, and therefore refused the application, without any exercise of discretion?]

Langton, Q. C., for the magistrate, contra. The High Court, by Ontario legislation, has the same criminal jurisdiction as the former Courts of Queen's Bench and Common Pleas had: O. J. A., 44 Vic. ch. 5, sec. 3, sub-sec. 3 (O.); R. S. O. ch. 44. secs. 3, 20, 35, and by Dominion legislation, the practice and procedure in criminal matters is the same as before the establishment of the High Court: R. S. C. ch. 174, sec. 270. Our Judicature Act differs from the English Judicature Act in that it makes the Divisions of the High Court continuations of the former Courts with similar names: Maclennan's Judicature Act, 1st ed. p. 3; *Mitchell* v. *Cameron*, 8 S. C. R. 126. The Divisions of the High Court are not the same as Divisional Courts, and neither Legislature has conferred criminal jurisdiction upon the Chancery Division or any Divisional Court. The effect of the legislation as regards criminal jurisdiction, is to substitute the High Court for the Courts which formerly had that jurisdiction; to make the Queen's Bench and Common Pleas Divisions continuations of the Queen's Bench and Common Pleas Courts, and to provide that the procedure should continue the same. The Judicature Act has altered the constitution and practice of all three divisions as continuations of the old Courts in respect to

Argument. their civil jurisdictions; but R. S. O. c. 44, sec. 163, and Con. Rule 1, made thereunder, provide that the procedure in criminal matters or proceedings on the Crown side of the Queen's Bench or Common Pleas shall not be affected. This proceeding is a criminal proceeding and is therefore not affected The only Courts, therefore, that have jurisdiction are the Queen's Bench and Common Pleas Divisions as continuations of the old Queen's Bench and Common Pleas Courts. Even if the Judges now sitting in this Divisional Court have jurisdiction as Judges, they must sit in sufficient numbers, and at the same time and place as the former Courts of Queen's Bench and Common Pleas sat for criminal business, not as Chancery Division Judges, but High Court Judges in the Queen's Bench or Common Pleas Division. The present Court is not so constituted. I refer also to *Regina* v. *Beemer*, 15 O. R. 266; *Mitchell* v. *Cameron*, 8 S. C. R. 126; Short & Mellor's Office Crown Practice, pp. 1, 2, 3, 114, 471; *Regina* v. *Birchall*, 19 O. R. 697.

December 1st, 1892. ROBERTSON, J.:—

This is a motion by defendant for a writ of *certiorari* to bring up the conviction made by the police magistrate of Woodstock, whereby the defendant, a hotel-keeper in Woodstock, county of Oxford, was convicted and fined in the sum of $10, and $3.60 costs, to the complainant, Wm. G. McKay: for that the said Davis, on the 19th day of May, A. D. 1892, in his premises, being a place where liquor is sold, unlawfully did have his barroom open after ten o'clock in the evening, contrary to rule 17 of the rules and regulations passed on the 28th day of April, 1892, by the license commissioners of the north riding of Oxford. The motion is opposed by *Langton*, Q. C., for the magistrate on the ground that this Divisional Court, as such, has no jurisdiction—this being a criminal matter.

This question has already been fully discussed before this Divisional Court, in *Queen* v. *Birchall*, 19 O. R. 697.

The Chancellor and my brother Ferguson, constituted the Court, between whom there was a difference of opinion. The learned Chancellor holding that the Court had jurisdiction to entertain a motion to make absolute a rule *nisi* in a criminal matter before this Division of the High Court. But my learned brother Ferguson, J., was of a contrary opinion, holding that inasmuch as it was a Divisional Court sitting under the provisions of Con. Rule 218, and had therefore only power to exercise the jurisdiction of the High Court, for the purposes referred to in R. S. O. 1887, ch. 44, sec. 62, and not the power to exercise the full jurisdiction of the High Court such as it seems would be possessed by a Division of the Court sitting under the provisions of old marginal Rule 480.

There are no rules of Court ordering that any criminal business should be transacted or disposed of by this Divisional Court of the High Court for the purpose of which it would be necessary to exercise any part of the criminal jurisdiction of the High Court. My learned brother, after very fully considering the matter and the authorities, concluded (at p. 703) in these words: "The other Divisions of the High Court are not in the same position with regard to criminal jurisdiction, because for one reason at least, the former Courts of Queen's Bench and Common Pleas had criminal jurisdiction, but the former Court of Chancery had not.

"The matter now before us, is shewn by the authorities to be in its nature a criminal matter, and for reasons that I have endeavoured to give, I am of the opinion (although owing to the complicated character of the various provisions of the law on the subject, not without some doubt) that this Court has not a criminal jurisdiction, and therefore not the jurisdiction necessary to deal with and dispose of these matters."

After much consideration, and with great respect for the decision of the learned Chancellor in the same case, I cannot come to any other conclusion, than that the judgment of my learned brother Ferguson is correct. There is no provision that I can discover conferring criminal jurisdiction

Judgment.

Robertson, J.

on the Chancery Divisional Court as such; each member of the Court as a member of the High Court has criminal jurisdiction to the extent that any of the Judges of either the Queen's Bench or Common Pleas Divisions has: and Ferguson, J., has exercised that jurisdiction in this matter before us, by granting an order allowing this applicant to issue a writ of *certiorari* returnable in one of the common law Divisions, and without prejudice to any other application being made or renewed to any Judge or Court. I think this was all he could do, and for the same reason, I think this motion should be refused.

My own view of the law in regard to jurisdiction is, that the forum applied to should, beyond question, have the jurisdiction invoked; although I am aware it has been held that where the liberty of the subject is in question, the doubt, if it is only a doubt, should be waived, and the jurisdiction assumed. Here, however, there is no necessity for straining a point. There are two other Courts each of which unquestionably and admittedly has the necessary authority to deal with criminal matters, *ergo*, there is no such necessity for this Division to exercise a jurisdiction as to which doubts exist.

MEREDITH, J.:—

This motion raises again the question of this Court's jurisdiction in criminal matters; a question which has not yet been expressly determined.

Granting the correctness of the decision that "a single Judge" sitting in Court, has not the jurisdiction here invoked—see *Regina* v. *Beemer*, 15 O. R. 266; see also *Regina* v. *Runchy*, 18 O. R. 478; *Regina* v. *McAuley*, 14 O. R. 643; *Regina* v. *Fee*, 13 O. R. 590—a doubt of the power and duty of this Court to exercise such jurisdiction, as it in fact for some years did, would not have occurred to me, but for the expressions and indications of opinion to the contrary, contained in some of the reported cases; see *Regina* v. *Birchall*, 19 O. R. 697; *Regina* v. *McAuley*, 14 O. R. 643; *Regina* v. *Beemer*, 15 O. R. 266; *Ball* v. *Cathcart*, 16 O. R. 525, and *Regina* v. *Runchy*, 18 O. R. 478.

Judgment.

Meredith, J.

Such decisions and expressions and indications of opinion seem, however, only to cause the doubt, and give rise to the question, whether the jurisdiction here invoked should be exercised as, and in the name of, the Divisional Court, or of the Court of the Chancery Division; for I do not understand that any of them throw doubt upon the power of the Judges, now sitting here, to entertain this application.

After the most careful consideration that I have been able to give the matter, and feeling bound to give effect to the view that a "single Judge sitting in Court" has not jurisdiction, I am unable to perceive any sufficient reason for considering that the Divisional Court cannot exercise it.

Early in the practice under the Judicature Act, it was said, in a criminal case, that "Not less than two nor more than three of the Judges of the High Court, when sitting together, are called a Divisional Court of the High Court of Justice, but this is a mere name of convenience, serving to designate them when so sitting; but they really sit as Judges of the High Court, and do but exercise the jurisdiction and administer the functions of the High Court of Justice": *Regina* v. *Bunting*, 7 O. R. 118, at p. 126. A statement of the character of the Divisional Courts in which I would have thought all might agree; one acted upon in that case and in very many other cases; and one which seems to me almost, if not quite, sufficient to dispose of this question.

It cannot reasonably be questioned that the High Court has the amplest jurisdiction in criminal matters, for in the distribution of legislative powers, made in the British North America Act, 1867, to provincial legislatures is given exclusive power to make laws in relation to "the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including

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Meredith, J.

procedure in civil matters in those Courts"; sec. 92, sub-sec. 14: whilst to the Parliament of Canada is given exclusive legislative authority in matters relating to "the Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the procedure in Criminal Matters; sec. 91, sub-sec. 27: with the further power, "notwithstanding anything in this Act, from time to time," to "provide for the constitution, maintenance and organization of a general Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the Laws of Canada"; sec. 101.

And, in virtue of such its legislative powers, the legislature, of this province "united and consolidated together" the then separately existing Superior Courts, and constited and organized the High Court of Justice for Ontario with the fullest jurisdiction in criminal as well as civil matters, including all the jurisdiction which, prior to the 22nd day of August, 1881, was vested in, or capable of being exercised by, "the Court of Queen's Bench, Court of Chancery, Court of Common Pleas, and Courts of Assize and Oyer and Terminer and Gaol Delivery."

Then, having such jurisdiction, how is it to be exercised but at the Divisional Court sittings, if a Judge sitting in Court cannot exercise it?

When did the High Court, or how can it, sit in *banc* unless in the sittings of its Divisional Courts?

The Act seems to me to contemplate, and to provide for, three modes only for the exercise, by its Judges, of the ordinary jurisdiction—of the character in question—conferred upon the High Court, viz.:

1. By a Judge in Chambers;
2. By a Judge in Court; and
3. By a Divisional Court.

What is there to give warrant for the introduction of any other mode? There are the express provisions for these three, and they are consonant with the former practice, familiar to all. What need for any other unfamiliar—and may I not add until recently unheard of—practice?

It is true that there is a continuation of the former Courts of Queen's Bench, Chancery, and Common Pleas, but they are continued in the High Court, not in the respective Divisions which, perhaps more as a matter of sentiment than anything else, bear their names instead of being numbered I., II., and III.; and the several jurisdictions vested in the High Court are not to be exercised "except in the name of the High Court as provided by this Act, save as otherwise provided therein"; and terms applicable to any sitting or business of the High Court are abolished.

It seems to me quite impossible to trace any such jurisdiction continued in, or inherited in any way by, any one of the Divisional Courts or Divisions, beyond that which this Court or Division has.

It is said that jurisdiction in criminal matters ought not to be exercised unless clearly given. But it must be exercised: it is expressly and unequivocally given to, and now rests in, the High Court alone. The question is, how should that Court exercise it? Whether by an expressly constituted mode, or a mode in respect of which it is impossible to say that there is any express provision, and of which I am unable to find in the Act any appearance, of constitution. This statement of principle, if accepted, makes therefore for rather than against the power of the Divisional Court.

Nor can I look upon the change in the words of Rule 480, in the schedule to the Act of 1881, when carried into the Consolidated Rules now in force, as materially affecting the question. The change seems to be aimed at a mere verbal correction, not an alteration of the constitution of the Court, with which the framers of the Rules were not concerned.

The sittings of the High Court referred to in the Rule 480, were surely its sittings in Divisional Courts; see sub-rule (*d*).

"The High Court shall sit in Divisional Courts," might have been a better correction; but it is, I think, evident that the meaning of the Rule 480, and of the Consolidated

Judgment.

Meredith, J.

Rules 216, 217, and 218, is, that the High Court shall sit in *banc*, and not some other "distinct organization * * invested with certain special functions" only.

It may be observed that in the Rules 216 to 218, the different terms "Divisional Courts," "Divisional Court of the Chancery Division," and "Divisional Courts of the High Court," are used, all having reference to Courts of the same character. And it may be also observed that the business transacted in the Divisional Courts, has never been confined to the subjects provided for in Rule 219, formerly rule 471, but has consisted mainly of motions against judgments, and applications for new trials, in actions tried without a jury, under Consolidated Rule 798.

If this Court or Division had jurisdiction before the consolidation of the rules of practice, I am unable to perceive how it has been lost or taken away.

It cannot but be said that the Act has not made very plain how the jurisdiction of the High Court in matters not expressly directed to be dealt with in one or other of the three modes before mentioned, is to be exercised; that it has left room for contention in that respect.

This has arisen, perhaps, in some degree from following too closely the wording of the Imperial Appellate Act, 1876, sec. 17, without regarding sufficiently the provisions of sections 40 to 46 of the Imperial Supreme Court of Judicature Act, 1873, in amendment of which the section 17 was passed. See also section 34 of the latter Act, by which, in England, the jurisdiction here invoked, is expressly assigned to one Division; that is entirely omitted from our Act. However nearly alike the circumstances may be, and however closely it may be desired to follow some other system, too rigid an adherence to the very words of a borrowed code is very apt to lead to technical difficulties of the character here in question.

But, in all such cases, is it not the best course to keep constantly in view the substantial purposes of the Act or Rules, and to reach them, even if that cannot be done without steering quite clear of all such difficulties as ingenuity can suggest?

Looking at all the legislation, bearing upon the subject, from the passing of the Common Law Procedure Act down to, and culminating in, the Judicature Act, it cannot be said that a general intention of the legislature to end the confusion arising from the existence of several separate Superior Courts, having and exercising different jurisdictions and powers, and proceeding upon different principles, and according to different practices, in a complete fusion of all such Courts, is anything but very plain. If that uniformity, so plainly desired, is not yet accomplished, it cannot be said to be for want of sufficient expressions of the purposes and intention of the legislature. And, read in the light of such intention, I cannot but think that the various provisions of the Act and rules ought to be so construed as to give the greatest effect possible to it, even though some details may not be expressly defined as clearly as they might be.

Looking at the whole Act in that light, I cannot consider the jurisdiction and powers of Divisional Courts limited to the "business which * * shall be transacted and disposed of by them" under section 62; or that they are a distinct organization invested with certain special functions only; but rather that they are sittings of the High Court at which all its jurisdiction may, unless otherwise provided, be exercised.

The creation of the High Court was an act within the exclusive power of the provincial legislature to maintain, constitute and organize provincial courts of criminal jurisdiction; and it appears to me that the mode of exercise of that jurisdiction, under discussion, was a proper part of such an act of constitution and organization.

It has been said that the wording of certain Acts of the Parliament of Canada favour the view that not to Divisional Courts, but to the "Divisions" pertains the jurisdiction in question. The wording, however, varies: in 46 Vic. ch. 10, sec. 2 (D.), it was, and now in section 754 of the Criminal Code 1892, is, correctly I think, the "High Court of Justice of Ontario;" so too in the Interpretation Act,

Judgment.

Meredith, J.

section 7, (31) R. S. C.: in section 5 of ch. 10, 46 Vic. (D.) "the Justices of any Division of the High Court of Justice for Ontario," and again in the Criminal Code 1892, section 3 (*e*) (1) "any Division of the High Court of Justice;" and section 3 (*y*) (1) "the three divisions of the High Court of Justice." But if any of these expressions do favour that view it may be said they are the later, which are probably attributable to the *dicta* to which I have referred; and, in any case, the complete answer is, the Parliament of Canada has no power to constitute any Provincial Court, and has not assumed to do so.

Then, if I am right, this Divisional Court has jurisdiction, and, having jurisdiction, ought to exercise it: if I am wrong, and the *dicta* to which I have referred right, then this Court constituted as it is, has, equally, jurisdiction; it is simply a question, under which name shall we act: practically a matter of entitling the proceedings on this application, "In the High Court of Justice, Chancery Division, The Divisional Court" or "In the Court of the Chancery Division," and, equally, we should exercise the jurisdiction, the policy of the legislature to which I have alluded requiring it, and there being no good reason why any applicant duly seeking relief should be turned from this to any other door of the one High Court; least of all, anyone duly seeking relief from wrong done under colour of the criminal laws.

I have considered the other questions arising upon the motion but abstain from giving any expression of my views of them, as this motion is—contrary to my judgment—to be dismissed on the one ground discussed.

BOYD, C.:—

I have expressed my views at sufficient length in *Regina* v. *Birchall*, to which I adhere. But this application should not be disposed of by a mere majority decision.

Sir J. Cross, commenting on the old maxim, which (as unrevised) reads, "*Boni judicis est ampliare jurisdictionem*," said: "This is not to be understood as implying,

Judgment.

Boyd, C.

that it is right to extend jurisdiction over matters clearly not within it, but that in doubtful cases the jurisdiction ought to be entertained, in order to prevent the failure of justice:" *Ex p. Davy*, 4 Dea. & Chit. at p. 333.

The question of criminal jurisdiction in this division, may well be accounted doubtful, when my brother Robertson agrees with my brother Ferguson, that it has not been conferred; though I agree with the opposite result arrived at by my brother Meredith.

Yet when there is an equally divided opinion for and against jurisdiction, entertained by the individual Judges constituting this division, it would be unseemly that by a mere accident, jurisdiction should be affirmed on one day and negatived on the next. It would depend upon the composition of the Divisional Court from day to day, whether jurisdiction existed or not.

If it were needful to assert jurisdiction in order to avoid a failure of justice, I should be disposed to entertain this application, agreeing, as I do, with my brother Meredith; but it is not necessary that this course be taken in order that the applicant should be heard.

Jurisdiction unquestionably exists in the other Divisions and to either of them resort may be had if the present experiment fails.

Therefore, though I do not propose to follow the precedent of Mr. Justice Maule, who, when two of his colleagues differed in opinion, said he agreed with his brother A. for reasons given by his brother B. yet I intend on this occasion to agree with my brother Robertson's conclusion, that the present motion should not be entertained.

G. A. B.

[CHANCERY DIVISION.]

RE SUSKEY AND THE CORPORATION OF THE TOWNSHIP OF ROMNEY.

Municipal corporation—Drainage by-law—Amending former by-law—Power to pass—55 Vic. ch. 42, sec. 573 (O.).

A by-law amending a drainage by-law under sec. 573 of the Consolidated Municipal Act, 1892, "in order fully to carry out the intention thereof," where sufficient funds have not been authorized by the original by-law, is one which provides for the completion of the work so as to make it efficient, although there may be some deviations and variations, or even additions to the work as originally planned.

During the construction of a drain, it was found that stone portals were needed for the work, and that the outlet to the lake had to be deepened, and certain other extra work and necessities were recommended by the engineer:—

Held, that the by-law providing for them was an amending by-law, under sec. 573 of the Consolidated Municipal Act, 1892, and that the township council had power to pass it under that section.

Statement.

THIS was an application to quash a by-law passed by the corporation of the township of Romney to raise the sum of $3,000, by assessment of owners of property benefited, to complete what was called "Tunnel Drain," and pay for some extras and alterations which were discovered to be necessary during the progress of the work, and which had not been provided for by the original by-law under which Tunnel Drain was constructed.

The ground on which the by-law was attacked was, that it was not an amending by-law under 55 Vic. ch. 42, sec. 573 (O.), but rather a new by-law, which had not been passed with all the necessary formalities provided by the Municipal Act, 55 Vic. ch. 42 (O.).

The motion was argued on November 22, 1892, before BOYD, C.

Pegley, Q. C., for the motion. There was a by-law passed by the council to construct the Tunnel Drain, which did not provide sufficient funds. The new by-law, the one in question, was passed to provide funds to make alterations in the work. It should be passed in the same manner, and with

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all the formalities of the original by-law. The municipal council had no power to pass it without them. There is no recital in it that it was passed for the purpose of making good the shortage of funds required for the work. If it was for the purpose of making an addition to the work, it should have been passed under section 569. If it was for improvements to the work, it should be under section 585, with which it does not comply. If it was for repairs it should be under section 586. [BOYD, C.—But if the drain was not completed it could not be for repair.] It is not an amending by-law, the recitals shew it was for improvements.

Atkinson, Q. C., contra. The original by-law provided for the work being done. While the work was going on, it was found some alterations would have to be made for which more money was required. The by-law was not for repairs. The drain was not finished. The recital shews the money was required for necessary extras. It is an amending by-law under section 573. The money was required to fully complete the work. The corporation has advanced the money and should be recouped: section 586 sub-section 5. The by-law sufficiently by the recitals shews that the money was expended to complete the drain, and on its face being legal it should be so held. See *per* Robinson, C. J., in *Gibson and the Corporation of the United Counties of Huron and Bruce*, 20 U. C. R. at p. 121.

Pegley, Q. C., in reply.

November 28th, 1892. BOYD, C. :—

Upon this summary application, I do not think I should interfere with the by-law. I think that it falls fairly within the scope of section 573 of the Consolidated Municipal Act of 1892, which gives power to amend a drainage by-law, when sufficient means have not been thereby provided for the completion of the work. I understand that to mean the completion of the drain, so as to make it an efficient work, though there may be some deviations and variations, or even additions to the work as originally planned by the engineer. If, in the prosecution of the work, the necessity for such minor changes

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develops, not affecting the general character, but in order to the proper and efficient operation of the drain when finished, then these must be made or the whole outlay will be worthless.

The "original co-adventurers" (to use the convenient phrase of Hagarty, C. J., in *The Corporation of the Township of Sombra* v. *The Corporation of the Township of Chatham*, 18 A. R. at p. 256) desire to have a drain that *will* drain their lands; they approve of the general scheme submitted by the engineer to this end: if in the actual construction something more needs to be done than is covered by the first plans and estimates for the due completion of the work, that extra work should then be done, as part of the one undertaking. So to modify the original scheme is only in order (as the statute says) "to fully carry out the intention of the by-law."

Such is the present case: the drain has been constructed and completed: during construction it was found that stone portals were needed for protection at each end of the brick work, where it passed through the ridge of land, and that it was proper to deepen the outlet to the lake, and supply a larger area for spoil bank and some other "extra work and necessities" recommended by the engineer, at an expense of $3,000, which having been paid by the township out of its general funds, is to be recouped by the ratepayers interested.

The recitals in the by-law, while not framed with technical skill, shew that it does, in effect, amend the former by-law for the drain, passed in June, 1889, and that the work done was necessary for the proper execution of that work and the due completion of that drain.

I have read *Green* v. *The Corporation of the Township of Orford*, 15 O. R. 506, reversed 16 A. R. 4 and *The Corporation of the Township of Sombra* v. *The Corporation of the Township of Chatham*, 18 A. R. 252, and think they rather confirm the conclusion I have reached, though not covering the same ground.

I dismiss the application with costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

BEAVER v. GRAND TRUNK R. W. Co.

Railway company—Passenger—Ticket, non-production of—Ejection from train—51 Vic. ch. 29, secs. 214, 248—Contract—Condition—Regulation.

A passenger upon a railway train who has paid his fare cannot, in the absence of any condition in his contract with the railway company requiring the production of his ticket, and in the absence of any regulation relating to or governing it made under sec. 214 of the Railway Act of Canada, 51 Vic. ch. 29, be treated as "a passenger who refuses to pay his fare" within the meaning of sec. 248, because he does not produce his ticket when asked for it by the conductor.

And where, under such circumstances, the plaintiff was put off a train by a conductor on the defendants' railway, a nonsuit entered by the trial Judge was set aside, and a new trial ordered.

Statement.

THIS was an action brought by the plaintiff against the defendants for damages for their having put him off a train, and was tried before ROSE, J., with a jury at the Autumn Assizes at Cayuga, on 1st November, 1892.

The plaintiff was examined as a witness, and stated that he lived at Caledonia in the county of Haldimand, where he purchased on 28th September, 1892, a ticket over the defendants' railway entitling him to travel from Caledonia to Detroit and back; that he travelled to Detroit, and on his return got on the evening train at Windsor, with a parcel; that shortly after he got on the train the conductor asked him for his ticket and he told him he had one in his pocket; that he could not find it at the time, and the conductor said to him, "You can find it before I come back;" that after a time he came back and again asked the plaintiff for his ticket, and was again told that he could not find it, whereupon he was told by the conductor that he must get off at the next station unless he produced it. The plaintiff said that he again looked for the ticket and was unable to find it. Presently the conductor came back and asked if he had it now and was told that he had not, whereupon he said, "You get out at the next station that comes." When the train stopped at the station the conductor said "Come, hurry up," and just took hold of his

Statement. coat and opened the door and told him to get out, and that he got off at a crossing about fifty yards from the station. Upon cross-examination it appeared that his parcel had not been taken by him into the train, but had been left by him at the Windsor station, and been handed by some one there to the station master. Before putting him off the train the conductor asked the plaintiff to pay his fare, and was told that he had not enough money to do so; he had in fact no money at all. The plaintiff found his ticket the same night after the train had gone, and produced it at the trial. The station at which the plaintiff was put off was distant fourteen miles from Windsor. At the conclusion of the plaintiff's evidence, the plaintiff's counsel proposed to read against the defendants a part of the examination of the conductor taken before action for the purpose of discovery, but the learned Judge, upon objection taken, refused to admit it, upon the ground that his statements made after the event were not binding on the defendants, saying that if the plaintiff wanted his evidence he must call him as a witness. Thereupon the plaintiff's case was closed without further evidence.

Upon motion of the defendants' counsel, the learned Judge nonsuited the plaintiff, and ordered judgment to be entered for the defendants with costs.

At the Michaelmas Sittings of the Divisional Court following the trial the plaintiff moved to set aside the nonsuit and that a new trial should be had.

The motion was argued on 23rd November, 1892, before the Divisional Court (ARMOUR, C.J., and STREET, J.).

Valentine Mackenzie, Q.C., for the plaintiff. Section 248 of the Dominion Railway Act, 51 Vic. ch. 29, is that under which the defendants, by their servant, must be taken to have acted in ejecting the plaintiff from the train. I submit that the provisions of the section must be closely followed. They were not followed here, and the defendants are therefore liable. The plaintiff had a ticket but had mislaid it and could not find it when the conductor

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asked him for it. That was not a refusal to pay his fare. I refer to *Hibbard* v. *New York and Erie R. R. Co.*, 15 N. Y. 455; *Butler* v. *Manchester, etc., R. W. Co.*, 21 Q. B. D. 207; Ferguson's Railway Rights and Duties, p. 188; *Farewell* v. *Grand Trunk R. W. Co.*, 15 C. P. 427; *Duke* v. *Great Western R. W. Co.*, 14 U. C. R. 369; *Maples* v. *New York and New Haven R. R. Co.*, 38 Conn. 557; American and English Railroad Cases, vol. 33, p. 556; *B. & M. R. R. Co.* v. *Rose*, 11 Neb. 179; *Shelton* v. *Lake Shore R. W. Co.*, 29 Ohio St. 214; *Downs* v. *New York and New Haven R. R. Co.*, 36 Conn. 287; 51 Vic. ch. 29, secs. 221, 230 (D.).

Osler, Q.C., for the defendants. *Butler* v. *Manchester, etc., R. W. Co.* is not applicable because there is no statutory provision in England at all corresponding to section 248. I rely on *Fulton* v. *Grand Trunk R. W. Co.*, 17 U. C. R. at p. 431; *Duke* v. *Great Western R. W. Co.*, 14 U. C. R. 369.

Mackenzie, in reply, referred to *London and Brighton R. W. Co.* v. *Watson*, 3 C. P. D. 429.

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

STREET, J.:—

The clauses of the Railway Act which bear upon the question before us are the following, the Railway Act in question being chapter 29 of the Dominion statutes of 1888, 51 Vic.:—

Sec. 247. Every servant of the company employed in a passenger train or at a station for passengers, shall wear upon his hat or cap a badge, which shall indicate his office, and he shall not, without such badge, be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office, or to interfere with any passenger or his baggage or property.

248. Every passenger who refuses to pay his fare may, by the conductor of the train and the train servants of the

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Street, J.

company, be put out of the train, with his baggage, at any usual stopping place, or near any dwelling-house, as the conductor elects, the conductor first stopping the train and using no unnecessary force.

In considering the objections now urged to the nonsuit it is not immaterial to consider what it is of which the plaintiff in his pleadings complains, especially as no application has at any time been made to amend them. The complaint is that while lawfully installed upon the train, and still continuing to hold the ticket which he had bought, he was violently laid hold of by the conductor in charge of the train and forcibly expelled from the car without a parcel or package which he had with him containing goods to the value of $20, which were lost to him

The main question raised by the pleadings and discussed before us is whether under the circumstances the defendants acted within their rights in ejecting the plaintiff from the train. It is contended by the plaintiff upon the authority of *Butler* v. *Manchester, etc., R. W. Co.*, 21 Q. B. D. 207, that they had no such right. In that case the passenger held a ticket, one of the conditions of which was that if he failed or refused to shew it when required by any duly authorized servant of the company, he should be required to pay the fare from the station whence the train originally started. The plaintiff, having lost his ticket, was unable to produce it when required to do so during the journey by one of the servants of the company, and, declining to pay the fare from the station whence the train had originally started, was forcibly removed from the train by the company's servants. It was held that the contract between the plaintiff and the defendants did not by implication authorize the defendants to remove him from the train for non-production of his ticket, but only entitled them to bring an action against him for the fare. It was argued by the defendants' counsel in that case that, apart from the conditions of the ticket, the reasonable implication would be that the contract in such cases is that the passenger shall produce his ticket or pay the fare, and failing to do so shall have no further right to be carried.

Judgment.

Street, J.

This argument was considered by Lord Esher, M. R., in giving judgment, and said to be without foundation. He says at p. 211, "The contract between the plaintiff and the defendants really is that on his paying the fare for the journey they will carry him in their carriage on the journey for which he has so paid his fare, using due care for his safety while so doing. That contract may be subject to conditions by reason of notice given to that effect upon the ticket, incorporating such conditions."

In the present case the plaintiff had paid his fare and received a ticket, with no conditions affecting his rights here, entitling him to be carried from Caledonia to Windsor and back, and it was upon the return journey that he was put off the train. The question is whether having once paid his fare he can be treated by the defendants as having "refused to pay his fare," within the meaning of section 248 of the Railway Act, because he did not produce his ticket when asked for it by the conductor. I am of opinion that he cannot, because of the absence of any condition in his contract with the company requiring the production of the ticket, and in the absence of any regulation relating to or governing it under section 214 of the Act. In all the reported cases to which I have referred in which the right of the company to eject a passenger who had purchased a ticket because he failed to produce it when required has been supported, the ticket has been made subject to conditions requiring him to do so. Such a condition formed part of the contract in *Duke* v. *Great Western R. W. Co.*, 14 U. C. R. 377, and the judgment of the Court there must be read bearing that fact in mind. See also *Hibbard* v. *New York and Erie R. R. Co.*, 15 N. Y. 455; *Maples* v. *New York and New Haven R. R. Co.*, 38 Conn. 557; *Downs* v. *New York and New Haven R. R. Co.*, 36 Conn. 287; Hodges on Railways, 7th ed., p. 509; Browne's Law of Carriers, p. 419.

In my judgment, therefore, the nonsuit should be set aside, and there must be a new trial. The costs of the former trial and of this motion to be costs to the plaintiff in any event.

[QUEEN'S BENCH DIVISION.]

RE PERRAS V. KEEFER.

RE BARRY V. KEEFER.

RE ANDREWS V. KEEFER.

Prohibition—Division Court—Attachment of debt—Assignment of debt attached—Trial of question of validity of assignment—Assignee not called upon as claimant—Submitting to jurisdiction of Court—Amount in controversy—R. S. O. ch. 51, sec. 197.

Each of the three primary creditors began an action in a Division Court against the primary debtor for the recovery of an amount within the jurisdiction of the Court, and also attached in the hands of garnishees the amount of the debt in each case; the sum of $500 having been admittedly due by the garnishees to the primary debtor, who, however, asserted that before the actions were commenced he had assigned the debt for valuable consideration.

Upon the Court day, the primary creditors, the primary debtor, and the assignee of the debt appeared before the Judge in the Division Court, counsel also appearing for the garnishees. Judgment was first given in favour of the primary creditors against the primary debtor in each case, and then the question of the validity of the assignment was entered upon and evidence given upon it, the assignee producing his books and giving his evidence. Judgment was then given declaring the assignment void as against the primary creditors as a fraud upon them. From this judgment the assignee gave notice of appeal, which he afterwards abandoned, and in the style of cause he named himself as "claimant."

Upon motion by the assignee for prohibition:—

Held, that he had submitted himself to the jurisdiction of the Court, and could not be heard to say that he was there merely as a witness; and that the Judge, having all parties before him, was justified under section 197 of the Division Courts Acts, R. S. O. ch. 51, in trying their rights without going through the formality of calling them before him:—

Held, also, that the Division Court had jurisdiction to try the right of the primary creditors to garnish portions of the $500 sufficient to satisfy their claims; and, under section 197, to determine whether or not the $500 was at the time of the attachment the property of the debtor.

Statement. THIS was a motion by one W. G. Johnson for prohibition to the first Division Court in the district of Thunder Bay.

Each of the three plaintiffs had begun an action in that Division Court against Thomas A. Keefer for the recovery of an amount within the jurisdiction of the Court. The corporation of the town of Port Arthur were named as garnishees in each summons, and it was sought to attach in the hands of the garnishees the amount of the debt in each case. It was asserted by Keefer that before the actions were commenced he had assigned the debt due him by the garnishees, for valuable consideration, to W. G. Johnson, the applicant for prohibition. Upon the Court day the plaintiffs and Keefer and Johnson appeared before the Judge, counsel also appearing for the garnishees. Judgment was first given in favour of the primary creditors against the primary debtor in each case, and then the question of the validity of the assignment from Keefer to Johnson was entered upon, and evidence was given upon it. Judgment was given upon the same day by the learned Judge, holding the assignment from Keefer to Johnson to be void as against the primary creditors as a fraud upon them. The subject-matter of this assignment was an undoubted debt due from the corporation of Port Arthur to Keefer, of $500. Statement.

Three days after this judgment was pronounced, Johnson, by his solicitors, served upon the primary creditor notice of an appeal to the Court of Appeal; the notice of appeal was styled in the three separate Division Court actions, and also "William G. Johnson, claimant," and the three primary creditors, respondents. Johnson also paid into the Division Court $50 as security for the costs of the appeal, and gave notice that he had done so, styling his notice in the same way as he had styled his notice of appeal.

On the 20th August, 1892, a notice was given by Johnson's solicitors that he abandoned his notice of appeal. It was sworn in one of the affidavits filed on the present motion that his reason for doing so was that he had omitted to apply for a new trial in the Division Court— a necessary preliminary to his appeal.

On the 30th August, 1892, the affidavits in support of the present motion on behalf of Johnson were filed.

The motion was argued in Chambers before GALT, C. J., on the 24th September, 1892.

E. T. English, for the applicant, Johnson.

Aylesworth, Q. C., for the primary creditors.

Judgment

Galt, C.J.

October 25, 1892. GALT, C. J.:—

The defendant Keefer had an agreement with the corporation of the town of Port Arthur, as assessor, under which he was to receive the sum of $500. Being indebted to one Johnson, he made an assignment to him of his claim to the $500. The plaintiffs brought these suits in the first Division Court against Keefer, and took garnishee proceedings against the town of Port Arthur. When these suits came on for trial, Johnson was present and produced the assignment from Keefer to him of the claim against the garnishees.

By section 197 of the Division Courts Act, R. S. O. ch. 51, "In case any one other than the primary creditor or primary debtor claims to be entitled to the debt owing from the garnishee, by assignment thereof or otherwise, the Judge, when adjudicating in any of the cases aforesaid, or by calling the proper parties before him by summons for the purpose, may inquire into and decide upon the claim, and may allow or give effect to it, or may hold it void as against the primary creditor for being a fraud upon creditors or otherwise, as the justice of the case may require," etc.

It is manifest from the foregoing express enactment that the Judge had authority to adjudicate upon the claim and it was not necessary that a summons should have been issued; it was within the power of the Judge to adjudicate upon the claim *or* to have issued a summons; Johnson was before him, and consequently a summons was not necessary.

Mr. English then urged that, as the assignment involved some $500, the Division Court had no authority to garnish any portion of that sum, or to set aside the assignment of it as fraudulent. This was the opinion of the late Cameron, C. J., in *Re Mead* v. *Creary*, 8 P. R. 374, but his judgment was reversed in 32 C. P. 1.

The motion must therefore be refused with costs.

The applicant, Johnson, then gave notice of motion by way of appeal from this decision to the Divisional Court, and the motion was argued on 25th November, 1892, before ARMOUR, C. J., and STREET, J. Argument.

E. T. English, for the appellant. The Judge had no power summarily to determine the invalidity of the assignment. Johnson was not made a party or summoned before the Judge. He was present, but merely as a witness. The question depends upon the construction of section 197 of the Division Courts Act, R. S. O. ch. 51. The application of that section is limited by the other provisions of the Act limiting the jurisdiction to $100 and $200. It was not within the jurisdiction of the Court to inquire into the validity of the assignment of a claim of $500. I refer on the construction of the statute to Maxwell, 2nd ed., p. 35; *Tobacco Pipe Makers* v. *Woodroffe*, 7 B. & C. 838.

Aylesworth, Q. C., for the primary creditors Barry and Andrews. Johnson did not come there as a witness only; he came as a claimant, with his counsel and witnesses, and fought out the case. He was a party; nothing formal was required to make him a party. He came in and asked to be a party, waiving a summons. If the garnishees had notified the Court that they had received notice of Johnson's claim, he would have been summoned; but he appeared and, himself, notified the Court. He did not ask for an adjournment till after the evidence had been heard, and the Judge had indicated that he was against him. The proceedings also were entitled in the name of Johnson as claimant. The sections of the Act as to the amount to which the Division Court has jurisdiction do not apply to collateral proceedings such as interpleader and garnishment. All the Judge did was to set aside the assignment *pro tanto*—to disregard it in adjudicating upon the claims of the primary creditors to the fund sought to be garnished. He ignored the assignment as fraudulent and void, and gave judgment for the primary creditors for the amounts of their claims, which were within the jurisdiction of the Court. I refer to *Munsie* v. *McKinley*, 15 C. P. 50; *Re Mead* v. *Creary*, 32 C. P. 1.

W. J. Green, for the primary creditor Perras.

English, in reply.

Judgment.

Street, J.

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

STREET, J.:—

Prohibition is asked for in these cases upon two grounds: 1st, That there was no jurisdiction to decide the rights of the claimant Johnson under the assignment to him from Keefer without bringing him properly before the Court; and, 2nd, That the subject-matter of the assignment, being a debt of $500, was beyond the jurisdiction of the Division Court and could not be disposed of by the Judge.

The section under which the learned Judge proceeded was sec. 197 of the Division Courts Act, ch. 51, R. S. O., and is in the following words: "In case any one other than the primary creditor or primary debtor claims to be entitled to the debt owing from the garnishee, by assignment thereof or otherwise, the Judge, when adjudicating in any of the cases aforesaid, or by calling the proper parties before him by summons for the purpose, may inquire into and decide upon the claim, and may allow or give effect to it, or may hold it void as against the primary creditor for being a fraud upon creditors or otherwise, as the justice of the case may require," etc.

It is plain that the Judge could not under this section or otherwise adjudicate without notice upon the claim of any absent party, for that would be contrary to natural justice; but it is equally plain that, having all parties before him willing to enter upon the investigation of their respective rights, he was justified in trying their rights without going through the formality of calling them before him. In the present case the affidavits seem to shew beyond question that the present applicant Johnson submitted himself to the jurisdiction of the Judge without question or hesitation for the purpose of the trial of his rights; he appeared before him by his counsel, produced his books, and gave his evidence. Then when judgment was given against him he gave notice of appeal to the

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Court of Appeal styling himself as being the claimant in the litigation in the Division Court. Under these circumstances he cannot now be heard to urge that he was present before the Judge not as a party but merely as a witness for the primary debtor.

As to the second ground upon which the motion is pressed, I am of opinion that that also is untenable. In *Re Mead* v. *Creary*, 32 C. P. 1, it was held that the Division Courts had authority to attach by garnishee proceedings a sufficient portion of a debt of any amount, however large, for the purpose of satisfying a Division Court judgment, so that there is no doubt here, and none was suggested, as to the right of the three plaintiffs here to garnish portions of the debt of $500 due to Keefer from the town of Port Arthur, sufficient to satisfy their claims. But it was argued that, although this might be done, the Division Court had no jurisdiction to determine whether the debt of which portions had been so attached did or did not still remain the property of the judgment debtor.

In my opinion, this power is sufficiently conferred by section 197 above set forth, that section being in harmony with the sections which were considered in *Re Mead* v. *Creary*, and forming with them an intelligible practice for the determination of conflicting claims to debts sought to be attached.

The motion should be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

SAGE ET AL. V. TOWNSHIP OF WEST OXFORD.

Drainage Trials Act, 1891, secs. 9, 11—Reference—Action for damages for not providing sufficient outlet—Jurisdiction to refer compulsorily—Drainage Referee—" Construction "—" Operation."

In an action against a township corporation for damages for flooding the plaintiffs' lands, they alleged that the defendants, in executing certain work and making certain drains under the drainage clauses of the Municipal Act, had brought water down upon the lands without providing any sufficient outlet for it:—

Held, that the damages complained of arose, if not from the "construction," at all events from the "operation," of the drainage works of the defendants; and therefore the Court or a Judge had jurisdiction under section 11 of the Drainage Trials Act, 1891, to compulsorily refer it to the Referee appointed under that Act.

Semble, there was no jurisdiction to refer this case under section 9 of the Act; for, according to the construction placed by the Supreme Court of Canada upon section 591 of the Municipal Act, which is in the same words as section 9, the damages complained of did not arise from the construction of the drain within the meaning of section 9.

Williams v. *Township of Raleigh*, 12 C. L. T. Occ. N. 381, considered.

Statement. THE plaintiffs in this action were certain landowners or landholders in the township of West Oxford, and they claimed damages from the defendants, the corporation of the township, because the defendants, in executing certain work and making certain drains under the drainage clauses of the Municipal Act, had brought down upon the lands owned or occupied by the plaintiffs a quantity of water without providing any sufficient outlet for it, and their lands had been flooded, to their great damage. The defendants in their statement of defence denied that they had acted improperly, or had caused damage to the plaintiffs, and they set up the provisions of the Municipal Act authorizing them to undertake and execute drainage works.

The action was entered for trial at the Woodstock Sittings, and came on there before MEREDITH, J., on 25th October, 1892, and was by him compulsorily referred to the Referee under "The Drainage Trials Act, 1891."

At the following Michaelmas Sittings the plaintiffs moved to set aside the order of reference upon the grounds:

(1) That the learned Judge had no power to refer this action to the Referee, and that the said Referee had not power to dispose of this action. (2) That this action was not one which might be referred under the Drainage Trials Act, as the plaintiffs were entitled to proceed by way of action for infringement of their common law rights. Statement.

The motion was argued on 24th November, 1892, before the Divisional Court (ARMOUR, C. J., and STREET, J.)

Aylesworth, Q. C., for the plaintiffs. There is the gravest doubt whether the Referee appointed under the Drainage Trials Act, 1891, 54 Vic. ch. 51 (O.), has any jurisdiction in this action, which is a common law action. The plaintiffs are content to have a reference to Mr. Britton (the Referee appointed under the Act) directed as to a special Referee under section 102 of the Judicature Act; but he has no jurisdiction as Referee under the Drainage Trials Act. I refer to the decision of the Supreme Court of Canada in *Williams* v. *Township of Raleigh* (not yet reported), where a section of the Municipal Act in the same words as sec. 9 of 54 Vic. ch. 51, has been construed. Section 11 of 54 Vic. ch. 51 is not applicable; the reference was expressly directed under section 9.

J. B. Jackson, on the same side. Section 9 is the only enactment that gives the Referee power to try any case. I refer to *Malott* v. *Mersea*, 9 O. R. 611; *McGarvey* v. *Strathroy*, 11 A. R. 631.

M. Wilson, Q. C., for the defendants. The suggestion to refer this action came from the learned trial Judge. The judgment has not yet been settled, and the defendants have no objection to a recital in it that Mr. Britton is to try the action as a common law action of negligence. In the Act of 1891 the policy of the legislature to have all these questions—both compensation and damages—referred to one person, is manifest. The other provisions of the Act shew the powers of the referee.

Aylesworth, in reply.

Judgment.

Street, J.

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

STREET, J.:—

The contention of the plaintiffs broadly is that no claim for damages existing at common law can be compulsorily referred to the Referee under the Drainage Trials Act, and that the jurisdiction of that officer, so far as claims for damages are concerned, is restricted to claims the only remedy for which would, but for this Act, have been under the arbitration clauses of the various municipal drainage enactments.

In support of this contention we were referred to the judgment of the Supreme Court (not yet reported) in *Williams* v. *Raleigh.* A copy of the judgment of Mr. Justice Gwynne in that case has been furnished to us. Although the facts of that case were somewhat complicated in their character, the action was in substance of a similar nature to the present one. It was objected by the defendants that the plaintiffs' only remedy was under the arbitration clauses of the Municipal Act, and it was so held by the Court of Appeal, reversing the judgment of Mr. Justice Ferguson, by whom the original judgment had been given. See note of the decision in 27 C. L. J. 411. Upon appeal to the Supreme Court, however, this judgment was reversed, and it was held that the right infringed by the municipality being a common law right and not one created by the statute, the plaintiff was not deprived of his right of action by section 483 of the Act, which provides for the determination by arbitration of a claim for compensation for lands injuriously affected by the exercise of municipal powers. See note of the decision in 12 C. L. T. Occ. ~~N. 381. It~~ was considered that the defendants, the township corporation, having a duty cast upon them in that case of keeping the outlet drain in a proper state of repair, and having failed in their duty, the damage resulting from their breach of duty was not a damage arising from the "con-

Judgment.

Street, J.

struction" of the drain within the meaning of section 591 of the Municipal Act, which is word for word the same as section 9 of the Drainage Trials Act, excepting that under the latter section the reference is to the Referee instead of to arbitration as in section 591. Section 9 of the Drainage Trials Act is as follows:—

"In case a dispute arises between municipalities * * or between individuals and a municipality * * * as to damages alleged to have been done to the property of the * * individual, in the construction of drainage works, or consequent thereon, the * * individual complaining may refer the matter to the arbitration and award of the said Referee, who shall hear and determine the same," etc., etc.

It was, as I have said, a section in practically the same terms as this which was interpreted in *Williams* v. *Raleigh*, and if this section had been the only one in the Act giving jurisdiction to the Referee, the order now appealed against could not be sustained. But it is not. The purposes of the appointment of the Referee are set forth in the second section of the Drainage Trials Act, as follows:—

"The Lieutenant-Governor in Council may appoint a Referee for the purpose of the drainage laws, that is to say, The Ontario Drainage Act, the provisions of The Municipal Act on the same subject sections 569 and following sections, and all other Acts and parts of Acts on the same subject, and *for the other purposes hereinafter mentioned:*" then after providing for various matters arising under the drainage clauses, it is provided by section 11 as follows:—

"Any action for damages from the construction or operation of drainage works may at any time after the issue of the writ be referred to the said Referee by the Court or a Judge thereof."

This section, I think, clearly shews the intention of the Act that it should be applied not only to cases where the remedy is confined to arbitration proceedings under the drainage enactments, but also to cases where an action is maintainable for injuries arising from the construction or

Judgment

Street, J.

operation of drainage works. The damages here complained of arose, if not from the "construction," at all events from the "operation" of the drainage works of the defendants, and the case therefore comes, I think, within the meaning of section 11, and was one which the learned Judge had jurisdiction to refer to the Referee.

In my opinion the motion must be dismissed with costs to be costs in the cause.

[CHANCERY DIVISION.]

LANGLOIS V LESPERANCE.

Deed—Limitations—Grant to A. and his heirs for ever, habendum to A. and his wife for life, and after the death of both over.

Under a grant to A. and his heirs for ever, habendum to A. and his wife "for and during their natural life and the life of the survivor of them;" and "from and after the death of both, to have and to hold unto their lawful heirs and assigns for ever," or "from and after the death of both to have and to hold unto their lawful heirs, their heirs and assigns for ever," A. takes a fee simple absolute.

Statement.

THIS was a special case involving the question of the proper construction of two deeds of bargain and sale, each dated December 6th, 1855, and by one of which, for an expressed consideration of £5, Jean Oliver Langlois granted certain lands "unto Fabien Lesperance and his heirs for ever," the habendum being "to have and to hold unto the said Fabien Lesperance and his lawful wife, for and during their natural life and the life of the survivor of them; and from and after the demise of both, to have and to hold unto their lawful heirs and assigns, to and for their sole and only use for ever"; and by the other of which, for a like consideration, the said Langlois granted certain other lands "unto Charles Lesperance and his heirs for ever," the habendum being "to have and to hold unto the said Charles Lesperance and his lawful wife for and during their natural life and the life of the survivor of them; and from and after the demise of both, to have and to hold unto their lawful heirs, their heirs and assigns, to and for their sole and only use for ever."

Argument.

The questions for the opinion of the Court, were:

1. Whether the conveyance to Fabien Lesperance conveyed to him and his wife, or to either of them, an estate in fee simple or fee tail in possession or in reversion.

2. Whether the said conveyance merely gave to him and his wife and the survivor of them a life estate.

3. Whether the conveyance to Charles Lesperance conveyed to him and his wife, or to either of them, an estate in fee simple or fee tail in possession or in reversion.

4. Whether the said conveyance merely gave to him and to his wife and the survivor of them a life estate.

The plaintiff in the case was the mortgagee of the lands conveyed by the above deeds, and desired to have the decision of the Court as to their effect, and the defendants were the grantees and their respective wives.

The matter came up for adjudication on September 28th, 1892, before BOYD, C., at Sandwich, and written arguments were put in on both sides, of which the following are the material parts:

T. Mercer Morton, for the plaintiff. It was evidently the intention of the grantor to grant and convey unto Fabien Lesperance and his wife an estate for life in joint tenancy, with remainder over to the heirs of the said Fabien Lesperance and his said wife of the fee simple in the lands conveyed by the deed, and it was also his intention to grant and convey unto Charles Lesperance and his wife, an estate for life in joint tenancy with the remainder to their heirs in fee simple, of the lands set out in the second deed. The plaintiff submits that the deeds, properly construed, give effect to the grantor's intention in both cases.

Argument.

A. R. Bartlett, for the defence. As to the first deed, there is no word in the grant, which is "unto Fabien Lesperance, the party of the second part, and his heirs for ever," which could by any means be construed to attach to the estate limited in the habendum to "the lawful wife" of the grantee, and the habendum is, therefore, repugnant and void: Leith's Blackstone, 2nd ed., p. 333; *Owston* v. *Williams*, 16 U. C. R. 405; *Doe d. Meyers* v. *Marsh*, 9 U. C. R. 242. And these cases also apply to the further limitations in the habendum respecting the heirs of "the lawful wife," except (if there be any exception, which the defendants contend there is not) in favour of the joint heirs of the bodies of the party of the second part and his lawful wife, which the defendants contend cannot by the strict reading of the habendum be construed to be its meaning. The limitation in the habendum is repugnant and void, in that it gives an estate utterly different from an estate in fee simple, which is the estate granted in the premises. There can be no trust raised on behalf of any persons other than the party of the second part, not clearly and definitely expressed, because the deed being expressed to be made for a valuable consideration paid by the party of the second part, any persons who might claim under the habendum, other than the party of the second part, are merely volunteers. If the estate described in the habendum is not void and repugnant to the estate granted in the premises, then the estate described in Fabien Lesperance's deed, is clearly an estate for life to him and his wife and the survivor of them, and an estate or remainder in fee simple vested in him and his wife, to take effect after the death of the survivor of both. The word, "their lawful heirs and assigns," can only be construed to be words of limitation, and come under the rule in *Shelley's Case*. The conveyance to Charles Lesperance is somewhat different with regard to the habendum and the insertion of the words, "their heirs," does not alter the grant: *Brown* v. *O'Dwyer*, 35 U. C. R. 354.

November 12th, 1892. BOYD, C. :—

Judgment.

Boyd, C.

The grant in the premises of the deed to the party of the second part and his heirs for ever, conveys the fee simple.

The habendum to the party of second part and his lawful wife for their natural lives, and the life of the survivor, and from and after the death of both to their lawful heirs and assigns, would, if operative, frustrate the grant in the premises by reducing the estate given to the husband : See Sheppard's Touchst, 112.

The case is covered by the old law : thus it is laid down in Viner's Abr. Grants (K. *a*) 16, "If land be given to the baron, habendum to him and his wife, and to the heirs of their two bodies, the *feme* takes nothing by this grant, because she was not mentioned in the premises of the deed."

This estate vests in the husband, I think, in fee simple; if at all qualified by the habendum, it might be in fee tail, but always to the exclusion of the wife.

Judgment, therefore, is given as agreed upon by the special case, for the plaintiffs without costs.

Afterwards :

Per Curiam : The above judgment covers the case of both deeds; the mention of the words, "their heirs," in the habendum of the second deed being mere surplusage, and not altering the effect of the grant.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

REGINA V. SMILEY ET AL.

Gaming—Becoming custodian of wager—R. S. C. ch. 159, sec. 9—Construction of—Restriction to events to take place in Canada.

R. S. C. ch. 159, sec. 9, provides that "every one who becomes the custodian or depositary of any money, property, or valuable thing staked, wagered, or pledged upon the result of any political or municipal election, or of any race, or of any contest or trial of skill or endurance of man or beast, is guilty of a misdemeanour":—

Held, that this enactment does not extend to the result of any election, race, contest, etc., to take place outside of the Dominion of Canada. *Wells* v. *Porter*, 3 Scott 141, followed.

Statement.

THE defendants were convicted upon an indictment charging them with having unlawfully become the custodians and depositaries of the sum of one dollar staked, wagered, and pledged by one Vaughan upon the result of a certain horse race, such money not being money to be paid to the winner of any lawful race, or to the owner of any horse engaged in any lawful race, and not being a bet between individuals.

The evidence shewed that the money was deposited by Vaughan with the defendants at an establishment kept by them on Jordan street, in the city of Toronto, to be by them placed on the result of a horse race to be run at Guttenburg, in the State of New Jersey, for a commission of ten cents paid to them therefor.

The learned trial Judge directed a verdict of guilty, reserving the question (with another question which the Court found it unnecessary to determine) whether, upon the evidence, the defendants were properly convicted.

The enactment under which the defendants were charged was section 9 of the Act respecting Lotteries, Betting, and Pool-selling, R. S. C. ch. 159, which is as follows: "Every one who" (*c*) "becomes the custodian or depositary of any money, property, or valuable thing staked, wagered or pledged upon the result of any political or municipal election, or of any race, or of any contest or

Statement.

trial of skill or endurance of man or beast, is guilty of a misdemeanour * *.

2. Nothing in this section shall apply to any person by reason of his becoming the custodian or depositary of any money, property or valuable thing staked, to be paid to the winner of any lawful race, sport, game or exercise, or to the owner of any horse engaged in any lawful race, or to bets between individuals."

The reserved case was argued on the 5th December, 1892, before ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.

Osler, Q. C., for the defendants. The indictment does not charge that it was an unlawful race upon the result of which the money was staked; and there is no evidence to shew that it was not a lawful race. There is nothing to shew that the defendants did not receive the money for the purpose of making a lawful bet; and the Crown have not negatived the proviso as to a bet between individuals. The defendants may have used it in making a bet between individuals. This section 9 is aimed against stakeholders, and the defendants are not stakeholders; they had not the other stake. There never was a bet, there never was a transaction under the statute, completed in Canada. The bet was completed in New Jersey, not here. The defendants received the money for the purpose of transmitting it to New Jersey. If they did not transmit it, there was no race and no bet. There is no English authority, but there is a similar statute in New York State, under which *People* v. *Wynn*, 13 Crim. Law Mag. 456, was decided, to which case I refer, and also to *Read* v. *Anderson*, 13 Q. B. D. 779; *Caminada* v. *Hulton*, 17 Cox C. C. 307; *Regina* v. *Dillon*, 10 P. R. 352.

W. G. Murdoch, on the same side, referred to *Johnson* v. *Lansley*, 12 C. B. 468.

J. R. Cartwright, Q. C., for the Crown. "Staked" in sub-sec. 2 of sec. 9 refers only to the money or purse run for by the horses, and not to a transaction like the present;

Argument. and, therefore, it is not necessary to negative the proviso as to a lawful race.

Osler, in reply. Section 6 of the Act provides distinctly for foreign lotteries. The scope of section 9 is entirely domestic, and cannot apply to a foreign race. A transaction completed in a foreign country cannot be made an offence under the statute.

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

ARMOUR, C. J.:—

The statute under which the defendants were charged is Revised Statutes of Canada, ch. 159, sec. 9, which provides that "Every one who becomes the custodian or depositary of any money, property, or valuable thing staked, wagered or pledged upon the result of any political or municipal election, or of any race, or of any contest or trial of skill or endurance of man or beast, is guilty of a misdemeanour."

We do not think that we can construe the words of this section as extending to the result of any political or municipal election, or of any race, or of any contest or trial of skill or endurance of man or beast, to take place out of Canada, but that we must construe them as limited to the result of some political or municipal election, or of some race, or of some contest or trial of skill or endurance of man or beast, to take place within the Dominion.

And we think that this is the true construction is apparent from the proviso that "nothing in this section shall apply to any person by reason of his becoming the custodian or depositary of any money, property or valuable thing staked, to be paid to the winner of any lawful race, sport, game or exercise, or to the owner of any horse engaged in any lawful race, or to bets between individuals"—clearly contemplating races, sports, games and exercises lawful according to the laws of this country, and individuals subject to the laws of this country.

Judgment.

Armour, C.J.

And while the provisions of this statute are by the 6th section of it extended to the printing or publishing, or causing to be printed or published, any advertisement, scheme, proposal or plan of any foreign lottery, and to the sale or offer for sale of any ticket, chance or share in any such lottery, or to the advertisement for sale of such ticket, chance or share, there are no words shewing that the provision under which the defendants were charged should extend to any foreign political or municipal election, or race, or contest or trial of skill or endurance of man or beast.

We also think that the statute in question being a penal one, we should not so construe it as to cover any foreign political or municipal election, or race, or contest or trial of skill or endurance of man or beast.

And this was the ground upon which the Stock Jobbing Act, 7 Geo. II. ch. 8, was held not to include foreign stocks: *Wells* v. *Porter*, 3 Scott 141.

We refer also to *Niboyet* v. *Niboyet*, 3 P. D. 52; *Niboyet* v. *Niboyet*, 4 P. D. 1; *Ex p. Blain*, 12 Ch. D. 522; *Ex p. Pearson*, [1892] 2 Q. B. 263; *Regina* v. *Blane*, 13 Q. B. 769; *Colquhoun* v. *Brooks*, 14 App. Cas. 493; *Colquhoun* v. *Heddon*, 25 Q. B. D. 129.

In our opinion the conviction must be quashed.

[QUEEN'S BENCH DIVISION.]

REGINA v. LEVINGER.

Constitutional law—53 Vic. c. 18, sec. 2 (O.)—Intra vires—Constitution of Criminal Courts—General Sessions of the Peace—Jurisdiction in cases of forgery—B. N. A. Act, sec. 91, sub-sec. 27; sec. 92, sub-sec. 14.

The power granted by the British North America Act, sec. 92, sub-sec. 14, to the provincial legislatures to constitute courts of civil and of criminal jurisdiction, necessarily includes the power of giving jurisdiction to those Courts, and impliedly includes the power of enlarging, altering, amending, and diminishing the jurisdiction of such Courts.

The Act 53 Vic. ch. 18, sec. 2 (O.), so far as it provides that the Courts of General Sessions of the Peace shall have jurisdiction to try any person for any offence under any of the provisions of secs. 28 to 31 of R. S. C. ch. 165, an Act respecting forgery, is within the powers of the legislature of Ontario, as being in relation to the constitution of a provincial Court of criminal jurisdiction, and does not in any way trench upon the exclusive authority given to the Parliament of Canada by sec. 91, sub-sec. 27, to make laws in relation to criminal law and criminal procedure.

Statement THE prisoner was indicted at the Court of General Sessions of the Peace for the county of York for an offence against some of the provisions of sections 28 to 31, both inclusive, of the Revised Statutes of Canada, chapter 165, an Act respecting Forgery, and on being arraigned moved to quash the indictment on the ground that the Sessions had no power to try the offence, the Act 53 Vic. ch. 18, sec. 2, being, as he alleged, beyond the powers of the Ontario Legislature; and, upon the learned chairman of the said Court refusing to quash the indictment, the prisoner pleaded guilty thereto, and the learned chairman thereupon reserved for the consideration of the Justices of the Queen's Bench Division of the High Court of Justice for Ontario, the question whether the said Court of General Sessions of the Peace had jurisdiction to try the prisoner upon the indictment.

Section 2 of 53 Vic. ch. 18 (O.) is as follows:—The courts of general sessions of the peace, the county judges' criminal courts and police or stipendiary magistrates, shall have jurisdiction to try any person for any offence under any of the provisions of sections 28 to 31, both inclusive, of the Revised Statutes of Canada, chapter 165, an Act respecting Forgery. Argument.

On the 5th of December, 1892, the reserved case was argued before ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.

Murphy, Q. C., for the prisoner. The exclusive legislative authority of the Parliament of Canada extends, by section 91, sub-sec. 27, of the British North America Act, to "the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters." The Act 53 Vic. ch. 18, sec. 2 (O.), provides for the trial of persons by certain tribunals. I contend that that is a provision relating to procedure in criminal matters. The trial is a proceeding, part of the procedure. I refer to *Regina* v. *O'Rourke*, 1 O. R. 464; *Regina* v. *Wason*, 17 A. R. 221, 251; *Regina* v. *Toland*, 22 O. R. 505.

J. R. Cartwright, Q. C., for the Crown, referred to sec. 92, sub-sec. 14, and secs. 96 and 101 of the British North America Act, and to *Re Bell Telephone Co.*, 7 O. R. 605; *The Picton*, 4 S. C. R. 648; Sweet's and Wharton's Law Dictionaries, *sub verb*, "procedure."

Murphy, in reply, referred to section 94 of the British North America Act, and to *Regina* v. *McDonald*, 31 U. C. R. 337; *Regina* v. *Dunlop*, 15 U. C. R. 118.

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

ARMOUR, C. J.:—

By section 92 of the British North America Act it is provided that in each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next thereinafter enumerated, of which class 14 is the administration of justice in the province, including the constitution, maintenance, and organization

Judgment.

Armour, C.J.

of provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts. And by section 91 of the said Act the Parliament of Canada was given exclusive legislative authority over the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters.

A court is a place where justice is judicially administered: Coke on Littleton, 58*a*; and the constitution of a court therefore necessarily includes its jurisdiction; and the granting by the British North America Act to the provincial legislatures of the power to constitute Courts of civil and of criminal jurisdiction necessarily included the power of giving jurisdiction to those Courts, and impliedly included the power of enlarging, altering, amending, and diminishing the jurisdiction of those Courts.

The Act of the Legislature of Ontario 53 Vic. ch. 18, sec. 2, so far as it provided that the Courts of General Sessions of the Peace should have jurisdiction to try any person for any offence under any of the provisions of sections 28 to 31, both inclusive, of the Revised Statutes of Canada, chapter 165, an Act respecting Forgery, was quite within the powers of the Legislature of Ontario, as being in relation to the constitution of a provincial Court of criminal jurisdiction, and did not in any way trench upon the exclusive authority of the Parliament of Canada to make laws in relation to criminal law and criminal procedure, it not assuming to deal with the procedure in such Courts of General Sessions of the Peace, in the trial of any such offence.

We therefore think that the Court of General Sessions of the Peace for the county of York had jurisdiction to try the prisoner upon the said indictment, and that the conviction must be affirmed.

[See *Regina* v. *Toland*, 22 O. R. 505.—REP.]

[QUEEN'S BENCH DIVISION.]

ERDMAN V. TOWN OF WALKERTON.

Evidence—Action for negligence resulting in injury to person—Death of person injured before trial—Examination de bene esse—Subsequent action by executrix under R. S. O. ch. 135—Admissibility of depositions taken in former action—Order in Chambers.

The plaintiff's husband was personally injured by an accident which occurred on a highway belonging to the defendants, and brought an action for damages, alleging that the action was owing to the defendants' negligence in not keeping the highway in repair. Under an order made in that action, upon his own application, he was examined *de bene esse* as a witness in his own behalf, and cross-examined by the defendants, and died before the action came to trial. His widow then brought this action under R. S. O. ch. 135, Lord Campbell's Act, as executrix, for the death of her husband, alleging that it was caused by the negligence of the defendants in not keeping their highway in repair :—

Held, that the two actions related to the same subject and involved the same material questions, and that the present plaintiff was to be regarded as claiming under her deceased husband ; and therefore that the evidence taken in the former action was admissible in the present :—

Held, also, that an order in Chambers providing that the evidence in question might be read at the trial, saving all just exceptions, was properly made.

Statement.

THIS was an action under (Lord Campbell's Act) R. S. O. ch. 135, brought by Anna Erdman, as executrix of her late husband, John B. Erdman, against the municipal corporation of the town of Walkerton, for the death of her said husband, alleged to have been caused by the neglect of the defendants to keep their highway in repair.

The defendants denied negligence and notice of the alleged defect in the highway, pleaded contributory negligence of the deceased, and claimed to recover over against one R. E. Heughan for all damages, etc., which they might be put to by reason of the premises, under the provisions of the 55 Vic. ch. 42, sec. 531 (4) (the Consolidated Municipal Act, 1892).

The accident to which the husband's death was attributed took place on the 20th of January, 1892.

On 9th of March, 1892, he had issued a writ against the corporation claiming by indorsement damages for injury to him by the negligence of defendants in not keeping the

Statement. street in question in repair, and on 31st of March he filed and delivered his statement of claim.

On 12th of March, 1892, Mr. Winchester, an official referee sitting for the Master in Chambers, made an order in that action on the plaintiff's application, that he (plaintiff) should be examined *vivâ voce* on oath on his own behalf; that the examination be filed in the office of the deputy clerk of the Crown at Walkerton; and that an office copy thereof might be read and given in evidence at the trial of that cause, saving all just exceptions, on giving sufficient proof of the absence of said plaintiff.

The examination of plaintiff John B. Erdman in that cause was taken before the officer named in the Master's order on 14th of March, 1892. No one appeared for defendants, although they were notified.

On 21st of March the Master in Chambers made a further order (after reciting an application of that plaintiff for an order allowing his evidence taken *de bene esse* to be used in any action which might be brought in the event of his death by his wife and children[*]), "that, without prejudice in any way to the present motion, the plaintiff be further examined *vivâ voce* before S. H. McKay on Wednesday 23rd March, 1892, at 10 o'clock a. m., in case his state of health permits, upon notice to the defendants and the third party." And it was further ordered that the examination so taken should be filed, etc., and that an office copy or copies thereof might be read in evidence on the trial of that action, saving all just exceptions, upon giving sufficient proof of the absence of said plaintiff, or of his inability to be present to testify on his own behalf at said trial. This order was not appealed from, and the examination of said plaintiff John B. Erdman was taken on 23rd of March pursuant to the last mentioned order. Counsel for defendants appeared and cross-examined him.

John B. Erdman died on the 2nd of April following.

The present action was commenced on the 6th of June.

On the 7th of October the Master in Chambers made an

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[*] See 14 P. R. 467.

order in this action, on the plaintiff's application, that the depositions of said John B. Erdman taken in the former action, might be given in evidence by either the plaintiff or defendants at the trial of this action, saving all just exceptions.

Judgment.

Master in Chambers.

The judgment of the learned Master was as follows:

Motion by the plaintiff for an order permitting her to use at the trial of this action the evidence of her husband taken *de bene esse* in a former action against the same defendants.

The former action was brought for damages for injury to the plaintiff by the negligence of the defendants, their servants and agents, in not keeping in repair a portion of McNabb street in the town of Walkerton, and in allowing an open ditch or drain to continue on said street, into which the plaintiff fell.

The present action is brought by the widow of the plaintiff in the first action, as executrix of his estate, for the benefit of herself as widow and their children, under ch. 135 R. S. O., against the same defendants, for damages for causing the death of the plaintiff in the first action by the wrongful negligence and default of the defendants, their servants and agents, in not keeping in repair a portion of McNabb street in said town of Walkerton, and in allowing an open ditch or drain to continue on said street, into which the said plaintiff in the first action fell and sustained fatal injuries, which resulted in his death.

The plaintiff in the first action was examined *de bene esse* on his own behalf; the steps taken for such examination being set out fully and correctly in the affidavit of J. R. Shaw, one of the plaintiff's solicitors herein, filed on this application.

It is contended for the defendants that the order asked for should not be made for several reasons, among them the following: (1) That the third party has not been notified of this application and is not present; (2) That

Judgment.

Master in Chambers.

the third party was not present at the examination of Erdman and had no opportunity of cross-examining him; (3) That the evidence cannot be used by the defendants against the third party, and should not therefore be used against the defendants; (4) That the defendants had not an opportunity of cross-examining Erdman fully, on account of the state of his health, and did not examine him at all on the first examination, not being present, the notice given being too short, and therefore irregular; (5) That the present action is not the same as the first, being for damages claimed in consequence of the death of the plaintiff in the first action; whilst the first action was for injuries to the plaintiff himself; (6) That the present action is not between the same parties as the first action; that the plaintiff herein is not a privy to the plaintiff in the first action, and does not claim through him.

The motion was ably argued by counsel for the plaintiff and defendants; all the points that affected the question being taken on both sides and fully discussed.

In support of the application Mr. Blake referred to the following cases: *McIntosh* v. *Great Western R. W. Co.*, 1 Jur. N. S. 1132; *Moggridge* v. *Hall*, 13 Ch. D. 380; *Llanover* v. *Homfray*, 19 Ch. D. 224; *Drewitt* v. *Drewitt*, 52 J. P. 232; and Taylor on Evidence, 8th ed., sec. 464, and the cases cited there.

With reference to the objection that the third party is not present and has not been notified by the plaintiff, I hold that the plaintiff is only seeking relief against the defendants and not against the third party, and for that reason if the defendants desired to have the assistance of the third party, they should have notified him. They had ample opportunity of doing so. There is no order requiring the plaintiff to interfere in the issue between the defendants and the third party. For the same reason the plaintiff was not bound to notify the third party as to the examination of the plaintiff in the first action; although I find as a matter of fact the plaintiff did, at my request, notify the third party of the examination taken on the last occasion. As to whether the defendants can or cannot use the evidence against the third party, that is a matter for the defendants, not for the plaintiff, who is not claiming relief against the third party.

As to the defendants not having an opportunity to cross-examine the witness, I hold that it is clearly shewn that they had ample opportunity on three occasions; but because they did not avail themselves of such liberty they cannot object to the evidence being used. In *Cazenove* v. *Vaughan*, 1 M. & Sel. 4, the plaintiffs filed a bill in Chancery for the examination of a witness *de bene esse*, and the defendant did not put in any answer. The plaintiffs gave notice to the defendant of an order obtained from the Court for the examination and of the question intended to be put, and examined the witness the same evening, who set off the next day and never returned. The plaintiffs obtained a further order for publication of the deposition in order that it might be read at the trial; and the deposition was admitted in evidence, since the defendant might have cross-examined if he had been so inclined. Lord Ellenborough in delivering judgment said: "The rule of the common law is, that no evidence shall be admitted but what is or might be under the examination of both parties; * * But if the adverse party has had liberty to cross-examine, and has not chosen to exercise it, the case is then the same in effect as if he had cross-examined; otherwise the admissibility of the evidence would be made to depend upon his pleasure, whether he will cross-examine or not; which would be a most uncertain and unjust rule."

In *Llanover* v. *Homfray*, 19 Ch. D. at pp. 229-230, Sir George Jessel, M. R., said: "Why should the evidence not be admissible? The lord had an opportunity of cross-examining, and the evidence answers every condition of admissibility." See also Starkie on Evidence, 4th ed., p. 409, where the rule is laid down that depositions of witnesses are admissible if "the party to be affected by them has cross-examined the deponents, or has been legally called upon, and had the opportunity to do so."

Judgment.

Master in Chambers.

As to the actions being for the same cause and between the same parties, in Starkie on Evidence, 3rd ed., p. 260, it is laid down that "it is not essential that either the parties or the form of action should be precisely the same, if they are substantially the same." In a very old case of *Terwit* v. *Gresham*, Chy. Cas. 73, before the Lord Chancellor, Baron Turner, the report reads as follows: "Ordered, upon long debate, that depositions of witnesses taken in a former cause thirty years since, where the same matters were under examination in issue as in this (the point being concerning incumbrances and damnification in both cases) should be made use of in this cause, albeit the plaintiff in this cause, and those under whom he claims, were not parties in the former cause, inasmuch as the tertenants were then parties, and the now plaintiff's title did not then appear, and the witnesses were dead."

In *Switzer* v. *Boulton*, 2 Gr. 693, the bill was filed to have a deed absolute in form declared a mortgage and for consequential relief. One of the defendants, a devisee of the lands, had previously brought an action of ejectment against the plaintiff to recover possession of the property. At the trial of the action P. H. had been examined as a witness on the part of the plaintiff in equity, being the defendant at law, for the purpose of proving the deed in question to be a mortgage. Since the trial P. H. had been committed to the penitentiary and refused to submit to be examined. Under the circumstances an application was made for the purpose of obtaining an order to shew the purport of the evidence of P. H. at the trial of the ejectment through the medium of the Judge's notes.

The Court delivered the following judgment: "In the case of *Carrington* v. *Cornock*, 2 Sim. 567, cited in the argument, the Vice-Chancellor of England observed that 'if any of the witnesses in the cause of *Carrington* v. *Jones* are dead, the Court will order the deposition of those witnesses to be read in this cause, saving exceptions.' Now, in the case before us, the witness H. is as much beyond the power of the plaintiff as if he were dead, and we think the plaintiff must, subject to all just exceptions, be at liberty to read the evidence given by H. on the trial of the action of ejectment; the parties to that action being substantially the same as those interested in this suit."

Judgment.

Master in Chambers.

In *Wright* v. *Doe dem. Tatham*, 1 A. & E. 3, Tatham, lessor of plaintiff in this action, filed his bill in Chancery against Wright, the defendant in this action, and three other persons. At the trial a witness was called and examined on the part of Wright, and cross-examined on the part of Tatham. Argued because Wright was not the only party but was joined with others, and that Tatham instead of being the plaintiff in the present action is only the lessor of the plaintiff, therefore the evidence given by this witness, since deceased, could not be used in this present action, and was properly rejected by the trial Judge. Tindal, C. J., in delivering the judgment of the Court, composed of Tindal, C. J., Park, J., Gaselee, J., Bosanquet, J., Bayley, B., Vaughan, B., and Gurney, B., said at p. 19: "We think neither of these circumstances will make any difference as to the admissibility of the evidence in question. For the result of the authorities is, that the lessor of the plaintiff is the real party in an ejectment, that the nominal plaintiff has no interest, and that, in an ejectment between Doe on the demise of J. S. against B., J. S. is bound by a verdict for the defendant. Neither can there be any real difference from the circumstance that, in the former action, the present defendant, Mr. Wright, was joined with other persons as plaintiffs; for Mr. Tatham, the lessor of the plaintiff in this action, had precisely the same power of objecting to the competency of Bleasdale (the witness), the same right of cross-examination and of calling witnesses to discredit or contradict his testimony, on the former trial, * * as he would have had now, if Bleasdale had been alive and subpœnaed as a witness. It is manifest therefore, that the verdict on the former trial, and the examination of witnesses on each side, did not take place in a suit between third parties, or strangers, but virtually and substantially between the very same parties who are parties

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to the present suit, and upon the very same subject-matter of dispute."

In *Doe dem. Foster* v. *Earl of Derby*, 1 A. & E. 783, it was held that the right to use evidence is co-extensive with the liability to be bound by evidence. At p. 791, note (*b*), evidence of witnesses was objected to on behalf of the defendant, inasmuch as the trial on which that examination was taken related to the property, late Mrs. Travers's, at Croft, whereas the present action was for the land, formerly hers, at Huyton, a different property. Alderson, B., without hearing counsel in answer to the objection, said that he had no doubt of the examination being admissible, the question being the same in both actions, viz., who was the heir-at-law of Mrs. Travers.

In this action the evidence of Erdman is upon the cause and result of the accident, and this is the same question in both actions. His evidence could be used by the defendants, if in their favour, against the present plaintiff, and if so, it seems to me the plaintiff can use it against the defendants: *Morgan* v. *Nicholl*, L. R. 2 C. P. 117; *Doe dem. Hulin* v. *Powell*, 3 Car. & K. 323.

The matter may not be free from some doubt, but, on the whole, I am of opinion ~~that it~~ will be in the interests of justice to allow the evidence to be used, saving all just exceptions.

Order will go with costs in the cause.

From this order the defendants gave notice of appeal to a Judge in Chambers, but before the appeal was heard the action came down for trial before STREET, J., and a jury, at Walkerton on 11th of October, 1892.

The learned trial Judge refused to allow the depositions to be given in evidence, and there being admittedly not sufficient evidence without them to go to the jury, the case was withdrawn from the jury and the action dismissed.

And sitting in Chambers on 26th of November, 1892, the same learned Judge heard the appeal from the Master's order of 7th of October and allowed the appeal therefrom.

Argument.

In Michaelmas Sittings, 1892, the plaintiff moved the Divisional Court by way of appeal from the judgment at the trial, and also from the order of 26th November, on the ground of alleged improper rejection of said evidence, and on the further ground that the learned trial Judge was bound by the order of the Master in Chambers.

The motion was argued before ARMOUR, C. J., and FALCONBRIDGE, J., on the 29th November, 1892.

Shaw, Q. C., for the plaintiff. This action could not have been brought if the former action had succeeded or been settled. This is a new action, but it is not a new cause of action. All the circumstances and conditions applicable to the first action are present in this action. There is a difference in the result; the damages are awarded on a different footing; but there is no difference in the cause of action. I refer to *Leggott* v. *Great Northern R. W. Co*, 1 Q. B. D. 599; *Llanover* v. *Homfray*, 19 Ch. D. 224; *Read* v. *Great Eastern R. W. Co.*, L. R. 3 Q. B. 555; *Griffiths* v. *Earl of Dudley*, 9 Q. B. D. 357; *Moggridge* v. *Hall*, 13 Ch. D. 380; *Drewitt* v. *Drewitt*, 52 J. P. 232; Daniell's Chy. Prac., 6th ed., p. 599; *Barnett* v. *Lucas*, 5 Ir. R. C. L. 140, at p. 143; 6 Ir. R. C. L. 247; *Pym* v. *Great Northern R. W. Co.*, 4 B. & S. 396; *Pulling* v. *Great Eastern R. W. Co.*, 9 Q. B. D. 110; *Dalton* v. *South-Eastern R. W. Co.*, 4 C. B. N. S. 296; *Blake* v. *Midland R. W. Co.*, 18 Q. B. 93; *Wright* v. *Doe dem. Tatham*, 1 A. & E. 3; *Doe dem. Foster* v. *Earl of Derby*, *ib.* 791 *n*; *White* v. *Parker*, 16 S. C. R. 699; *Switzer* v. *Boulton*, 2 Gr. 693.

Aylesworth, Q. C., for the defendants the town of Walkerton. The naked question is whether this evidence is admissible. Where the parties are the same, and the cause of action the same, the evidence is admissible; also where the party is claiming in the same right, as where the title to land descends. Here the cause of action is different, and the parties are different. The nature of the plaintiff's claim is different. The evidence was properly rejected

Argument. under *Morgan* v. *Nicholl*, L. R. 2 C. P. 117, if I can shew that the cause of action and the parties are different. I rely on *Brunsden* v. *Humphrey*, 14 Q. B. D. 141; *Leggott* v. *Great Northern R. W. Co.*, 1 Q. B. D. 599; *Doolan* v. *Martin*, 6 P. R. 319; *Regina* v. *Ledbetter*, 3 Car. & K. 108. Had there been a recovery by the deceased, it would have been for his own suffering, his own inability to work, etc.; it would have been for damages to his own estate. But this action is not for the suffering of the deceased, etc., but for damages done to individual members of his family by reason of his death, not by what took place prior to his death. What is recovered for is different. Then I contend, also, that the parties are different. Heughan was not a party to the former action. We could not use against Heughan the evidence that the plaintiff seeks to use against us.

H. P. O'Connor, Q. C., for Heughan. The evidence certainly cannot be read as against my client.

Shaw, in reply.

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

FALCONBRIDGE, J. :—

I do not concern myself about the position of the third party. He was brought into the controversy by the defendants and not by the plaintiff, who has nothing to do with any rights or remedies which the defendants may have against him, and I shall therefore exclude him from consideration in dealing with the case.

Judge Pitt Taylor—Evidence, 8th ed., sec. 464—states the rule as follows * * * "It may be advanced as a general rule of law, that where a witness has given his testimony under oath in a judicial proceeding, in which the adverse litigant had the power to cross-examine, the testimony so given, will, if the witness himself cannot be called, be admitted in any subsequent suit between the same par-

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ties, or those claiming under them, provided it relate to the same subject, or substantially involve the same material questions."

Adopting this statement (with the necessary right or opportunity of cross-examination, as stated in section 465) as being fairly borne out by the authorities cited by the learned author; (see particularly *Wright* v. *Doe dem. Tatham*, 1 A. & E. 3; *Lawrence* v. *Maule*, 4 Drew. at p. 480, to which cases I shall have occasion to refer again) it becomes necessary to inquire whether the present suit is: (1) Between the same parties or those claiming under them; and (2) Relates to the same subject or involves the same material questions.

There can be but one answer to the latter branch of the inquiry, for it is beyond doubt that the injury to the deceased, and the alleged negligence of the corporation, were one and the same so far as the happening of the accident is concerned. The state of facts on which the right of the plaintiff, if any, in both cases to recover is based, is identical, and the defence of the corporation is necessarily the same.

There was the same issue in both proceedings—an affirmation on the one side that J. B. Erdman sustained injury by reason of the negligence of the defendants, and a denial by the defendants of such negligence; and the defence of contributory negligence is as applicable in the one case as in the other: *Tucker* v. *Chaplin*, 2 Car. & K. 730; see *Doe dem. Foster* v. *Earl of Derby*, 1 A. & E. note (*b*) to p. 791, cited below.

I am speaking now of the evidence as to the facts, without reference to the cause of action.

The cases of *Regina* v. *Morris*, 1 C. C. R. 90, and *Doolan* v. *Martin*, 6 P. R. 319, are instructive on the subject of what are the same causes; but do not affect my opinion on this point so far as the cause of action involves the consideration of the status of the plaintiff.

That investigation merges itself in the settlement of the more difficult branch of the case, viz., whether the present plaintiff claims under J. B. Erdman in the sense and to the extent which will justify the reception of the evidence.

Judgment.

Falconbridge, J.

R. S. O. ch. 135, provides, sec. 2: "Where the death of a person has been caused by such wrongful act, neglect or default, as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, in such case the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as to amount in law to felony;" and by sec. 3: "Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death has been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased."

The contention of the defendants is that a proceeding under this statute is an essentially different cause of action, and that in it the parties are essentially different from the cause of action and the parties in the suit of J. B. Erdman against the corporation.

Taking the second section of the statute by itself, I fail to find anything in it to favour this view. It provides that "the person who would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death * *." This is simply equivalent to saying that in such a case the maxim *actio personalis moritur cum personâ* shall not apply.

Then section 3 designates the persons or classes for whose benefit the action shall be, and provides that the action shall be brought by and in the name of the executor or administrator.

The statute in fine creates a trust in favour of certain beneficiaries, and appoints the mode of settling the ratio of distribution among them; but the action is brought by the personal representative of the deceased.

Then does it make any difference that the personal representative does not sue for the benefit of the estate, but for the benefit of next of kin designated by the statute? or that the near relations of the deceased should get the fruits of the judgment to the exclusion of creditors of the deceased?

Judgment

Falconbridge, J.

I should think not, unless there is clear authority the other way.

In *Regina* v. *Ledbetter*, 3 Car. & K. 108, Mr. Greaves Q. C., after consultation with Lord Campbell and Mr. Justice Williams, refused to admit in evidence against a prisoner on trial at the assizes for feloniously wounding, a deposition properly taken before a magistrate against the same prisoner on a charge of assault.

This decision turns on the wording of the 17th section of the 11 & 12 Vic. (Imp.) ch. 42, as to the person "*so accused*" and "in *such* prosecution," and is not of avail here.

In the same volume, at p. 323, there is a ruling of Vaughan Williams, J., in a case of *Doe dem. Hulin* v. *Powell*, which seems favourable to the plaintiff here.

In a former ejectment, *Doe dem. Hulin* v. *Richards*, brought by the present lessor of the plaintiff to recover the same property, a witness, since deceased, was examined under a commission. In this, the second ejectment, it was proved that before the examination R. agreed to defend the former ejectment for P.

The Judge, laying stress on the fact that the lessor of the plaintiff had an opportunity of cross-examining the witness, received the evidence, considering it immaterial whether the lessor of the plaintiff knew or did not know that P. was the real defendant.

Morgan v. *Nicholl*, L. R. 2 C. P. 117, is pointed to as accentuating the rigour of the rule which the defendants say exists.

There a previous action had been brought by the plaintiff's son against the defendant's father to recover possession of the same premises; and it being supposed at that time that the plaintiff was dead, the son had claimed the property as his father's heir-at-law.

Plaintiff proposed to cross-examine a shorthand writer as to the evidence given in the previous action by a witness who had since died.

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Falconbridge, J.

The evidence was held inadmissible on the very short and intelligible ground that the father was, for the purposes of that suit, as distinct a person from his son as a perfect stranger.

To apply this case to the present one, is a complete *petitio principii.*

In 16 S. C. R. at p. 699 there is a head-note of a judgment in appeal from the Supreme Court of New Brunswick, in a case of *Parker* v. *White.* P. brought an action against a conductor of the I. C. R. for injuries alleged to be caused by the conductor's negligence. On the trial P. was nonsuited; and on motion to the full Court the nonsuit was set aside and a new trial ordered. Between the verdict and the judgment ordering a new trial P. died, and a suggestion of his death was entered on the record. The Supreme Court of Canada is reported to have held on appeal from the order of the full Court, that under the statute equivalent to Lord Campbell's Act in New Brunswick, an entirely new cause of action arose on the death of P., and the original action was entirely gone and could not be revived.

We have not seen the judgments of the Supreme Court. A perusal of the case in the Court below in 27 N. B. Reps. p. 442, of course throws no light on the question, except to make it clear that the use of the expression "an entirely new cause of action," in the sense in which defendants would apply it here, is not necessary for the decision of that case, and was probably not used by any member of the Court in that sense.

The above seem to be the main authorities which at all favour the defendants' contention.

In *Wright* v. *Doe dem. Tatham,* 1 A. & E. 3, Wright was not the only party, but was joined with other plaintiffs in the former action, and Tatham, instead of being the plaintiff in the present action, is only the lessor of the plaintiff. Tindal, C. J., says, at p. 19: "But we think neither of these circumstances will make any difference as to the admissibility of the evidence in question. For the result

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Falconbridge, J.

of the authorities is, that the lessor of the plaintiff is the real party in an ejectment, that the nominal plaintiff has no interest, and that, in an ejectment between Doe on the demise of J. S. against B., J. S. is bound by a verdict for the defendant. Neither can there be any real difference from the circumstance that, in the former action, the present defendant, Mr. W., was joined with other persons as plaintiffs; for Mr. T., the lessor of the plaintiff in this action, had precisely the same power of objecting to the competency of Bleasdale, the same right of cross-examination and of calling witnesses to discredit or contradict his testimony, on the former trial, as he would have had if Mr. W. had been the sole plaintiff in that suit, or as he would have had now if Bleasdale had been alive and subpœnaed as a witness. It is manifest, therefore, that the verdict on the former trial, and the examination of witnesses on each side, did not take place in a suit between third parties, or strangers, but virtually and substantially between the very same parties who are parties to the present suit, and upon the very same subject-matter of dispute."

I think the plaintiff in an action under Lord Campbell's Act occupies a like position towards the persons to be benefited as the plaintiff in the old action of ejectment did to his lessor.

In *Doe dem. Foster* v. *Earl of Derby*, 1 A. & E. 783, the evidence was rejected, the parties nominal and real not being the same, but in note (*b*) at p. 791 there is reported a ruling of Alderson, B., admitting the examination of a deceased witness, although a different property was claimed, on the ground that the question was the same in both actions, viz., who was the heir-at-law of Mrs. T.

I cite this judgment in support of my conclusion that the question is the same in the two actions which we are considering.

In *Switzer* v. *Boulton*, 2 Gr. 693, one of the defendants had brought an action of ejectment against the plaintiff to recover possession of the property, and a person who

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had given evidence in the former action was afterwards committed to the provincial penitentiary. He, fearing no additional punishment for his contumacy, or hoping that his refusal might lead to his liberation, refused to be examined in the new cause at the penitentiary. The Court, treating him as being as much beyond the power of the plaintiff as if he were dead, gave the plaintiff liberty, subject to all just exceptions, to read his evidence.

Lawrence v. *Maule*, 4 Drew. 472, is a decision of Kindersley, V.-C., and is in point.

The head-note is "Upon a petition for the transfer of stock, under 56 Geo. 3, ch. 60, service on the Commissioners and also on the Attorney-General is required by the Act. The Court will presume at the hearing of the petition, that the Attorney-General represents not only the Commissioners and the Crown as *parens patriæ*, but also the Crown in its beneficial capacity. Therefore, where testimony of a witness since deceased was received upon a petition under that Act, that testimony is receivable in a subsequent proceeding against an administrator nominated by the Crown, and the Crown by a party to the former proceedings or his representatives."

The learned Vice-Chancellor points out (p. 482) that "the Attorney-General may represent the Crown when the Crown has an interest that is not a public interest."

In *McIntosh* v. *Great Western R. W. Co.*, 1 Jur. N. S. 1132, the Court (Stuart, V.-C.) on motion by the plaintiff ordered to be published depositions taken in a suit which had been dismissed through the conduct of the plaintiff.

One party was a defendant in the suit last brought who was not in the former suit. The Vice-Chancellor says, "although there are minute differences in respect to the relief prayed, the parties are substantially the same, and the case is instituted for the same great object as the former suit."

In *Read* v. *Great Eastern R. W. Co.*, L. R. 3 Q. B. 555, the plaintiff as widow of D. R. declared against defendants under the statute for negligence whereby D. R. was injured and died.

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Falconbridge, J.

Plea, that in the lifetime of D. R., the defendants paid him, and he accepted, a sum of money in full satisfaction and discharge of all the claims and causes of action he had against the defendants. Demurrer, on the ground that the accord and satisfaction with D. R. was no accord and satisfaction of the claim arising from his death.

Held, that the cause of action was the defendants' negligence, which had been satisfied in the deceased's lifetime, and that the death of D. R. did not create a fresh cause of action.

This is a strong authority in favour of the plaintiff. On the argument both *Blake* v. *Midland R. W. Co.*, 18 Q. B. at p. 109, and *Pym* v. *Great Northern R. W. Co.*, 4 B. & S. at p. 406, were cited in support of the demurrer, and counsel in answer to a question by Lush, J., " Suppose that the deceased had brought an action and recovered and then died, could his widow bring another action ? " maintained that she could.

Blackburn, J., says, p. 558: "Then comes sec. 2," (our sec. 3) " which regulates the amount of damages, and provides for its apportionment in a manner different to that which would have been awarded to a man in his lifetime. This section may provide a new principle as to the assessment of damages, but it does not give any new right of action." And Lush, J., expresses this opinion almost in the same words.

Leggott v. *Great Northern R. W. Co.*, 1 Q. B. D. 599, is claimed as an authority by both parties. Plaintiff, as administratrix of her husband L., sued for damages to the personal estate and effects of L. The plaintiff as administratrix had sued defendants in a former action for the benefit of herself as wife, and of the children of L., and had recovered judgment against them. It was held that the second action was not barred by the judgment and satisfaction under the first, and that there was no estoppel of which either party could take advantage, as the plaintiff sued in a different right in either action.

In *Llanover* v. *Homfray*, 19 Ch. D. 224, it was held by Hall, V.-C., and by the Court of Appeal, that evidence

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taken *de bene esse* in 1815, in a suit in which answers were put in in 1819, after which nothing further was done, was admissible in a new suit in which the bill was filed in 1871 by customary tenants who did not derive title under any of the persons named as plaintiffs in the suit of 1815, against a different lord of the manor from the defendant. The old suit was held to be between persons privy in estate to the parties in the new action.

In *Griffiths* v. *Earl of Dudley*, 9 Q. B. D. 357, the Court held that a workman's widow suing for damages under the Act was bound by a contract made by her husband with his employer, for himself and his representatives and any person entitled in case of death, not to claim any compensation under the Act for personal injury, whether resulting in death or not.

Both Field, J., and Cave, J., treat the judgment in *Read* v. *Great Eastern R. W. Co.* as binding and as a clear decision that Lord Campbell's Act did not give any new cause of action.

The defendants invoke the aid of a purely technical rule, claiming that such a rule exists, I will not say with the intention, but certainly with the result, of defeating the ends of justice, if their contention be upheld.

I am glad to be able to find that on the authorities the rule does not exist, and that the deposition ought to have been admitted in evidence.

It is satisfactory also to find high authority in the United States supporting the view which we take.

Mr. Greenleaf, Evidence, 15th ed., sec. 164, put it as follows: "The admissibility of this evidence seems to *turn* rather *on the right to cross-examine* than upon the precise nominal identity of all the parties." The italics are the author's.

We rest our judgment in the case in hand, on both grounds, viz., the right to cross-examine and the substantial identity of the parties.

The Indianapolis and St. Louis R. R. Co. v. *Stout, Administrator*, 53 Indiana 143, is exactly in point.

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Falconbridge, J.

There the Supreme Court of that state held that on the trial of an action brought by an administrator to recover damages for the death of his intestate, caused by the wrongful act of the defendant, evidence is admissible to prove what was the testimony of witnesses since deceased, on the trial of an action brought by said intestate, and abated by his death, for damages for injuries caused by said wrongful act.

Buskirk, J., says at p. 158 "The action of Peter Stout was based upon the common law liability of the appellant, while the present action is based upon a statute; but the foundation of the action in each case was the injury caused by the negligence of the appellant." "We think the causes of action were the same. The parties are not the same, but Greenleaf says * * * " citing sec. 164:

Something was said at the argument about the cross-examination being ineffective by reason of the infirm and weak condition of the deponent.

That may be the defendants' misfortune, but is no ground in law for the consideration of the Court, so far as regards the admissibility of the evidence, even although under some circumstances there had been no cross-examination at all, though the want of cross-examination might impair the weight and value of the testimony.

See *Courtenay* v. *Hoskins*, 2 Russ. 253; *Dom. Arundel cont. Arundel*, 1 Reports in Chy. 48 (* 90.)

In the former of these cases the witness had refused to answer the cross-interrogatories; in the latter the witness died before he could be cross-examined. In both cases the Court ordered the deposition to stand.

There must be a new trial—costs of former trial and of this motion to be costs to the plaintiff in any event of the cause.

As to the Master's order, we do not think it was argued that the order was improper if the evidence was otherwise admissible. But if it was so contended, we do not give effect to the contention. The practice as laid down in Daniell's Chy. Prac., 6th ed., p. 599, seem to fully justify

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the making of the order as the learned Master made it saving all just exceptions.

The Master's order will therefore be reinstated, with costs of the appeal therefrom, here and below, to be costs in the cause to the plaintiff in any event.

[CHANCERY DIVISION.]

MITCHELL V. MCMURRICH.

Action for wrongfully commencing civil action—Malice—Special damage—Necessary allegations—Demurrer.

Action for damages against solicitors for, as alleged in the statement of claim, "wrongfully and unlawfully without any instructions or retainer" issuing a writ of summons against the plaintiff in the name of the third party, by reason of which the plaintiff was injured in his occupation as a builder, suffered in his credit and reputation, and was hindered in the performance of his contracts, and had to borrow money at a higher interest than he would otherwise have had to do, and other creditors were induced to sue him, whose accounts he had to compromise and settle at great loss:—

Held, on demurrer, that neither malice and want of reasonable and probable cause, nor special damage, both of which are necessary in such an action, were sufficiently alleged.

Semble, that an allegation that by reason of the proceedings complained of the plaintiff was put into insolvency or bankruptcy, if such a thing were possible in this country, might be a sufficient allegation of special damage.

Statement.

THIS was an action brought by Charles Mitchell, a builder, carrying on business in Toronto, against a firm of barristers and solicitors, also practising in Toronto, claiming damages upon grounds set out in the statement of claim as follows: That on July 23rd, 1892, the defendants caused a writ of summons to be issued out of the Queen's Bench Division in a certain action, wherein William Kean was plaintiff, and the plaintiff in the present action, Charles R. Cuthbertson, and William Maclaren, were defendants, whereon they claimed for the price of work done by the plaintiff for the plaintiff in the present action, and the cost of registering a mechanics' lien, according to the particulars on the said writ set out; and also claimed a lien for the sum alleged to be due as aforesaid on certain lands and premises of the present plaintiff; that prior to the date of issue of the said writ, he, the present plaintiff, had settled with the said Kean all his claims and demands in respect to the cause of action set out in the said writ; and that—

5. "The plaintiff claims, as the fact is, that the said writ of summons was issued by the defendants wrongfully and unlawfully, and without any instructions or retainer on the part of the said William Kean, or any one on his behalf, and at the instance of the said defendants only, and the issue of the said writ of summons was calculated to injure the plaintiff, and did injure the plaintiff in his calling and occupation as a builder aforesaid, and the plaintiff suffered in his credit and reputation, and was delayed and hindered in the performance of his contracts and works, and had to procure moneys at a higher rate of interest than he otherwise would have done; and further, other creditors were induced by the action of the defendants and the plaintiff's loss of credit thereby, to take action against the defendant, whereby the plaintiff in order to compromise and settle, had to sacrifice, and did sacrifice certain lands and premises at a great loss, and in divers ways the plaintiff suffered and sustained great loss and damage, and in respect of the cause of action aforesaid, and for the loss and damage sustained by the plaintiff, the plaintiff claims the sum of $3,000 damages, together with the costs of this action."

The defendants demurred to the above 5th paragraph of the statement of claim, on the grounds set out in the judgment of FERGUSON, J.

The demurrer was argued on October 18th, 1892, before FERGUSON, J.

E. D. Armour, Q. C., for the demurrer, referred to *Ram Coomar Condoo* v. *Chunder Canto Mookerjee*, 2 App. Cas.

Argument. 186, 201, 211, 213; *Cotterell* v. *Jones*, 11 C. B. 713; *The Montreal Street R. W. Co.* v. *Ritchie*, 16 S. C. R. 622, 629; *Farley* v. *Danks*, 4 El. & Bl. 493; *Flight* v. *Leman*, 4 Q. B. 883; *Tuckett* v. *Eaton*, 6 O. R. 486; *The Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674, 682.

Swartout, contra. Even if it be necessary to prove the absence of reasonable and probable cause, the words "wrongfully and unlawfully and without any retainer," are sufficient: *Craft* v. *Boite*, 1 Saund. 242; *Drewe* v. *Coulton*, 1 East 563, *n*; *Bromage* v. *Prosser*, 4 B. & C. 247, 255; *Attorney-General* v. *The Midland R. W. Co. of Canada*, 3 O. R. 511.

November 17th, 1892. FERGUSON, J.:—

The demurrer is to the fifth paragraph of the statement of claim. The grounds of this demurrer are two: (1) That it is not alleged that the proceedings complained of were taken maliciously and without reasonable and probable cause; and (2), that special damage is not alleged to have accrued to the plaintiff.

In support of the plaintiff's pleading, the contention was not so much that the allegation of malice and want of reasonable and probable cause, is not necessary, as that the statement of malice, etc., is necessarily contained in the statement that the act was done "wrongfully and unlawfully and without instructions." It appears to me that the case of *Saxon* v. *Castle*, 6 A. & E. 652, is an answer to this contention. In that case the words employed were "wrongfully and injuriously," and the judgment was arrested (after verdict) because the word "maliciously" was not added. Patteson, J., said: "Proof of malice was not called for, because malice was not alleged." In the case *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*, before the Privy Council, 2 App. Cas. at pp. 201 and 202, the Court refers with approbation to a statement of the law in *Cotterell* v. *Jones*, 11 C. B. 735, which is: "It is clear no action will lie for improperly putting the law in motion in the name of a third person, unless it is alleged

Judgment.

Ferguson, J.

and proved that it is done maliciously and without reasonable or probable cause; but if there be malice and want of reasonable or probable cause, no doubt the action will lie, provided there be also legal damage."

It seems to me clear that to sustain the present action, the plaintiff is called upon to allege and prove malice and want of probable cause.

I think it also clear that these have not been alleged, and according to *Saxon* v. *Castle* above, as I understand it, without the allegation, the proof of malice would not be called for at the trial.

On this ground alone I am of the opinion that the pleading demurred to is clearly bad. As to the second ground of demurrer, I think Mr. Armour is right in his contention that special damage is not alleged. I do not see that what is alleged can amount to an allegation of legal damage. No unwarrantable interference with the person or property of the plaintiff is stated (16 S. C. R. at p. 630).

If in this country such a thing were possible, and it was alleged that the effect of the proceeding complained of was to put the plaintiff into insolvency or bankruptcy, that might be different.

What is alleged as damages, is no more than what might be said by a person who had been sued by another for the recovery of an alleged debt, where the defendant succeeded in the action, and by reason of the existence of the action the credit of the defendant therein became injured, etc., and such an injury could not, I think, be at all said to be "legal damages," or such special damages as seem to be necessary to support this character of action.

The demurrer must, I think, be allowed on both grounds of demurrer. If, however, the plaintiff desire to amend, he may do so within ten days from to-day, on payment of costs of the demurrer, etc., to be taxed. If not, the demurrer will be allowed with costs.

Order accordingly.

A. H. F. L.

END OF VOLUME XXII.

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.

ACCIDENT.

See MASTER AND SERVANT—NEGLIGENCE, 1, 2.

AFFIDAVIT.

Of bona fides.]—*See* BILLS OF SALE AND CHATTEL MORTGAGES.

AMENDMENT.

Of lien claim.]—*See* LIEN, 1.

ASSIGNMENT.

Equitable.]—*See* CHOSE IN ACTION.

Of a debt before action, validity of.]—*See* PROHIBITION, 3.

Of a legacy before period of distribution.]—*See* LEGACY.

Right to demand assignment of mortgage without paying others.]—*See* MORTGAGE, 2.

ASSIGNMENTS AND PREFERENCES.

R. S. O. ch. 124, sec. 3, sub-sec 1—Payment of money to a creditor—Transfer of cheque.]—The handing by a debtor to his creditor of the cheque of a third person upon a bank in the place where the creditor lives, the maker of the cheque having funds there to meet it, is a "payment of money to a creditor" within the meaning of R. S. O. ch. 124, sec. 3, sub-sec. 1. *Armstrong et al.* v. *Hemstreet et al.* 336.

Act respecting, not retrospective.]—*See* BILLS OF SALE AND CHATTEL MORTGAGES.

AUCTION AND AUCTIONEER.

Assignee of estate of insolvent—By-law under Municipal Act R. S. O. ch. 184, sec. 495—Selling estate of insolvent by auction—Conviction.]—A by-law of a county municipality passed under sub-section 2 of section 495 of the Municipal Act, R. S. O. ch. 184, enacted, that it should not be lawful for any person or persons to act as auctioneers, or to sell or put up for sale any goods, etc., "by public auction" unless duly licensed:—

Held, that the agent of an assignee of an insolvent estate selling without a license the stock-in-trade of an insolvent who had carried on business in the county, was rightly convicted of a breach of the by-law, although it was the only occasion he had so acted in the municipality. *Regina* v. *Rawson*, 467.

BANKRUPTCY AND INSOLVENCY.

Chattel mortgage, validity of—Prior agreement therefor—Intent to prefer—Rebuttable presumption—R. S. O. ch. 124, 54 Vic. ch. 20 (O.).—A chattel mortgage given in pursuance of a previous agreement therefor to cover an antecedent debt and advance made at the time of the agreement, both the mortgagor and mortgagee believing the former to be solvent when the mortgage was actually made, was impeached within the sixty days provided for by sec. 2, sub sec. (*a*) of 54 Vic. ch. 20 (O.), amending the R. S. O. ch. 124:—

Held, that the mortgage was valid.

The presumption of an intent to prefer as to transactions coming within the 54 Vic. ch. 20 (O.), impeached within the sixty days, is not an irrebuttable one, but the onus of shewing that no such intent existed is cast on the person supporting the transaction. *Lawson* v. *McGeoch et al*, 474.

Act respecting assignments and preferences by insolvent persons, not retrospective.]—*See* BILLS OF SALE AND CHATTEL MORTGAGES.

See also COMPANY, 1, 2.

BANKS AND BANKING.

See COMPANY, 2.

BENEVOLENT SOCIETY.

See INSURANCE, 1.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Effect of, as payment in lien cases.]—*See* LIEN, 2.

See also DIVISION COURTS.

BILLS OF SALE AND CHATTEL MORTGAGES.

Affidavit of bona fides—Statement of consideration—R. S. O. ch. 125, sec. 5—54 Vic. ch. 20, not retrospective.]—The affidavit of bona fides on a bill of sale, which the evidence shewed was taken in satisfaction of a previous loan from the bargainee to the bargainor, stated that the sale was bonâ fide and for good consideration, namely, $830 (which was the consideration expressed in the bill of sale), advanced by the bargainee by way of a loan:—

Held (STREET, J., dissenting), that the affidavit substantially complied with section 5 of R. S. O. ch. 125, and that the addition of the words "advanced, etc., by way of a loan," did not render the affidavit defective.

54 Vic. ch. 20, the "Act to amend the Act respecting Assignments and Preferences by Insolvent Persons" (R. S. O. ch. 124), is not retrospective, and does not apply to any gift, transfer, etc., made before the passing thereof, and no inference that the legislature intended it to be retrospective is to be drawn from the language of section 3, providing that nothing therein should affect any action pending, etc. *Ormsby* v. *Jarvis, Chapman* v. *Jarvis*, 11.

Validity of chattel mortgage.]—*See* BANKRUPTCY AND INSOLVENCY.

BONA FIDES.

Affidavit of.]—*See* BILLS OF SALE AND CHATTEL MORTGAGES.

BONUS.

Conditions of, to railway company.]—*See* RAILWAYS, 2.

To street railway.]—*See* MUNICIPAL CORPORATIONS, 1.

BRIDGES.

See MUNICIPAL CORPORATIONS, 1.

BRITISH NORTH AMERICA ACT.

See CONSTITUTIONAL LAW, 1-3.

BY-LAW.

Construction of wording—Want of penalty in, does not invalidate—Days of publication and notice.]—*See* INTOXICATING LIQUORS, 2.

Drainage.]—*See* MUNICIPAL CORPORATIONS, 6.

Majority voting on.]—*See* MUNICIPAL CORPORATIONS, 7.

To divide school section, necessity for seal and signature.]—*See* MUNICIPAL CORPORATIONS, 4.

To forfeit license, void.] — *See* MUNICIPAL CORPORATIONS, 2.

To license auctioneer.]—*See* AUCTION AND AUCTIONEER.

To license omnibus owners.]—*See* MUNICIPAL CORPORATIONS, 5.

CASES.

Amsden v. *Kyle*, 9 O. R. 441, corrected.]—*See* WILL, 12.

Ashbridge v. *Ashbridge*, 22 O. R. 146, followed.]—*See* WILL, 8.

Balzer v. *Gosfield*, 17 O. R. 700, followed.]—*See* DAMAGES.

Cornish, Re, 6 O. R. 259, followed.]—*See* LIEN, 3.

Cowan v. *Besserer*, 5 O. R. 624, followed.]—*See* WILL, 12.

Hall v. *Prittie*, 17 A. R. 306, followed.]—*See* CHOSE IN ACTION.

Knapp v. *Great Western R. W. Co.*, 6 C. P. 187, distinguished.]—*See*

WATERS AND WATERCOURSES, 2.

L'Esperance v. *Great Western R. W. Co.*, 14 U. C. R. 173, distinguished.]—*See* WATERS AND WATERCOURSES, 2.

Little v. *Billings*, 27 Gr. 353, followed.]—*See* WILL, 8.

Local Option Act, Re, 18 A. R. 573, followed.]—*See* INTOXICATING LIQUORS, 2.

Moore v. *Mellish*, 3 O. R. 174, distinguished.]—*See* WILL, 4.

McMillan v. *McMillan*, 21 Gr. 594, distinguished.]—*See* WILL, 4.

Page v. *Bucksport*, 64 Maine, 51 applied and followed.]—*See* DAMAGES.

Partridge v. *Great Western R. W. Co.*, 8 C. P. 97, distinguished.]—*See* WATERS AND WATERCOURSES, 2.

Quimby Re, Quimby v. *Quimby*, 5 O. R. 744, distinguished.]—*See* WILL, 12.

Regina v. *Birchall*, 19 O. R. 697, adhered to.]—*See* CRIMINAL LAW, 3.

Robson v. *Jardine*, 22 Gr. 424, followed.]—*See* WILL, 4.

Sawyer v. *Pringle*, 18 A. R. 218, followed.]—*See* SALE OF GOODS.

Slavin v. *Corporation of Orillia*, 36 U. C. R. 159, followed.]—*See* INTOXICATING LIQUORS, 2.

Stickney v. *Maidstone*, 30 Vermont 738, applied and followed.]—*See* DAMAGES.

Vespra v. *Cook*, 26 C. P. 185, distinguished.]—*See* DAMAGES.

Wallace v. *Grand Trunk R. W. Co.*, 16 U. C. R. 551, distinguished.]—*See* WATERS AND WATERCOURSES, 2.

Watson v. *Woolverton, In re*, 9 C. L. T. Occ. N. 480, distinguished.]—*See* PROHIBITION, 2.

Wells v. *Porter*, 3 Scott 141, followed.]—*See* GAMING.

Williams v. *Township of Raleigh*, 12 C. L. T. Occ N. 381, considered.]—*See* DRAINAGE TRIALS ACT, 1891.

CHANCERY DIVISION.

Jurisdiction of, in criminal matters]—*See* CRIMINAL LAW, 3.

CHATTEL MORTGAGES.

See BILLS OF SALE AND CHATTEL MORTGAGES.

CHEQUE.

Payment of money by.] — *See* ASSIGNMENTS AND PREFERENCES.

CHOSE IN ACTION.

Equitable assignment—Order for payment of money — Evidence of intention.]—The contractor for the erection of a building for the defendants during its progress gave to various persons orders upon the defendants for sums due them by him, in the following form:—Dungannon, September 12, 1890. To the directors of the Dungannon Driving Park

Association. Please pay to D. M. the sum of $—, and oblige (signed) T. F. H., contractor":—

Held, per STREET, J., that these orders were not in themselves good equitable assignments of portions of the fund in the hands of the defendants.

Hall v. *Prittie*, 17 A. R. 306, followed.

The evidence, however, shewed that there was only one fund out of which the directors could be expected to pay the orders; that the nature of that fund and its origin were well known to all the parties; that when the contractor promised the persons with whom he dealt orders upon the directors, he meant to give, and these persons expected to get, orders which were to be paid out of the contract price; and that the directors understood the orders as intended to deal with portions of the contract price, and to be payable only out of that particular fund:—

Held, per STREET, J., that the Court should look to the real intention of all the parties to the transaction, and give effect to it, by declaring that the contractor did make an equitable assignment to each of the orderholders of a portion of the fund.

ARMOUR, C. J., agreed in the result. *Lane* v. *The Dungannon Agricultural Driving Park Association*, 264.

CHRISTMAS DAY.

See INTOXICATING LIQUORS, 2.

CIVIL CODE OF QUEBEC.

Article 1092.]—*See* COMPANY, 3.

COMMISSION.

Allowance of, to liquidators.]—*See* COMPANY, 2.

COMPANY.

1. *Winding-up proceedings—Reference—Master in Ordinary—Jurisdiction—Claim that a conveyance is a fraudulent preference.*]—In the course of a reference made to the Master in Ordinary in winding-up proceedings under R. S. C. c. 129, s. 77, sub-s. 2, as amended by 52 Vic. c. 32, s. 20 (D.), a claim was made for rent, and the liquidator contended that the conveyance under which the claimant assumed to be owner of the demised premises was a fraudulent preference, and further that the alleged lease was never executed:—

Held, that the Master had no jurisdiction to adjudicate upon this contention; and the liquidator should be left to proceed under R. S. C. c. 129, s. 31, by way of action. *In re the Sun Lithographing Company, Farquhar's Claim*, 57.

2. *Winding-up proceedings—Liquidators' commission—Banks and banking—Allowance of commission on set-off.*]—In fixing the liquidators' commission or compensation in the winding-up proceedings of an insolvent bank, it is proper to take into consideration amounts adjusted or set-off, but not actually received by the liquidators; and in this case a commission of two and a-quarter per cent. having been allowed on the gross amount of moneys actually collected, a further commission of one and a-quarter per cent. on a sum of $231,000, consisting of amounts adjusted or set-off was allowed.

So far as possible, the amount allowed as compensation to liquidators in such winding-up proceedings should be evenly spread over the whole period of the liquidation, so as to ensure vigilance and expedition at all stages of the liquidation, as well as a proper distribution among the liquidators, when more than one. *In re Central Bank, Lye's Claim*, 247.

3. *Winding-up Act—R. S. C. c. 129, s. 56—Dominion and Provincial laws—Claim under Quebec law—Civil code of Quebec, Art. 1092.*]—There is nothing in section 56 of the Dominion Winding-up Act which alters or interferes with the *lex loci contractus* in the case of a claim.

Where a lease of property situate in the Province of Quebec, and entered into there, contained a provision making the same void, at the option of the lessor, on the insolvency of the lessee, and by the law of that Province (Civil Code, Art. 1092) on such insolvency the rent not yet exigible, by the terms of the lease, becomes so, a claim for the whole rent, taxes, etc., to the end of the term was, on the insolvency of the lessee company, allowed to the lessors in liquidation proceedings under the Dominion Act. *In re Harte and the Ontario Express and Transportation Company*, 510.

4. *Mortgage of company's property—R. S. O. ch. 157, sec. 38—Voting—Mode of calculating vote—Interference of Court where sanction of shareholders obtainable.*]—Under the 38th section of the Ontario Joint Stock Companys' Letters Patent Act, R. S. O. ch. 157, the votes of the "two-thirds in value of the shareholders" who may vote for a by-law authorizing the borrowing of money, etc., on the property of the company are, where there has been no default after a call, to be computed upon the face value of the number of the shares held, and not upon the amount paid upon such shares.

The Court will not interfere with the doing of an act by a company which should have been sanctioned by a majority of the shareholders before the act was done, if such sanction can be afterwards obtained. *Purdom et al.* v. *The Ontario Loan and Debenture Company et al.* 597.

CONDITION

Of insurance policy.]—*See* INSURANCE, 2.

Of sale.]—*See* WILL, 8.

CONSOLIDATED RULES.

620.]—*See* REVIVOR.

1141.]—*See* INTERPLEADER.

CONSIDERATION.

For settlement.]—*See* FRAUDULENT CONVEYANCE, 2.

CONSIGNOR AND CONSIGNEE.

See RAILWAYS, 3.

CONSTITUTIONAL LAW.

1. *Procedure in criminal matters—B. N. A. Act, sec. 91, sub-sec. 27—Trial and conviction by police magistrate for forgery—53 Vic. ch. 18,*

section 2 (O.)—Ultra vires.]—Procedure in criminal matters, which by the B. N. A. Act, sec. 91, sub-sec. 27, is assigned exclusively to the Parliament of Canada, includes the trial and punishment of the offender; and therefore sec. 2 of 53 Vic. ch. 18 (O.), which authorizes police magistrates to try and convict persons charged with forgery is *ultra vires* of the provincial legislature. *Regina* v. *Toland*, 505.

2. *Change of ownership of land by statute—Power of Local Legislature —48 Vic. ch. 92 (O.)*]—So far as abstract competence is concerned the Ontario Legislature has power to change the ownership of land within the Province with or without compensation.

Land which had been dedicated by its owner for a public burying ground was used for many years for such purpose. The municipality in which the ground was situate procured an Act of the Ontario Legislature authorizing the closing of the burial ground, and the removal of the dead, thereafter vesting the land in the corporation; the Act providing for compensation for all parties likely to be affected by the carrying out of its provisions, and for payment of the value of the lot to the dedicator or those claiming under him to be fixed by arbitration:—

Held, that the Act was within the competence of the Legislature. *Re McDowell and The Corporation of the Town of Palmerston*, 563.

3. *53 Vic. ch. 18, sec. 2 (O.)—Intra vires—Constitution of Criminal Courts—General Sessions of the Peace—Jurisdiction in cases of forgery—B. N. A. Act, sec. 91, sub-sec. 27; sec. 92, sub-sec. 14.*]—The power granted by the British North America Act, sec. 92, sub-sec. 14, to the provincial legislatures to constitute courts of civil and of criminal jurisdiction, necessarily includes the power of giving jurisdiction to those Courts, and impliedly includes the power of enlarging, altering, amending, and diminishing the jurisdiction of such Courts.

The Act 53 Vic. ch. 18, sec. 2 (O.), so far as it provides that the Courts of General Sessions of the Peace shall have jurisdiction to try any person for any offence under any of the provisions of secs. 28 to 31 of R. S. C. ch. 165, an Act respecting forgery, is within the powers of the legislature of Ontario, as being in relation to the constitution of a provincial Court of criminal jurisdiction, and does not in any way trench upon the exclusive authority given to the Parliament of Canada by sec. 91, sub-sec. 27, to make laws in relation to criminal law and criminal procedure. *Regina* v. *Levinger*, 690.

CONTRACTOR.

In mechanics' lien case.]—*See* LIEN, 3.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 2.

CONVICTION.

For driving omnibus without license.]—*See* MUNICIPAL CORPORATIONS, 5.

For selling insolvent estate without license.]—*See* AUCTION AND AUCTIONEER.

CORPORATIONS.

Individual members of made parties to an action.]—*See* MUNICIPAL CORPORATIONS, 4.

See also MUNICIPAL CORPORATIONS.

COSTS.

The plaintiff was ordered to pay the costs of an interim injunction obtained by him, because the facts proved at the trial shewed no anticipation of such immediate and serious damage as to justify the application for it. *Sklitzsky* v. *Cranston*, 590.

COUNCILLOR.

Town, qualification of.] — *See* MUNICIPAL CORPORATIONS, 3.

COUNTY COURTS.

Prohibition — Jurisdiction — Action for surplus after mortgage.]— A County Court has jurisdiction, whatever the amount of a mortgagee's claim at the time of the exercise of a power of sale, to entertain an action for the recovery of an alleged surplus derived from the sale and not exceeding $200, although the existence of the surplus is denied. *Reddick* v. *The Traders' Bank of Canada*, 449.

COUNTY JUDGE.

Jurisdiction of, as to transfer of license under Liquor License Act.]— *See* INTOXICATING LIQUORS, 1.

COVENANT.

To pay mortgage.]—*See* MORTGAGE, 2.

To repair, by tenant.—*See* NEGLIGENCE, 3.

Not to assign or sublet without leave.]—*See* LANDLORD AND TENANT, 2.

CREDITOR.

Payment of money to, within meaning of R. S. O., c. 124, s. 3, sub-s. 1.]—*See* ASSIGNMENT AND PREFERENCES.

CRIMINAL COURTS.

Constitution of.]—*See* CONSTITUTIONAL LAW, 3.

CRIMINAL LAW.

1. *Evidence before committee of House of Commons—Hearing before magistrate — Refusal to admit evidence—Mandamus.*]—At the hearing of a criminal charge before a County Judge sitting as police magistrate evidence was given before a special committee of the House of Commons, and taken by stenographers was tendered before the magistrate and refused by him:—

Held, that the Court had no power to grant a mandamus to the county Judge directing him to receive such evidence.

ROSE, J., while concurring in the decision that a mandamus should not issue was of opinion that Parliament having ordered the prosecution, the evidence should have been received by the magistrate.

Subsequent resolution of the House of Commons authorizing the evidence to be given. *The Queen* v. *Connolly et al.*, 220.

2. *Forgery—Interest of witness—R. S. C. ch. 174, sec. 218—Construction of.*]—On the trial of an indictment for uttering a forged note evidence was given by a person who had no interest therein of the note being forged. The wife of the person on whose behalf the note was received, and who, when receiving it, was in attendance in her husband's shop as his agent, proved the uttering.

Per MacMahon, J.—The note having been proved to be forged by a person having no interest, the question as to corroboration of the wife's evidence, on the ground of interest, did not arise under sec. 218 of the Criminal Procedure Act, R. S. C., ch. 174.

Per Rose, J.—The wife had no interest in the forged document; her interest, if any, was to prove its genuineness; but in any event there was abundant evidence of corroboration. *Regina* v. *Rhodes*, 480.

3. *Jurisdiction of the Chancery Division in criminal matters.*]—On an appeal from an order for a *certiorari*, which the Judge (Ferguson, J.) granting it, refused to make returnable in the Chancery Division:—

Held, per Robertson, J.—That the Chancery Division of the High Court of Justice has no jurisdiction in criminal matters.

Held, per Meredith, J.—That it has: and ought to exercise it.

Boyd, C.—While adhering to his view as expressed in *Regina* v. *Birchall*, 19 O. R. 697, that it has, thought that when there is an equally divided opinion for and against jurisdiction entertained by the individual Judges constituting the Division, it would be unseemly that by a mere accident, such as the constitution of the Court, jurisdiction should be affirmed on one day and negatived on the next; and as there was jurisdiction in the other divisions of the High Court he agreed with Robertson, J., that the motion be not entertained. *Regina* v. *Davis*, 652.

DAMAGES.

Remoteness—Action for negligence—Obstruction in highway—Remedy over—R. S. O. ch. 184, sec. 531, sub-sec. 4.]—The plaintiff was driving a horse and sleigh along a highway belonging to a city corporation, when the runner of the sleigh came in contact with a large boulder, whereby both horse and sleigh were overturned. In endeavouring to raise his horse the plaintiff sustained a bodily injury, on account of which he sued the corporation for damages, alleging that his injury was due to their negligence:—

Held, that the damages were not too remote:—

Page v. *Bucksport*, 64 Maine 51; and *Stickney* v. *Maidstone*, 30 Vermont, applied and followed:—

Held, also, that the person who placed the boulder on the highway, and who had been added as a defendant under section 531 of the Municipal Act, R. S. O. ch. 184, was liable over to the corporation under sub-section 4.

Vespra v. *Cook*, 26 C. P. 185, distinguished.

Balzer v. *Gosfield*, 17 O. R. 700, followed. *McKelvin* v. *The City of London, et al.*, 70.

Allegation of special damage.]—*See* Malicious Prosecution.

Amount recoverable—*See* Solicitor and Client.

See Waters and Watercourses, 1, 3.

DECLARATION.

Of trust.]—*See* Insurance, 4.

DEED.

Limitations—Grant to A. and his heirs for ever, habendum to A. and his wife for life, and after the death of both over.]—Under a grant to A. and his heirs for ever, habendum to A. and his wife "for and during their natural life and the life of the survivor of them;" and "from and after the death of both, to have and to hold unto their lawful heirs and assigns for ever," or "from and after the death of both to have and to hold unto their lawful heirs, their heirs and assigns for ever," A. takes a fee simple absolute. *Langlois* v. *Lesperance*, 682.

DEFAMATION.

Libel—Poster advertising account for sale—Justification.]—Two of the defendants, merchants, placed in the hands of the other defendant, a collector of debts, an account against the female plaintiff, wife of the other plaintiff, for collection, well knowing the method of collection adopted by the collector, who, after a threatening letter to the female plaintiff, which did not evoke payment, caused to be posted up conspicuously in several parts of the city where the plaintiffs lived, a yellow poster advertising a number of accounts for sale, among them being one against "Mrs. J. Green (the female plaintiff), Princess Street, dry goods bill, $59.35." The evidence shewed that she owed $24.33 only:—

Held, that the publication was libellous and could only be justified by shewing its truth, and, as the defendants had failed to shew that she was indebted in the sum mentioned in the poster, they were liable in damages. *Green et ux.* v. *Minnes et al.*, 177.

DEVISE.

See Will.

DIVISION COURTS.

Amount beyond jurisdiction — Prohibition for excess—Promissory note—What constitutes.]—Judgment was recovered in a Division Court for $108.63, being $100 balance due and $8.63 interest on a document signed by defendants, namely: "To G. T., we hereby undertake to pay the executors of the late J. D. K., the sum of $375 on a mortgage they hold against the Royal Hotel property, Streetsville, thereby reducing the amount to $2,000":—

Held, that the document, even if a note, under sec. 82 of the Bills of Exchange Act, 53 Vic. ch. 33 (D.), which was doubtful, only enured to the benefit of the executors and not to G. T.; and therefore the action being merely for breach of contract, the judgment was in excess of the jurisdiction which is limited to $100, but that prohibition would only go for the excess. *Trimble* v. *Miller*, 500.

See Prohibition.

DOWER.

Will—Benefit under, to widow—Election—Administration action—Estoppel.]—A testator bequeathed his personal estate to his widow absolutely, and devised his real estate to his executors to be by them sold, and four per cent. of the proceeds paid to his widow, and the balance invested, and the income paid to his widow during her life, and afterwards the proceeds to be divided as directed; and he gave the rents, until the real estate was sold, to his widow:—

Held, that the widow was put to her election, and that she could not claim dower and to be tenant of the freehold at the same time.

Decision of ROBERTSON, J., reversed. *Marriott* v. *McKay*, 320.

Election as to.]—*See* WILL, 14.

DRAINAGE.

By-law.]—*See* MUNICIPAL CORPORATIONS, 6.

DRAINAGE TRIALS ACT, 1891.

Drainage Trials Act, 1891, secs. 9, 11—Action for damages for not providing sufficient outlet—Jurisdiction to refer compulsorily—Drainage Referee—"Construction"—"Operation."]—In an action against a township corporation for damages for flooding the plaintiffs' lands, they alleged that the defendants, in executing certain work and making certain drains under the drainage clauses of the Municipal Act, had brought water down upon the lands without providing any sufficient outlet for it:—

Held, that the damages complained of arose, if not from the "construction," at all events from the "operation," of the drainage works of the defendants; and therefore the Court or a Judge had jurisdiction under section 11 of the Drainage Trials Act, 1891, to compulsorily refer it to the Referee appointed under that Act.

Semble, there was no jurisdiction to refer this case under section 9 of the Act; for, according to the construction placed by the Supreme Court of Canada upon section 591 of the Municipal Act, which is in the same words as section 9, the damages complained of did not arise from the construction of the drain within the meaning of section 9.

Williams v. *Township of Raleigh*, 12 C. L. T. Occ. N. 381, considered. *Sage et al.* v. *Township of West Oxford*, 678.

EASEMENT.

Conveyance of.]—*See* RAILWAYS, 1.

Equitable.]—*See* WATERS AND WATERCOURSES, 2.

ELECTION.

As a town councillor.]—*See* MUNICIPAL CORPORATIONS, 3.

As to dower.]—*See* DOWER.

To forfeit lease.]—*See* LANDLORD AND TENANT, 1.

ESTATE.

Tail.]—*See* WILL, 3.

In fee simple—*See* DEED—WILL, 3, 5.

ESTOPPEL.

As to denial of title—*See* RAILWAYS, 1.

EQUITABLE ASSIGNMENT.

See CHOSE IN ACTION.

EVIDENCE.

1. *Action for relief against re-entry for nonpayment of rent—Admissibility of evidence to shew misrepresentations by lessee in obtaining lease.*]—To an action for relief against a re-entry made by a landlord for nonpayment of rent, the defendant pleaded that she had been induced to grant the lease by reasons of representations made by the plaintiff to the effect that he would improve and beautify the demised premises, which would enhance the value of other lands of the defendant, but that the plaintiff had not done as he represented he would, and that the defendant had been thereby damnified:—

Held, that evidence tendered by the defendant to establish the truth of this defence was admissible in answer to the claim of the plaintiff for relief.

The origin both of the action for specific performance and of the action for relief against re-entry for nonpayment of rent is in the equitable jurisdiction of the Court; the compelling performance in the one and the granting relief in the other is in the judicial discretion of the Court; and in each the Court has regard to the conduct of the party seeking to compel such performance or to obtain such relief. *Coventry* v. *McLean*, 1.

2. *Action for negligence resulting in injury to person—Death of person injured before trial—Examination de bene esse—Subsequent action by executrix under R. S. O. ch. 135—Admissibility of depositions taken in former action—Order in Chambers.*]—The plaintiff's husband was personally injured by an accident which occurred on a highway belonging to the defendants, and brought an action for damages, alleging that the action was owing to the defendants' negligence in not keeping the highway in repair. Under an order made in that action, upon his own application, he was examined *de bene esse* as a witness in his own behalf, and cross-examined by the defendants, and died before the action came to trial. His widow then brought this action under R. S. O. ch. 135, Lord Campbell's Act, as executrix, for the death of her husband, alleging that it was caused by the negligence of the defendants in not keeping their highway in repair:—

Held, that the two actions related to the same subject and involved the same material questions, and that the present plaintiff was to be regarded as claiming under her deceased husband; and therefore that the evidence taken in the former action was admissible in the present:—

Held, also, that an order in Chambers providing that the evidence in question might be read at the trial, saving all just exceptions, was properly made. *Erdman* v. *Town of Walkerton*, 693.

Corroboration of interested witness.]—*See* CRIMINAL LAW, 2.

Before committee of House of Commons, reception of.]—*See* CRIMINAL LAW, 1.

Of intention.]—*See* Chose in Action.

Of license inspector.]—*See* Intoxicating Liquors, 3.

Rebuttable presumption.] — *See* Bankruptcy and Insolvency.

See Insurance, 3.

EXAMINATION.

De bene esse.]—*See* Evidence, 2.

EXCHANGE.

Of land under a power of sale in a mortgage.]—*See* Mortgage, 1.

EXECUTION.

Against cestui que trust.]—*See* Vendor and Purchaser, 1.

See Fraudulent Conveyance, 1.

EXECUTORS.

Powers of, where there is a testamentary guardian.] — *See* Insurance, 2.

FACTORIES' ACT.

See Master and Servant, 1, 2.

FEE SIMPLE.

See Deed—Will, 3, 5.

FORFEITURE.

Of insurance policy.]—*See* Insurance, 3.

Of lease.] — *See* Landlord and Tenant, 1.

Of license, power to create.]—*See* Municipal Corporations, 2.

FORGERY.

Jurisdiction of General Sessions of the Peace as to.]—*See* Constitutional Law, 3.

See, also, Constitutional Law, 1—Criminal Law, 2.

FRANCHISE.

See Toronto Street Railway.

FRAUDS, STATUTE OF.

See Lien, 3—Specific Performance.

FRAUDULENT CONVEYANCE.

1. *Colourable sale of goods—Following money in hands of nominal purchaser—Direction to pay proceeds into Court — Execution.*] — Where moneys arising from a feigned sale of goods, fraudulent and void as against creditors, were, at the time of the commencement of the action by a creditor to set the same aside, in the hands of the nominal purchaser, one of the defendants and a party to the transaction, he was ordered to pay the moneys into Court for distribution among the creditors of the insolvent, and in default of payment by him, it was ordered that execution should issue for the amount. *Masuret* v. *Stewart and Lampman*, 290.

2. *Settlement by debtor and other members of family—Valuable consideration.*]—A person, having entered into business, joined with his brothers and sisters in a settlement, the effect of which was to transfer all their undivided interest in their father's estate to trustees for the benefit of their mother, and subsequently became insolvent:—

Held, on the evidence that there was no fraudulent intent, and *per* BOYD, C., and ARMOUR, C. J., that the agreement to execute, and the execution by the other members of the family was a valuable consideration for the settlement. *Randall et al.* v. *Dopp et al.*, 422.

GAMING.

Becoming custodian of wager—R. S. C. ch. 159, sec. 9—Construction of—Restriction to events to take place in Canada.]—R. S. C. ch. 159, sec. 9, provides that "every one who becomes the custodian or depositary of any money, property, or valuable thing staked, wagered, or pledged upon the result of any political or municipal election, or of any race, or of any contest or trial of skill or endurance of man or beast, is guilty of a misdemeanour:—

Held, that this enactment does not extend to the result of any election, race, contest, etc., to take place outside of the Dominion of Canada.

Wells v. *Porter*, 3 Scott 141 followed. *Regina* v. *Smiley et al.*, 686.

GUARDIAN.

Testamentary]—*See* INSURANCE, 2.

HABENDUM.

See DEED.

HIGHWAY.

See WAYS.

HOUSE OF COMMONS.

Evidence taken before committee of—Resolution of.]—*See* CRIMINAL LAW, 1.

INDIAN RESERVE.

See INTOXICATING LIQUORS, 3.

INFANCY.

See MEDICAL PRACTITIONER.

INJUNCTION.

Costs of, where no anticipation of immediate damage.]—*See* COSTS.

Reference as to, compensation granted in lieu of.]—*See* WATERS AND WATERCOURSES, 2.

INSURANCE.

1. *Life—Benevolent Society—Certificate payable to "legal heirs"—Effect of, between the children of first marriage and second wife.*]—A widower, having two children, insured in a benevolent society and took out his certificate payable "to his legal heirs" and subsequently married a second time, and died without having altered the certifi-

cate, leaving his wife surviving with the two children of the first marriage :—

Held, that the two children took the whole fund payable under the certificate to the exclusion of the wife. *Mearns* v. *The Ancient Order of United Workmen et al.*, 34.

2. *Life—Benefit of children—Will—Powers of executors and testamentary guardian as to proceeds—R.S.O. ch. 136.*]—A testatrix having insured her life and made the policies payable to her two daughters, by her will requested her executors, the defendants, to place the amount thereof in some thoroughly safe investment until her daughters' majority or marriage, when the amounts and their accumulated interest should be divided equally between her daughters, and appointed her husband, the plaintiff, their guardian.

In an action brought by the guardian to have the proceeds of the policies handed over to him by the executors :—

Held, that the insurance moneys being made payable to the daughters were by 53 Vic. ch. 39, sec. 4 (O.), severed from her estate at her death and her testamentary directions could not affect the fund beyond what was permitted by that statute, and R. S. O. ch. 136 :—

Held, also, that during the minority of the daughters the trustees appointed by the will as provided for by section 11, R. S. O. ch. 136, might by section 13, invest in manner authorized by the will; but while the insured could give directions as to the investment, she was not to control the discretion of the lawful custodian of the fund and child, in case the income was needed for maintenance or education, or the *corpus* for advancement :—

Held, also, that the guardian was the custodian of the daughters with the incident of determining to a large extent what should be expended in their bringing up, and that the executors had charge of the preservation and utilization of the fund ;—

Held, also, that section 12 of R. S. O. ch. 136, does not justify an Insurance Company in paying the amount of a policy to a testamentary guardian ; the guardian there named being one who has given security and that the Court should not transfer the moneys from the executors to the father, as testamentary guardian, as his right to handle any part of the fund was subject to the trusts specified in the will, the execution of which was vested in the executors. *Campbell et al.* v. *Dunn et al.*, 98.

3. *Life — Premium note—Nonpayment of—Forfeiture—Election—Conditions of policy—Conduct of defendants—Evidence.*] — The defendants insured the life of the plaintiff's husband and issued a policy to him, taking his promissory note for the amount of the first year's premium. The note was several times renewed, and at the death of the insured, which took place within the first year, the last of the renewals was overdue and unpaid. During the currency of one of the renewal notes the insured wrote to the defendants asking them for their terms for the cancellation of the policy, to which they replied that his request that they should cancel the policy was unreasonable. On the day before the death of the insured the defendants wrote to him that they had expected to hear from him with a remittance, and asked him to give the matter his immediate attention. After his death the amount of the note and interest was tendered to

the defendants, who refused to accept it. In the application for the insurance, which was made part of the contract, it was provided that if a note should be given for a premium and should not be paid at maturity, the insurance or policy should thereupon become null and void, but the note must nevertheless be paid; and indorsed on the policy was a provision that if any premium note should not be paid when due the policy should be void and all payments made upon it forfeited to the defendants:—

Held, that the policy was voidable upon default being made in the payment of the premium note, but only at the election of the defendants; that, upon the evidence, the defendants had elected not to forfeit it but to continue it, and had treated it as subsisting up to the time of the death; that the policy being in force at the time of the death, no subsequent act of the defendants could affect the plaintiff's claim:—

Held, also, upon the evidence, that it could not be said that the defendants were at any time electing to forfeit the policy and nevertheless insisting upon the payment of the note, as they might have done under the provision therefore in the application. *McGeachie* v. *North American Life Assurance Co.*, 151.

(Reversed by the Court of Appeal.)

4. *Life-Gift—Declaration of trust—Will—Absence of witnesses.*]—A person insured his life and signed a document directed to the managers of the insurance company, in these words: "I give and bequeath to * * the amount stated on the policy given on my life by the S— Life Insurance Co. To be paid to none other unless at my request, dated later." After showing or reading the policy which he retained, he handed the document to the plaintiff, remarking: "There, that is as good as a will":—

Held, that on account of its incompleteness, the transaction was not a gift or a declaration of trust, as the trust intended was not irrevocable, nor could the paper take effect as a will. *Kreh* v. *Moses*, 307.

5. *Fire—Contract for sale of insured building—Change of title—Change material to the risk—R. S. O. ch. 167.*]—Where in a contract for the rebuilding of a church, the contractors for the work agreed with the churchwardens to take the old materials at a fixed sum as a first payment on the contract, and before the date fixed for the commencement of the work the church was destroyed by fire, and the contractors before the time for the commencement of the work received from the churchwardens a smaller sum than the amount agreed on as a first payment in place of the materials deliverable to them under the contract:—

Held, that upon the construction of the building contract, the church was to remain the property of the plaintiffs until the date fixed for beginning the work, and that under the statutory conditions, at the time of the fire, there had been no assignment, alienation, sale or transfer, or change of title to the property, or change material to the risk; and that the plaintiffs were therefore entitled to recover from the defendants the amount of the loss. *Ardill et al.* v. *Citizens' Insurance Company. Ardill et al.* v. *Ætna Insurance Company*, 529.

6. *Life Policy—Construction of—Money payable to "children"—Re-*

presentative of deceased child—Exclusion of grandchildren.]—By a policy of life insurance the insurers agreed to pay the amount of the insurance, after the death of the insured, to his wife, or her legal representatives; or, if she should not then be living, to her children, or to their guardian if under age. The wife predeceased the insured. Two of her children died before her, one of them leaving a child :—

Held, that only the children who survived the wife were entitled to share in the insurance moneys payable under the policy. *Murray et al.* v. *Macdonald*, 557.

INTEREST.

On legacy.]—*See* WILL, 7.

INTERPLEADER.

Claim for rent—Right of sheriff to interplead—Con. Rule. 1141.]—The express statutory provision giving sheriffs the right to interplead where a claim against the goods seized is made by a landlord for rent, was omitted in the Revised Statutes of 1887, it being stated in the appendix thereto that it was *superseded* by Con. Rule 1141, which provides that the sheriff, etc., may interplead where a claim is made, etc., to any money, goods, or chattels, etc., taken in execution, etc., by any person other than the person against whom the process issued :—

Held, that the right to interplead, where a claim for rent is made, still exists. *McLaughlin* v. *Hammill*, 493.

INTOXICATING LIQUORS.

1. *Liquor License Act—R. S. O. ch. 194, sec. 91—Construction of—Transfer of license—Certificate of electors—53 Vic. ch. 56, sec. 1 (O.)—County Judge — Jurisdiction to revoke license—Mandamus.*] — Section 91 of the "Liquor License Act," R. S. O. ch. 194, is a penal enactment and is to be construed strictly; and, as it refers only to a "license issued" contrary to any of the provisions of the Act, and not to a "license transferred," and to the licensee and not to the transferee, a County Judge has no jurisdiction under it to entertain a complaint against a transferee that a license has been improperly transferred to him; and has no jurisdiction to revoke or cancel a license not already issued.

The applicant was, in the month March, 1891, the holder of a wholesale license to sell liquor in premises in polling sub-division 10 in a city. The holder of a shop license in polling sub-division 18 transferred his license to the applicant on the 26th March, 1891. On the same day the license commissioners, on the petition of the applicant, not accompanied by a certificate signed by a majority of the electors in polling sub-division 10, consented in writing to the transfer of the shop license and to its transfer to the premises in polling sub-division 10, and also cancelled the applicant's wholesale license:—

Held, that the commissioners erred in consenting to the transfer of the shop license to the premises of the applicant in polling sub-division 10 without his petition therefor being accompanied by the certificate required by 53 Vic. ch. 56, sec. 1 (O.). *Re Dunlop*, 22.

2. *Sale of liquors—Sale by retail*

—*Quantity—Locality—Days named for appointment of agents and declaring the result of polling—Sufficiency of—Notice—Sufficiency—Christmas and New Years' days—Publication on.*]—A by-law passed by a township council under 53 Vic. ch. 56, sec. 18 (O.), was entituled a by-law to prohibit the retail sale of intoxicating liquors in the township of Mariposa; and enacted that "the sale by retail of spirituous liquors is and shall be prohibited in every tavern, inn, or other house or place of public entertainment: and the sale thereof is altogether prohibited in every shop or place other than a house of public entertainment":—

Held, that the last part of the clause must be read in connection with the previous part so as to limit the prohibition to a sale by retail, which is now put beyond question by 54 Vic. ch. 46, section 1 (O.).

Slavin v. *Corporation of Orillia*, 36 U. C. R. 159, and *Re Local Option Act*, 18 A. R. 573, followed:—

Held, also, that the quantity of liquor to be deemed a sale by retail need not appear in the by-law being defined by the statute: that the locality within which the liquor could be sold was sufficiently indicated; and that the want of penalty in the by-law did not invalidate it.

The day named in the by-law for the appointment of agents to attend at the final summing up of the votes was nearly three weeks after the first publication of the by-law, and the day named for the clerk to declare the result of the polling was the second after said polling:—

Held, both days sufficient.

The notice at the foot of the by-law after certifying that the foregoing (*i. e.* the copy of the by-law published) was a true copy of the proposed by-law of the township of Mariposa which had been taken into consideration by the council thereof, and which would be finally passed in the event of the electors' assent being obtained thereto after one month's publication in a named paper, stated that all persons were required to take notice that on the 4th of January, 1892, a poll will be opened, naming the statutory hours, at the several polling places named in the by-law for the purpose of receiving the votes of the electors on the same. Two of the days of publication were Christmas and New Years:—

Held, that the formal notice was sufficient; and the fact of publication on the days named did not render the publication invalid; publication not being a judicial act so as to prevent publication on those days. *Brunker* v. *The Corporation of the Township of Mariposa*, 120.

3. "*The Liquor License Act*"—*Evidence of license inspector and defendant—Admissibility—Indian reserve.*]—For an offence under "The Liquor License Act," R. S. O. ch. 194, the license inspector, who lays the information, is a competent witness.

An objection that the conviction, which was for selling liquor without a license at the village of M., in the township of O., should have negatived that the place where the offence was committed was in an Indian reserve, which it was alleged formed part of such township, was overruled, as there was nothing to shew the fact alleged, and under section 1 of R. S. O. ch. 5, there was *primâ facie* jurisdiction. *Regina* v. *Fearman*, 456.

4. "*The Liquor License Act*"—*Reeves in unorganized districts—Ex*

officio justices of the peace—Jurisdiction.]—The reeves of municipalities in unorganized districts are, under the legislation relating thereto, *ex officio* justices of the peace in their respective municipalities, with power to try alone, and convict, for offences under "The Liquor License Act," R. S. O. ch. 194. *Regina* v. *McGowan*, 487.

JURISDICTION.

Of Chancery Division in criminal matters.]—*See* CRIMINAL LAW, 3.

Of Master in Ordinary in lien cases.]—*See* LIEN, 1.

Of Master in Ordinary in winding up proceedings.]—*See* COMPANY, 1.

Of County Court.]—*See* COUNTY COURTS.

Of County Judge, as to transfer of license under Liquor License Act.]—*See* INTOXICATING LIQUORS, 1.

Of Reeves in unorganized districts as Justices of the Peace.]—*See* INTOXICATING LIQUORS, 4.

Of Division Court.]—*See* DIVISION COURTS—PROHIBITION—SOLICITOR AND CLIENT.

Is equitable in actions for specific performance and for relief against re-entry for nonpayment of rent.]—*See* EVIDENCE, 1.

Question of, should be tried by Division Court Judge.]—*See* PROHIBITION, 2.

JUSTICE OF THE PEACE.

Reeves in unorganized districts are.]—*See* INTOXICATING LIQUORS, 4.

JUSTIFICATION.

Of Libel.]—*See* DEFAMATION.

LANDLORD AND TENANT.

1. *Action for arrears of rent and recovery of demised premises—Election to forfeit lease—Retraction of—Payment of rent and costs—Implied request to be relieved from forfeiture—R. S. O. ch. 143, s. 17-22—Vacant land—Evidence.*] — Rent under a lease made pursuant to the "Short Forms Act" becoming in arrear, the landlord served the statutory notice of forfeiture, and brought an action against the tenants both for the recovery of the demised premises and of the arrears of rent. Before the action came to trial the defendants paid the arrears and costs :—

Held, that the bringing of the action was an election on the part of the landlord to forfeit the lease which could not be retracted by him ; to enable him to get rid of the forfeiture there must have been a request on the part of the tenants, either express or implied, to be relieved from the forfeiture ; and the mere payment, after the forfeiture, of rent which accrued due before would not amount to such a request.

The effect of such a payment depends upon the intention of the party paying ; and the payment of the rent and costs in this case could not operate, by force of R. S. O. ch. 143, secs. 17-22, to permit the landlord to retract his forfeiture, without regard to the intention of the tenants, and without any request on their part to be relieved from the forfeiture.

These sections are applicable simply to an action for the recovery of the demised premises ; had the action been brought for that alone, an implication might have arisen from the payment of rent and costs that the tenants intended to seek to be relieved from the forfeiture ; but not so where the action was also brought for the rent in arrear, more especially as the demised premises were vacant land, the tenants not being in actual possession :—

Held, also, on the evidence, that there was no intention on the part of the tenants to seek to be relieved from the forfeiture :—

Held, further, that the landlord could not get rid of the forfeiture unless both tenants concurred in seeking relief from it.

Decision of BOYD, C., reversed. *Denison* v. *Maitland et al.*, 166.

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2. *Covenant not to assign or sublet —Re-entry—License—Severance of the reversion—Registration—Notice —R. S. O. 1887, ch. 143, secs. 12 and 13.*]—Upon a lease made pursuant to the Short Form of Leases Act, containing a condition for re-entry on assigning or subletting without leave, when the lessor gives license to assign part of the demised premises, he may re-enter upon the remainder for breach of covenant not to assign or sublet, notwithstanding that the proviso for re-entry requires the right of re-entry on the whole or a part in the name of the whole.

Sections 12 and 13 of the Landlord and Tenant Act, R. S. O. ch. 143, are to be read together, the former referring generally to all cases, and making licenses to alien applicable *pro hâc vice* only, the latter referring to specific cases of licensing the alienation of a part, and reserving the right of re-entry as to the remainder. Hence, where a lessor gave a license to alien part of the demised premises, it was *held*, that the license applied to the licensed arrangements only, and that upon subsequent alienation without leave, he might re-enter.

A lessee under such a lease, which contained also a covenant for renewal, sublet, and the sublease contained a covenant to renew for the term to be granted on the renewal of the superior lease less one month ; and to this the lessors assented. On an assignment by the lessee, without leave, of his reversion expectant on the sublease :—

Held, that the lessors might re-enter as against the subtenant, notwithstanding their assent, for it must be deemed to have been an assent to the renewal of the sublease, provided that the superior lease was renewed.

A lessee under such a lease created a number of subtenancies on part of the land with leave. He then assigned all the rents, etc., to an assignee. The head lessors assented to the assignment and covenanted with the assignee that so long as the rents reserved were paid and the covenants observed, they would not claim any forfeiture, as to the lands affected by the assignment, and that the rights of the assignee should not be prejudiced by any act of the original lessee, or any person claiming under him, or by any breach or nonobservance by the lessee or any person claiming under him of the covenants or provisions contained in the original lease, such consent not, however, to operate as a waiver of the covenant against assigning and subletting. The original lessee afterwards assigned his reversion in the whole of the demised premises without leave, and for this the lessors brought an action to recover the demised premises, after the interest of the assignee of the rents had expired by lapse of time:—

Held, that in the absence of notice of the assignment without leave pending the existence of the interest created by the assignment of the rents, they were not precluded from maintaining the action.

After an assignment by the lessee without leave of part of a lot was registered, the lessors took a surrender of part of the same lot demised by another lease and registered it:—

Held, that the registration of the assignment without leave, was not notice of it to them, as they were not bound by the nature of the surrender to examine the register as to that part of the lot affected by the assignment without leave.

A tenant in fee simple conveyed land to the use of himself for life, and after his death to such uses as he might by will appoint. He with his grantees to uses, then made a lease of the land containing a covenant not to assign or sublet without leave, and a proviso for re-entry for breach of the covenant, and by will appointed the reversion to his seven children. After his death an assignment was made by the lessee without leave, and subsequently one of the devisees conveyed his undivided one-seventh interest to trustees, to sell, lease, or mortgage. An action was brought to recover the lands for breach of the covenant against assigning:—

Held, that by the conveyance of the undivided one-seventh share, the reversion was severed and the condition destroyed, and therefore no recovery could be had for breach of the covenant occurring either before or after the severance. *Baldwin* v. *Wanzer*. *Baldwin* v. *The Canadian Pacific Railway Company*, 612.

Action for relief against security for nonpayment of rent.]—*See* EVIDENCE, 1.

Liability of tenant continuing in possession after expiry of lease, on covenant to repair in lease.]—*See* NEGLIGENCE, 3.

See COMPANY, 3.

LEASE.

Covenant to repair in.]—*See* NEGLIGENCE, 3.

Misrepresentation in obtaining.]—*See* EVIDENCE, 1.

See COMPANY, 3—LANDLORD AND TENANT, 1, 2.

LEGACY.

Vested interest in—Assignment of—Payment before period of distribution, to assignee.]—Two devisees of full age having a vested interest absolute in a definite fund in Court, although not divisible by the terms of the will until a third devisee attained twenty-one, having assigned their interest in the fund to a purchaser, the Court, the estate having been otherwise wound up, made an order for payment out to the assignee, without waiting for the period of distribution. *Re Wartmen*, 601.

Charge on land, direction to devisee to pay.]—*See* WILL, 3.

Interest on.]—*See* WILL, 7.

Priority over mortgage.]—*See* WILL, 4.

To promote temperance legislation.]—*See* WILL, 11.

LIBEL.

See DEFAMATION.

LICENSE COMMISSIONERS.

See INTOXICATING LIQUORS, 1.

LIEN.

1. *Mechanics' lien—53 Vic. ch. 37 (O.)—Amendment of claim—Jurisdiction of master—Extension of time for service of appointment—Procedure.*]—The Master or Official Referee in a proceeding under 53 Vic. ch. 37 (O.), "An Act to simplify the Procedure for enforcing Mechanics' Liens," should be judicially satisfied that the facts stated before him are sufficient to manifest a valid claim; but if any one element is omitted he has general power of permitting an amendment if the facts and circumstances warrant it, *e. g.*, as in this case, to permit an amendment of the claim shewing when the work was done or materials furnished.

The distinction between the requisites of a claim under the amending Act and one under section 16 of the original Act R. S. O. ch. 126 pointed out.

A Master or Referee has power to extend the time for prosecuting the proceedings where the certificate and appointment has not been served within the time named in section 6 of the Act. *Orr et al.* v. *Davie*, 430.

2. *Mechanics' lien—"Payments" by owner—R. S. O. ch. 126, sec. 9.*]—The word "payment" in sec. 9 of the Mechanics' Lien Act, R. S. O. ch. 126, covers the giving of a bill or promissory note; or payments made by the owner at the instance or by the direction of the contractor to those who supply materials to him; or tri-partite arrangements by which an order is given by the contractor on the owner for the payment of the material-man out of the fund, which, when accepted, fixes the owner with direct liability to pay for the materials. *Jennings* v. *Willis*, 439.

3. *Mechanics' Lien Act—"Owner"—Ten per cent.—Money furnished to complete buildings after contractor's failure—R. S. O. c. 126, sec. 2, sub-s. 3—Ib. sec. 9.*]—An agreement to purchase property, under which buildings are to be erected thereon by the seller, and which has been acted on by the parties, although not binding under the Statute of Frauds if pleaded, constitutes the person agreeing to buy an "owner" within sub-section 3 of section 2 of the Mechanics' Lien Act:—

Semble, if not an owner under such an agreement, then by virtue of the Registry Act no unregistered lien of which he had not notice prior to the registry of the deed to him could prevail against him.

A payment in excess of the contract price made to complete a building, owing to the failure of the contractor, should be deducted from the contract price, and the ten per cent. under section 9 of the Mechanics' Lien Act is to be calculated on the balance of the contract price after such deduction.

Re Cornish, 6 O. R. 259, followed. *Reggin* v. *Manes*, 443.

For costs.]—*See* SOLICITOR AND CLIENT.

LIFE INSURANCE.

See INSURANCE, 1, 2, 3, 4, 6.

LIMITATION.

Of actions.]—*See* MEDICAL PRACTITIONER.

Words of.]—*See* WILL, 3.

LIQUIDATORS.

Commission to.]—*See* COMPANY, 2.

LIQUOR LICENSE ACT.

See INTOXICATING LIQUORS.

LIQUORS.

See INTOXICATING LIQUORS.

MAGISTRATE.

See CRIMINAL LAW, 1.

MALICE.

Persistence in wrongful act is malicious.]—*See* WATERS AND WATERCOURSES, 3.

Sufficiency of allegation.] — *See* MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION.

For wrongfully commencing civil action—Malice—Special damage—Necessary allegations—Demurrer.]—Action for damages against solicitors for, as alleged in the statement of claim, "wrongfully and unlawfully without any instructions or retainer" issuing a writ of summons against the plaintiff in the name of the third party, by reason of which the plaintiff was injured in his occupation as a builder, suffered in his credit and reputation, and was hindered in the performance of his contracts, and had to borrow money at a higher interest than he would otherwise have had to do, and other creditors were induced to sue him, whose accounts he had to compomise and settle at great loss:—

Held, on demurrer that neither malice and want of reasonable and probable cause, nor special damage, both of which are necessary in such an action, were sufficiently alleged.

Semble, that an allegation that by reason of the proceedings complained of the plaintiff was put into insolvency or bankruptcy, if such a thing were possible in this country, might be a sufficient allegation of special damage. *Mitchell* v. *McMurrich*, 712.

MANDAMUS.

To County Judge to receive evidence.]—*See* CRIMINAL LAW, 1.

MASTER AND SERVANT.

1. *Workmen's compensation for Injuries' Act—Machinery—Stamping-machine—Employer's liability—Neglect to supply proper material—Factories' Act—R. S. O. 1887, ch. 141, 208.*]—The plaintiff, a lad of seventeen, worked at a stamp-machine in the defendants' factory, his duty being to keep it clean. Being refused proper material for this purpose, he resorted to pieces of bagging. Attempting to clean it while in motion, the bagging got caught in the cogwheel, and he was injured:—

Held, that the defendants knowing that the plaintiff was working with improper appliances in a dangerous place, were guilty of negligence in not making provision for his safety, by supplying him with proper material, and in not having the machinery stopped while the cleaning was going on, and the plaintiff was entitled to retain the verdict found in his favour at the trial.

As the place where the plaintiff worked was dangerous, and called for a guard under the provisions of the Factories' Act, the failure to furnish one was *per se* evidence of negligence on the part of the defendants. *Thompson* v. *Wright*, 127.

2. *Workmen's Compensation for Injuries' Act—Elevator—Accident—Negligence—Employment of infant under twelve—Factories' Act—R. S. O. 1887, ch. 208, sec. 12—52 Vic. ch. 43, sec. 7, sub-sec. 2.*]—The plaintiff, a boy under twelve years of age, was hired to work a hoist for the defendants in their factory. The elevator was worked by ropes on the outside of the cab or frame which were handled by the person standing within, through a square opening cut in the framework. The plaintiff was instructed for a few hours by a bigger boy how to raise and lower the hoist, and was cautioned not to put his head out of the opening when the hoist was going. On the occasion in question the elevator stopped when going up, and the plaintiff put his head out of the opening to see what stopped it, when, the elevator starting again, the plaintiff received the injuries complained of. On this evidence the plaintiff was nonsuited in his action, which he brought against the defendants for negligence:—

Held, that the nonsuit should be set aside, and a new trial ordered with costs to the plaintiff in any event.

Per BOYD, C. The employment of a child under twelve to work an elevator for the uses of a manufacturing concern is made illegal by the Factories' Act; and, for this reason, the employer has to exercise more than ordinary precautions for the well-being and safe-guarding of minors who have been put into factory work contrary to the prohibition of the legislature. *O'Brien* v. *Sanford*, 136.

MECHANICS' LIEN.

See LIEN.

MEDICAL PRACTITIONER.

Limitation of actions—College of Physicians and Surgeons, Ontario—R. S. O. ch. 148, sec. 40—Infant.]—An action for malpractice against a registered member of the "College of Physicians and Surgeons of Ontario," was brought within one year from the time when the alleged ill effects of the treatment developed, but more than a year from the date when the professional services terminated:—

Held, that the action was barred under "The Ontario Medical Act," R. S. O. ch. 148, sec. 40.

Infancy does not prevent the running of the Statute. *Miller* v. *Ryerson*, 309.

MORTGAGE.

1. *Power of sale—Sale by way of exchange—"Sell and absolutely dispose of."*]—A mortgagee with power of sale under the Short Form Mort-

gage Act can exercise the power by way of exchange for other land instead of, in the usual way, by sale for money. The words "absolutely dispose of" in the power are appropriate to an exchange. *Smith* v. *Spears*, 286.

2. *Covenant—Right of party liable to pay one, to demand assignment without paying the others.*]—The owner of property mortgaged it to the plaintiff and then sold subject to the mortgage, taking from the purchaser a second mortgage as part of his purchase money, which he assigned to the plaintiff. The purchaser then sold to one of the defendants, who, to obtain an extension of time on the first mortgage, entered into a covenant with the plaintiff to pay it, and afterwards sold the property.

In a foreclosure action the plaintiff claimed an order for the payment of the first mortgage by the covenantor under his covenant, and the latter refused to pay the amount due on it unless the plaintiff would assign the mortgage to him :—

Held, that the plaintiff was not bound to assign to the covenantor unless he paid off both mortgages. *Muttlebury* v. *Taylor et al.*, 312.

3. *Power of sale--Exercise of--Obligation to carry out sale—Effect of, on purchasers subject to the mortgage.*]—A mortgagee having exercised the power of sale in a mortgage and sold the land for sufficient to pay the mortgage and costs, cannot without sufficient reason treat the sale as a nullity, and fall back on the mortgage as if the exercise of the power was a mere matter of form.

Three joint owners of property mortgaged it and then sold to the plaintiff who covenanted to pay off the mortgage. The plaintiff sold to the defendant, taking a similar covenant. The mortgagees exercised the power of sale in their mortgage, and one of the original owners became the purchaser, at a price sufficient to pay the mortgage and costs. The purchaser though able, not being willing to carry out the sale, the mortgagees refrained from compelling him to do so, and under threats of legal proceedings by the mortgagor collected the arrears and costs from the plaintiff.

In an action by the plaintiff to recover from his vendee the amount thus paid :—

Held, that he was not entitled to recover. *Patterson* v. *Tanner et al.*, 364.

4. *Power of sale—Exercise of—Sale of timber only--Notice of sale.*]—A mortgagee of timbered land, whose mortgage contained the ordinary short form of power of sale authorized by R. S. O. ch. 107, in the exercise of such power sold the timber without the land :—

Held, that the sale as an exercise of the power was void :—

Held, also, that there being an existing interest in the land vested in or claimable by the plaintiff, of which the mortgagee had express notice, the plaintiff was entitled to notice of the sale, and, upon the evidence, that no such notice of sale was given him as he was entitled to under the power. *Stewart* v. *Rowsom et al.*, 533.

Action for surplus after sale.]—*See* COUNTY COURTS.

Of a company's property. How to calculate the shareholders vote to authorize.]—*See* COUNTY COURTS.

MORTGAGOR AND MORTGAGEE.

See MORTGAGE.

MUNICIPAL ACT.

See MUNICIPAL CORPORATIONS, 1, 2, 3, 5, 6.

MORTMAIN.

See WILL, 11.

MUNICIPALITY.

Vesting of streets in, after sale of lots on plan.]—*See* WAYS.

MUNICIPAL CORPORATIONS.

1. *Bridges—R. S. O. ch. 184, secs. 532, 534—Counties and villages—Rivers and streams—Width of, how ascertained.*]—Upon the proper construction of secs. 532 and 534 of the Municipal Act, R. S. O. ch. 184, the county council is by the former provision given exclusive jurisdiction over all bridges, by whomsoever built, 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 is by the latter provision compellable to build such bridges only where necessary to connect any main public highway leading through the county.

The place at which the width of a stream or river is to be ascertained is the place at which the bridge crosses; and the width is to be determined by the width of the natural channel of such stream or river, taking it in its highest ordinary state.

Decision of FERGUSON, J., at the trial reversed. *Village of New Hamburg v. County of Waterloo*, 193.

2. *Victualling houses—By-law to forfeit license invalid—R. S. O. ch. 184, sec. 285.*]—The power given to municipal corporations under sec. 285 of R. S. O. ch. 184, "to determine the time during which victualling licenses shall be in force" does not confer any power to forfeit such licenses, but merely to fix the duration of the license.

The power to create a forfeiture of property is one which must be expressly given to a corporation by the legislature, and such an extraordinary power is least of all to be inferred where the legislature has provided other means of enforcing by-laws by means of fine and amerciament, as in this case. *Bannan v. The Corporation of the City of Toronto*, 274.

3. *Town councillor—Qualification—Quo warranto—Alienation—Cesser of term of leasehold qualification before election—Acquisition of new leasehold qualification—R. S. O. ch. 184, sec. 73—51 Vic. ch. 28, sec. 9 (O.)*—A town councillor, when nominated, was possessed of a sufficient leasehold qualification, the term of which, however, expired before the election; in the meanwhile he had acquired another leasehold property on which he sought to qualify:—

Held, on quo warranto proceedings, that he could do so under R. S. O. ch. 184, sec. 73, as amended by 51 Vic. ch. 28, sec. 9, since the cesser of the term of the first leasehold amounted to an alienation by operation of law within the meaning of the statute. *Regina ex rel. Chick* v. *Smith*, 279.

4. *Public schools—By-law to divide school section—Necessity for seal and signature—Injunction—Parties.*]—A by-law of a township corporation for the purpose of dividing a school section is invalid unless under the corporate seal, and signed by the head and by the clerk of the corporation.

The township corporation and the individual members of the proposed new school board, are proper parties to an action to have an invalid by-law for such a purpose set aside. *Holt et al.* v. *The Corporation of the Township of Medonte, et al.*, 302.

5. *Police commissioners—Licensing omnibuses—Restriction to owners—R. S. O. ch. 184, sec. 436.*]—Sec. 436 of the Municipal Act, R. S. O. ch. 184, empowers the police commissioners of a city to regulate and license the owners of omnibuses, etc. The commissioners of a city passed a by-law enacting that no person or persons should drive or own any omnibus without being licensed to do so:—

Held, that the authority conferred on the commissioners was to license owners, and not drivers; and therefore a conviction of a driver for driving without a license, was bad, and must be quashed. *The Queen* v. *Butler*, 462.

6. *Drainage by-law—Amending former by-law—Power to pass—55 Vic. ch. 42 sec. 573 (O.)*]—A by-law amending a drainage by-law under sec. 573 of the Consolidated Municipal Act, 1892, "in order fully to carry out the intention thereof," where sufficient funds have not been authorized by the original by-law, is one which provides for the completion of the work so as to make it efficient, although there may be some deviations and variations, or even additions to the work as originally planned.

During the construction of a drain, it was found that stone portals were needed for the work, and that the outlet to the lake had to be deepened, and certain other extra work and necessities were recommended by the engineer:—

Held, that the by-law providing for them was an amending by-law, under sec. 573 of the Consolidated Municipal Act, 1892, and that the township council had power to pass it under that section. *Re Suskey and the Corporation of the Township of Romney*, 664.

7. *Bonus to street railway from portion of township—54 Vic. ch. 42, sec. 36 (O.)—Petition for, by majority of assessed owners—Voting on by-law—Majority.*]—Although under 54 Vic. ch. 42, sec. 36 (O.), it is necessary, when aid is sought to be granted to a street railway by a portion of a municipality, that a majority in number representing one-half in value of the persons shewn by the last assessment roll to be the owners of real property in such portion should petition for the passing of the by-law, it is sufficient if the by-law is carried at the poll by a majority of those voting upon it. *Adamson* v. *The Corporation of The Township of Etobicoke*, 341.

NEGLIGENCE.

1. *Accident—Liability of hotel-keeper to guest—Falling down trap-door.*]—The plaintiff went into the defendant's hotel, as a customer where he had been several times

before. In passing through the building to go to the urinal he fell through an open trapdoor, which had been left unguarded, and received injuries :—*Held*, that he was entitled to damages from the defendant. *Hasson* v. *Wood*, 66.

2. *Accident—Street railway—Neglecting to stop a car—Driving over a man in broad daylight—Contributory negligence.*]—The plaintiff in broad daylight having hailed a westward bound tramway car, on the north track, crossed over from the south side of the street to get into it; the eastward bound car at the time was coming along on the south track at a fast trot, but was some 300 feet away, to the west. The plaintiff was somewhat intoxicated. As he took hold of the westward bound car to board it, he fell, and the eastward bound car passed over his foot, which was on the rail.

The jury found that there was no negligence on the part of the defendants, and that the plaintiff was guilty of contributory negligence, on which the trial Judge entered judgment for the defendants :—

Held, that the attendant or surrounding circumstances were, in the absence of any explanatory evidence by the defendants, sufficient to raise the presumption that there was negligence on the part of those in charge of the eastward bound car, the consequence of which was the happening of the accident, and that there must be a new trial. *Forwood* v. *The Corporation of the City of Toronto*, 351.

3. *Landlord and tenant—Covenant by tenant to repair—Non-repair during lease and yearly tenancy—Non-liability of landlord.*]—Where a lessee continues in possession as a yearly tenant after the expiry of a lease containing a covenant by him to repair, a similar obligation will be implied; and the landlord, if ignorant of a defect arising from non-repair during the currency of the lease, and continuing during the subsequent tenancy, is not liable to a stranger for an injury caused by such neglect, happening during such subsequent tenancy. *Hett* v. *Janzen*, 414.

See DAMAGES—MASTER AND SERVANT, 1, 2—WATERS AND WATERCOURSES, 1.

NEW YEAR'S DAY.

See INTOXICATING LIQUORS, 2.

NOTICE.

To mortgagee, by registration of will of legacy charged on land.]—*See* WILL, 4.

Of sale under a power.]—*See* MORTGAGE, 4.

OWNER.

Under Mechanics' Lien Act.]—*See* LIEN, 3.

PASSENGER.

On train, non-production of ticket by.]—*See* RAILWAYS, 4.

PAYMENT.

Of money by cheque.]—*See* ASSIGNMENTS AND PREFERENCES.

What is, in lien cases.]—*See* LIEN, 2.

PHYSICIANS AND SURGEONS.

College of.]—*See* MEDICAL PRACTITIONER.

PLAN.

Registration of, on township lot.]—*See* WAYS, 2.

PLEADING.

Sufficiency of allegations of malice, want of reasonable and probable cause and special damage.] — *See* MALICIOUS PROSECUTION.

POLICE COMMISSIONERS.

Powers of, to license.]—*See* MUNICIPAL CORPORATIONS, 5.

POSSESSION.

Taken by purchaser.]—*See* SPECIFIC PERFORMANCE.

POWER OF SALE.

Includes power to mortgage.]—*See* TRUSTS AND TRUSTEES, 1.

See also MORTGAGE, 1, 3, 4.

PREFERENCE.

Intent to give.]—*See* BANKRUPTCY AND INSOLVENCY.

PREMIUM NOTE.

See INSURANCE, 3.

PRESCRIPTION.

Non-acquisition of title by, by less than forty years user.]—*See* RAILWAYS, 1.

PRESUMPTION.

Of negligence.]—*See* NEGLIGENCE, 2.

Rebuttable.]—*See* BANKRUPTCY AND INSOLVENCY.

PRINCIPAL AND AGENT.

See RAILWAYS, 3.

PRINCIPAL AND SURETY.

Release of debtor — Consent of surety—Agreement of surety to remain liable.]—*Held*, per BOYD, C., that the consent of the surety to the discharge of the principal debtor will have the effect of preventing such discharge operating to release the surety, and this sufficed for the determination of the law in this case.

Held, per MEREDITH, J., that the evidence showed that the sureties in this case intended and agreed to remain liable to the creditor, and therefore *cadit quæstio*.

Judgment of ROBERTSON, J., affirmed. *Holliday* v. *Hogan*, 235.

PROHIBITION.

1. *Division Court—Judge reserving judgment without naming day*—

R. S. O. ch. 51, sec. 144—Failure to notify parties of judgment—Prejudice—Waiver.]—The County Judge presiding in a Division Court heard two plaints, and, in the presence of the agents for the parties, who made no objection, stated his intention of postponing judgment, but did not name a subsequent day and hour for the delivery thereof, as required by R. S. O. ch. 51, sec. 144. A month later the Judge, without any previous announcement, gave judgment in writing in favour of the plaintiffs, handing it to the agents of the plaintiffs, who delivered it to the clerk of the Division Court. The defendants were not notified by the clerk that judgment had been given till seven weeks later, and till then neither they nor their agent had any knowledge of the judgment. It was then too late to move for a new trial:—

Held, that what had happened was just what sec. 144 was designed to prevent; that the defendants had lost the opportunity of moving for a new trial, and so were prejudiced; and that there had been no such acquiescence in the course taken by the Judge as to deprive them of the right to prohibition.

Judgment of ROSE, J., reversed. *Re Forbes* v. *Michigan Central R. W. Co. Re Murphy* v. *Michigan Central R. W. Co.*, 568.

2. *Division Court — Territorial jurisdiction—R. S. O. ch. 51, sec. 87—52 Vic. ch. 12, sec. 5—Application to transfer cause — Trial of question raised by notice disputing jurisdiction—Refusal of Judge to try.*]—Where the Judge presiding at the trial of an action in a Division Court declines to try the question of the jurisdiction of that Court raised by a notice disputing the jurisdiction, he may be prohibited.

Such question may be tried at the time and place of the trial of the action; and the defendant is in no way bound by anything contained in R. S. O. ch. 51, sec. 87, as amended by 52 Vic. ch. 12, sec. 5, to apply for an order transferring the action to a Division Court having jurisdiction over it, or to apply to the Judge at any other time or place for the trial of the question so raised.

In re Watson v. *Woolverton*, 9 C. L. T. Occ. N. 480, distinguished.

Per FALCONBRIDGE, J., dissenting: The defendant, before coming to the High Court for prohibition, is bound to apply to the County Judge somewhere, either at or before the trial, to transfer the cause; and in this case he did not so apply. *Re Thompson* v. *Hay*, 583.

3. *Division Court—Attachment of debt—Assignment of debt attached—Trial of question of validity of assignment—Assignee not called upon as claimant—Submitting to jurisdiction of Court — Amount in controversy—R. S. O. ch. 51, sec. 197.*]—Each of the three primary creditors began an action in a Division Court against the primary debtor for the recovery of an amount within the jurisdiction of the Court, and also attached in the hands of garnishees the amount of the debt in each case; the sum of $500 having been admittedly due by the garnishees to the primary debtor, who, however, asserted that before the actions were commenced he had assigned the debt for valuable consideration.

Upon the Court day, the primary creditors, the primary debtor, and the assignee of the debt appeared before the Judge in the Division Court, counsel also appearing for the garnishees. Judgment was first given in favour of the primary creditors against the primary debtor in each case, and then the question of the validity of the assignment was entered upon and evidence given upon it, the assignee producing his books and giving his evidence. Judgment was then given declaring the assignment void as against the primary creditors as a fraud upon them. From this judgment the assignee gave notice of appeal, which he afterwards abandoned, and in the style of cause he named himself as "claimant."

Upon motion by the assignee for prohibition:—

Held, that he had submitted himself to the jurisdiction of the Court, and could not be heard to say that he was there merely as a witness; and that the Judge, having all parties before him, was justified under section 197 of the Division Courts Act, R. S. O. ch. 51, in trying their rights without going through the formality of calling them before him:—

Held, also, that the Division Court had jurisdiction to try the right of the primary creditors to garnish portions of the $500 sufficient to satisfy their claims; and, under section 197, to determine whether or not the $500 was at the time of the attachment the property of the debtor. *Re Perras* v. *Keefer*, *Re Barry* v. *Keefer*, *Re Andrews* v. *Keefer*, 672.

See COUNTY COURTS — DIVISION COURTS.

PROMISSORY NOTE.

Secured by mortgage on land is impure personalty.]—*See* WILL, 11.

See, also, BILLS OF EXCHANGE AND PROMISSORY NOTES.

PUBLIC SCHOOLS.

See MUNICIPAL CORPORATIONS, 4.

PURCHASER.

For value without notice.]—*See* WATERS AND WATERCOURSES, 2.

Taking possession.]—*See* SPECIFIC PERFORMANCE.

See also VENDOR AND PURCHASER.

QUO WARRANTO.

See MUNICIPAL CORPORATIONS, 3.

RAILWAYS.

1. *Power of "letting, conveying and otherwise departing" with their lands—Conveyance of easement — Ultra vires—Estoppel— Prescription — R. S. O. ch. 111, sec. 35.*]—The Act of incorporation of a railway company, the predecessors in title of the plaintiffs, and which was incorporated for the purpose of constructing and operating a certain line of railway, conferred upon the company in respect of the disposition of lands acquired by them, powers of "letting, conveying and otherwise departing therewith for the benefit and on account of the company from time to time as they should deem necessary."

Nearly forty years before the commencement of this action the predecessors in title of the defendants laid pipes for conveying water along the railway track of the plaintiffs' predecessors, using them for such purpose almost continuously up to the present time, such privilege having been given to them by resolution of the directors of the company, who a few years subsequently passed another resolution, and in pursuance thereof executed a deed granting, releasing and confirming such right and privilege which at the time this action was brought had become vested in the defendants.

The undertaking of the original railway company became vested in the plaintiffs, who, a few years before the commencement of this action desiring to alter the position of their track gave notice of expropriation to the immediate predecessors in title of the defendants, and placed the track over the water pipes.

The plaintiffs now sought to have the resolutions and deed mentioned declared *ultra vires*, and also claimed an injunction restraining the user of the water pipes, and if necessary an order for their removal :—

Held, that the resolutions and deed were *ultra vires* as not within the powers specified by the charter, or such as could fairly be regarded as incidental thereto, or reasonably derived by implication therefrom :—

Held, also, that the plaintiffs were not estopped from asserting their own title and denying the defendants':—

Held, lastly, that the defendants not having used and enjoyed their easement for forty years had not acquired a title thereto by prescription under R. S. O. ch. 111, sec. 35. *The Canada Southern Railway Co.* v. *The Corporation of the Town of Niagara Falls et al.*, 41.

2. *Bonus—Condition—That machine shops shall be "located and maintained"—Amalgamation with larger company—Changing circumstances—Ceasing to maintain.*]—A railway company having obtained a bonus from the plaintiffs upon condition that its machine shops should be "located and maintained" within the city limits, did so erect and maintain them for some years, until authorized by legislation it amalgamated with and lost its identity in another company, all the engagements and agreements of the amalgamating companies being preserved. The amalgamated company was afterwards leased in perpetuity to a much larger railway company who removed the shops outside the city limits :—

Held, that although all engagements and agreements made by the original company were preserved, the amalgamation and leasing in perpetuity by the larger company of the smaller under the authority of Parliament imposed new relations upon the amalgamated road which worked a change in the policy as to the site and size of the machine shops and that the engagement had been satisfied by the maintenance of the said shops by the original company during its independent existence. *The Corporation of the City of Toronto* v. *The Ontario and Quebec R. W. Co.*, 344.

3. *Connecting lines—Misdelivery of goods owing to mistake on connecting line—Principal and agent—Consignor and consignee.*]—The purchaser in Victoria, B.C., of goods from the agent of the plaintiffs there, ordered their shipment by the plaintiffs from this province through an agent of the defendants in Victoria, the latter furnishing on behalf of his company a tag marked "*Via* Grand Trunk Railway, and Chicago & North Western, care of Northern Pacific Railway, St. Paul." The defendants' agent in Victoria sent this order and tag to their contracting freight agent in Toronto, who communicated with the plaintiffs in this province.

and the latter shipping the goods to their own order at Victoria, drew through a bank on the purchaser against the shipment with a shipping bill attached, marking the goods as above with the addition "notify," naming the purchaser, and advised the defendants' agent in Toronto, who undertook to have the shipment looked after. The Grand Trunk Railway forwarded the goods in their own car, which went through; each successive forwarding company signed a fresh shipping bill and paid all charges up to the time of receipt, to the company from whom they received the goods. Before the goods reached the defendants' own line, owing to a mistake in copying the waybill, another name was substituted for that of the plaintiffs, and in the defendants' waybill the word "order" was left out. These mistakes were continued in the shipping bills over the other lines, until the shipment reached Victoria, when the goods were delivered to the purchaser, who refused to pay for them, and shortly afterwards failed.

Held, that the goods were received by the defendants in this province by the Grand Trunk Railway Company, as their agents, upon a through contract to deliver them to the order of the consignor at Victoria, and that they were liable to the plaintiffs for their wrongful delivery. *Grant* v. *The Northern Pacific Railway Company*, 645.

4. *Passenger — Ticket, non-production of—Ejection from train—51 Vic. ch. 29, secs. 214, 248—Contract — Condition — Regulation.*] — A passenger upon a railway train who has paid his fare cannot, in the absence of any condition in his contract with the railway company requiring the production of his ticket, and in the absence of any regulation relating to or governing it made under section 214 of the Railway Act of Canada, 51 Vic. ch. 29, be treated as "a passenger who refuses to pay his fare" within the meaning of section 248, because he does not produce his ticket when asked for it by the conductor.

And where, under such circumstances, the plaintiff was put off a train by a conductor on the defendants' railway, a nonsuit entered by the trial Judge was set aside, and a new trial ordered. *Beaver* v. *Grand Trunk R. W. Co.*, 667.

RAILWAYS (STREET).

See MUNICIPAL LAW — NEGLIGENCE, 2—TORONTO STREET RAILWAY.

REASONABLE AND PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

RE-ENTRY.

By landlord upon breach of covenant.]—*See* LANDLORD AND TENANT, 2.

REFERENCE.

Jurisdiction of Judge to make, compulsorily.]—*See* DRAINAGE TRIALS ACT, 1891.

REGISTRY ACT.

See LIEN, 3.

REPAIR.

Covenant by tenant.]—*See* NEGLIGENCE, 3.

REPLEVIN.

Bond, form of.]—*See* SOLICITOR AND CLIENT.

REVERSION.

Severance of.]—*See* LANDLORD AND TENANT, 2.

REVIVOR.

Lapse of time—Agreement of solicitors—Effect of.]—In 1867 an action of ejectment was brought by L. and notice of trial given, and the case entered for trial for 15th October following. The trial was postponed, and on 21st October L. conveyed the lands to I. On the 8th January, 1871, L. died, and on 14th May, 1886, I. conveyed to the plaintiff. In February, 1892, an *ex parte* order under Rule 620 was obtained by the plaintiff from the local registrar, reviving the action in the plaintiff's name. It appeared that in January, 1872, the then plaintiff's solicitors had notified the defendant's solicitors of the plaintiff's intention of reviving the action, and they gave notice of trial for the ensuing assizes, whereupon it was agreed between the solicitors that on the then plaintiff's solicitors refraining from reviving and proceeding to trial, the defendant's solicitors would abide by the result of another named suit, which, if in favour of the plaintiff, an order of revivor might then issue and judgment be entered for the plaintiff:—

Held, that the original action was governed by C. S. U. C., ch. 27, sec. 22, and terminated on the 21st October, 1867, when the plaintiff conveyed to I.; that after such a lapse of time the plaintiff's rights being barred by the statute of limitations no order of revivor should have issued, and that the Court would give no effect to the agreement made by the solicitor, for to do so would be an injustice to the client. *Lemesurier* v. *Macaulay*, 316.

RIPARIAN PROPRIETOR.

See WATERS AND WATERCOURSES, 3.

RIVERS AND STREAMS.

Bridges over, width of.] — *See* MUNICIPAL CORPORATIONS, 1.

Use of.]–*See* WATERS AND WATERCOURSES, 3.

ROADBED.

Of street railway, valuation of.]—*See* TORONTO STREET RAILWAY.

SALE OF GOODS.

Conditional sale—Resumption of possession—Resale after judgment for purchase money—Absence of condition that purchaser is to remain liable.]—The defendants purchased machinery from a company under a conditional contract of sale in writing, providing that the property should remain in the company until payment of the price in full, with the right to resume possession and resell on nonpayment, but without any provision that in such latter event the purchase-money was to be applied *pro tanto*, and the defendants remain liable for any balance. On default after certain payments had been made, the company obtained judgment on notes which had been given for the purchase money, and subsequently seized and sold the machinery, and applying the proceeds sought and were allowed to prove a claim in the Master's office for the balance due on the judgment:—

Held, that the whole matter was examinable in the Master's office, although judgment had been recovered, and as the consideration for the judgment had disappeared by the intentional act of the company in taking possession and selling, the claim should have been disallowed.

Sawyer v. *Pringle*, 18 A. R. 218, followed. *Arnold et al.* v. *Playter et al. The Waterous Engine Works Company Claim*, 608.

By agent of assignee of insolvent estate as auctioneer without license.]—*See* AUCTION AND AUCTIONEER.

See FRAUDULENT CONVEYANCE, 1.

SALE OF LAND.

By executors to pay legacy.]—*See* WILL, 7, 10.

Of lots on plan.]—*See* WAYS, 1.

Under power in mortgage.]—*See* MORTGAGE, 1, 3, 4.

See also SPECIFIC PERFORMANCE—WILL, 8.

SCHOOLS.

Public.]—*See* MUNICIPAL CORPORATIONS, 4.

SEAL.

To by-law, necessity for.]—*See* MUNICIPAL CORPORATIONS, 4.

SET OFF.

Allowance of commission on, to liquidators.]—*See* COMPANY, 2.

SETTLEMENT.

Consideration for.]—*See* FRAUDULENT CONVEYANCE, 2.

SHAREHOLDERS.

How to calculate voting power of.]—*See* COMPANY, 4.

SHERIFF.

Right to interplead.]—*See* SOLICITOR AND CLIENT.

SOLICITOR.

Action against for wrongfully commencing action.]—*See* MALICIOUS PROSECUTION.

Agreement by, effect of, on client's rights.]—*See* REVIVOR.

Lien of, Waiver.]—*See* SOLICITOR AND CLIENT.

SOLICITOR AND CLIENT.

Lien for costs—Taking note and leaving country—Waiver of lien—Replevin—Damages—Form of re-

plevin bond.]—The plaintiff, a solicitor, claiming on defendant's papers a lien for costs, settled with him, taking a note therefor payable on demand. He then went to the United States, leaving the note and papers with another solicitor as his agent. The defendant, stating that he required the papers, or some of them, for use in his business, brought replevin proceedings in the Division Court, giving a bond to prosecute the suit with effect and without delay, or to return the property replevied and to pay the damages sustained by the issuing of the writ, and there was a breach of the bond in not prosecuting the suit with effect. Under the replevin the defendant only procured some of the papers and which were tendered back to the plaintiff and refused, the defendant stating that they were of no value, the agent having retained the valuable ones. In an action on the bond by plaintiff to recover the amount of the note as damages he had sustained by the replevin:—

Held, per BOYD, C., that even if any lien existed, which was questionable, by reason of the taking of the note and departure from the country, it was not displaced by the replevin suit; but, in any event, the plaintiff had failed to prove any actual damage; and though there might be judgment for nominal damages and costs, there would be a set-off of the defendant's costs of trial; and the action was dismissed without costs.

Under the Division Court Act, R. S. O. ch. 51, sec. 266, the whole matter could have been litigated in the Division Court.

Quære as to the amount of damages recoverable.

The fact of the conditions of the bond being in the alternative instead of the conjunctive remarked on.

On appeal to the Divisional Court the judgment was affirmed. *Kennin et al.* v. *Macdonald et al.*, 484.

SPECIFIC PERFORMANCE.

Sale of land—Parol contract—Possession—Sale of partner's share.]—Land owned by two persons in partnership was sold under a parol contract by one of the partners to a purchaser, under the belief that the copartner would agree in the sale, and the whole would be conveyed, the purchaser being put in possession, but the copartner refused to carry out the sale:—

Held, that the placing of the purchaser in possession was sufficient to prevent the Statute of Frauds being set up as a bar to the proof of the parol contract, and that the purchaser could elect to take the share of the selling partner with an abatement of the purchase money, and judgment for specific performance was given as against him. *Crane et al.* v. *Rapple*, 519.

STATUTES.

C. S. U. C. ch. 27, sec. 22.]—*See* REVIVOR.

30 & 31 Vic. ch. 3, sec. 91, sub-sec. 27 (B. N. A. Act).]—*See* CONSTITUTIONAL LAW, 1, 3.

30 & 31 Vic. ch. 3, sec. 92, sub-sec. 14.]—*See* CONSTITUTIONAL LAW, 3

48 Vic. ch. 92 (O.).]—*See* CONSTITUTIONAL LAW, 2.

R. S. C. ch. 129, secs. 31, 77, sub-sec. 2.]—*See* COMPANY, 1.

R. S. C. ch. 129, sec. 56.]—*See* COMPANY, 3.

R. S. C. ch. 159, sec. 9.]—*See* GAMING.

52 Vic. ch. 43, sec. 7, sub-sec. 2.] —*See* Master and Servant, 2.

53 Vic. ch. 18, sec. 2 (O.).]—*See* Constitutional Law, 1, 3.

53 Vic. ch. 33, sec. 82 (D.).]—*See* Division Courts.

53 Vic. c. 37 (O.).]—*See* Lien, 1.

53 Vic. ch. 39, sec. 4 (O.).]—*See* Insurance, 2.

53 Vic. ch. 56, sec. 1 (O.).]—*See* Intoxicating Liquors, 1.

53 Vic. ch. 56, sec. 18 (O.).]—*See* Intoxicating Liquors, 2.

54 Vic. ch. 20 (O.), sec. 2, sub-sec. (*a*).] —*See* Bankruptcy and Insolvency.

54 Vic. ch. 20 (O.) sec. 3.]—*See* Bills of Sale and Chattel Mortgages.

54 Vic. ch. 42, sec. 36 (O.).] — *See* Municipal Corporations, 7.

54 Vic. ch. 46, sec. 1 (O.).]—*See* Intoxicating Liquors, 2.

54 Vic. ch. 51, secs. 9, 11 (O.).]—*See* Drainage Trials Act, 1891.

55 Vic. ch. 42, sec. 573 (O.).] — *See* Municipal Corporations, 6.

55 Vic. ch. 42, sec. 591 (O.).] — *See* Drainage Trials Act, 1891.

STREETS.

Vesting of, in municipality after sale of lots on plan.]—*See* Ways, 1.

STREET RAILWAY.

See Municipal Corporations, 7—Negligence, 2—Toronto Street Railway.

SURETY.

Consent of, to release of debtor.]—*See* Principal and Surety.

TENANT.

See Landlord and Tenant — Negligence, 3.

TIMBER BOOM.

Right to erect across river.]—*See* Waters and Watercourses, 1.

TITLE.

Change of, in insured building.]—*See* Insurance, 5.

Non-acquisition of, by prescription by less than forty years user.]—*See* Railways, 1.

Objection to.]—*See* Will, 8.

See also Vendor and Purchaser.

TORONTO STREET RAILWAY.

Franchise—Property—Roadbed.] —Under the statutes and the agreement set out in the judgment, the Toronto Street Railway Company from time to time constructed and operated lines of street railway in the city of Toronto, extending over a period of thirty years, when in pursuance of provisions in the agreement in that behalf the city proceeded to assume the ownership of the railway and the property used in connection with its working, and to fix by arbitration the amount to be paid therefor.

By an agreement between the city and the company the former had, on payment by the latter of a fixed sum per mile, constructed certain portions of permanent pavement which the company would otherwise have been bound to do.

In the award made, the railways were valued as being street railways in use, but the arbitrators who signed the award declined to allow anything for the value of any privilege or franchise extending beyond the period of thirty years, and also refused to allow anything to the company for the pavements. On a motion against the award :—

Held, that the "privilege" or franchise could not be properly said to have been limited to thirty years only, because there was no obligation on the part of the city to assume the ownership of the railway at the expiration of that term, although it had a right to do so :—

Held, however, that this privilege or franchise could not be construed to be "property" the value of which was intended to be taken into account by the arbitrators when the city assumed the ownership of the railway. No provision was made for its valuation, either as to the basis on which it was to be ascertained, or otherwise, indicating that it was not contemplated by the respective parties that the city should in money pay to the company for that which they, with the sanction and authority of the legislature, had granted for a term which they had the right to terminate after a fixed period :—

Held, also, that the arrangement between the company and the city as to the pavements did not entitle the former to have them treated as part of its railway property, to be valued and paid for by the city. *In the matter of the Arbitration respecting the Toronto Street Railway Company*, 374.

TOWN.

Councillor, qualification of.]—*See* MUNICIPAL CORPORATIONS, 3.

TRUSTS AND TRUSTEES.

Power of sale—Prior incumbrance—Power to mortgage, to pay off.]—*Held*, that trustees of real estate with a power of sale had power to mortgage for the purpose of paying a part of a prior incumbrance thereon with a view to saving the property from foreclosure. *Re Vansickle and Moore*, 560.

2. *Appointment of new trustees where estate not in appointor—R. S. O. ch. 110, sec. 4—Vesting of estate in appointees.*]—Where an appointment of new trustees is duly made under R. S. O., 1887, ch. 110, the legal estate by virtue of section 4, vests in the new trustees so appointed, even though it was not vested in the parties making the appointment. *In re Hunter* v. *Patterson*, 571.

Declaration of trust—*See* INSURANCE, 4.

ULTRA VIRES.

Resolutions and deed.]—*See* RAILWAYS, 1.

Of local legislature—*See* CONSTITUTIONAL LAW, 1.

VENDOR AND PURCHASER.

1. *Lands vested in trustee—Executions against cestui que trust—Title.*]—Lands were conveyed to, and held in the name of a trustee, at the instance and for the benefit of another, but without any disclosed trust. Writs of *fi. fa.* lands against the *cestui que trust* were placed in the sheriff's hands before his death, but after the conveyance to the

trustee. After the death of the *cestui que trust* his administrators sold the lands, and offered to convey the lands with the trustee:—

Held, that the purchaser was not bound to carry out the sale unless the writs were removed or released. *Re The Trusts Corporation of Ontario and Medland et al.* 538.

2. *Conveyance by all parties interested during life of life tenant—Title—R. S. O. ch. 112.*]—A testator devised his lands to executors and trustees, to lease and pay the amount received to his widow for life, and after her death to sell and divide the proceeds between two sons. One of the sons sold and conveyed all his interest to his brother's wife. During the lifetime of the widow the trustees, the widow, and the remaining son and his wife, all being *sui juris*, conveyed by way of exchange all their interests to a purchaser:—

Held, that the grantee claiming through that conveyance could make a good title. *Re Rathbone and White*, 550.

WAGER.

Custodian of.]—*See* GAMING.

WATERS AND WATERCOURSES.

1. *Negligence — Overflowing of land—Bursting of timber boom—Right to erect booms across rivers—R. S. O. ch. 121, sec. 5.*]—In an action for damages caused by overflowage, it appeared that the defendants' boom in a river broke by reason of the heavy floods, whereupon they constructed another boom lower down near to a certain bridge, which also broke, and the logs became massed against the bridge, which the jury found, with the excess of rain, caused the injury complained of. They did not find negligence on the part of the defendants, but that they were guilty of a wrongful act in throwing the boom across the river:—

Held, that the defendants were entitled to judgment.

Per BOYD, C.—The use of the boom being lawful by statute (R. S. O. ch. 121, sec. 5), and no negligence in its construction being pretended, it was impossible to say that what is thus expressly legalized, can be made the ground of an action of tort.

Decision of MACMAHON, J., reversed. *Langstaff* v. *McRae, et al.*, 78.

2. *Diversion of, by railway company—Equitable easement — Bonâ fide purchaser for value—Registered deed—Actual notice—Prescriptive right—Damages—51 Vic. ch. 29, sec. 90 sub-[illegible]h, (D.)—Compensation.*]—Whe[illegible] the defendants in 1871, witho[illegible]thority, diverted a watercours[illegible]certain land and afterwards [illegible] made compensation therefor to the then owner of the land, the plaintiff's predecessor in title:—

Held, that the equitable easement thereby created in favour of the defendants was not valid against the registered deed of the plaintiff, a *bonâ fide* purchaser for value without actual notice; the defendants having shown no prescriptive right to divert the watercourse; and the diversion being wrongful as against the plaintiff. *Knapp* v. *Great Western R. W. Co.*, 6 C. P. 187; *L'Esperance* v. *Great Western R. W. Co.*, 14 U. C. R. 173; *Wallace* v. *Grand Trunk R. W. Co.*, 16 U. C. R. 551; and

Partridge v. *Great Western R. W. Co.*, 8 C. P. 97, distinguished.

The plaintiff, having failed to prove actual damage, was allowed nominal damages for the wrong; and instead of granting a mandatory injunction to compel the restoration of the watercourse, the Court directed a reference to ascertain the compensation to which the plaintiff would be entitled as upon an authorized diversion of the watercourse under 51 Vic. ch. 29, sec. 90, sub-sec. h, (D.). *Tolton* v. *Canadian Pacific R. W. Co. et al.*, 204.

3. *Riparian proprietors—User of stream—Reasonable user—Injury to plaintiff's land—Prescriptive right—Malice—Damages—Concurrent cause of injury.*]—The use by riparian proprietors of the waters of streams through whose lands they flow must be a reasonable use, and the proprietors so using the waters must restore them to their natural channel before they reach the lands of the proprietors below them.

The defendant, in restoring the water of a stream used by him to its natural channel, did so at such times and in such a manner that the water froze as it was being restored, and formed a solid mass of ice, completely filling the natural channel, so that the water coming down flowed away from the channel and over the plaintiff's land, and injured it. The evidence shewed that the cause of the water freezing as it did was the times at which and the manner in which the defendant so restored it, and was the natural result thereof; and it appeared that the defendant had been remonstrated with by the plaintiff and the consequences of his action pointed out to him:—

Held, that the defendant's use of the water was unreasonable; and, as there was no proof to sanction a prescriptive right to restore the water at the times and in the manner indicated, he was liable to the plaintiff for the injury so caused: his conduct being wrongful, his persistence in it was malicious; and the injury to the plaintiff was an invasion of his rights, and imported damage, whether there was any actual damage or not:—

Held, also, that even if there was a cause, for which the defendant was not responsible, concurrent with the wrongful acts complained of, and contributing to the injury sustained by the plaintiff, the defendant would still be answerable for the injury sustained by such wrongful acts for such damages, or such portion thereof, as were caused by the wrongful acts complained of.

Judgment of STREET, J., 21 O. R. 227, affirmed. *Ellis* v. *Clemens*, 216.

WAYS.

1. *Plan—Registration of and sales under—Effect—Vesting of streets in municipality.*]—Under the Municipal and Surveyors' Acts by the filing of a plan, and the sale of lots according to it, abutting on a street, the property in the street becomes vested in the municipality, although they may have done no corporate act by which they have become liable to repair.

Decision of STREET, J., at the trial reversed. *Roche* v. *Ryan*, 107.

2. *Highway—Township lot—Registered plan—Unincorporated village—Rights of the public and of the private owner—Injunction—Costs.*]—A street or road laid out upon a registered plan of a township lot, where, although houses are clustered,

there is not an incorporated village, continues to be a private street or road, although the owner should sell a lot fronting on it, until the township council adopts it as a public highway, or until the public by travelling upon it has accepted the dedication offered by the proprietor.

R. S. O. ch. 152, sec. 62, only applies to cities, towns or incorporated villages.

A person who purchases lots according to such a plan, abutting upon streets laid out thereon, acquires as against the person who laid out the plot and sold him the land a private right to use those streets, subject to the right of the public to make them highways, in which case the private right becomes extinguished.

The right so to use a private road does not necessarily mean a right over every part of the roadway, but only to such a width as may be necessary for the reasonable enjoyment of it. *Sklitzsky* v. *Cranston*, 590.

WILL.

1. *Construction—Devise of land facing on two streets by description of house facing on one.*]—In 1886 a testator by his will devised to his brother "All that real estate now owned by me, being No. 32 on the north side of A. street for and during his life," and afterwards over, and then made a general residuary devise of the rest of his land to his sisters. It appeared that in 1867 the testator purchased the land in question with a frontage of twenty-six feet on A. street, by a depth of 200 feet to a lane twenty feet wide, which lane was in 1882 converted into P. street. At the time of purchase there was a house facing on A. street known as No. 32, and also one facing on the lane, afterwards known as No. 21 P. street, occupied as distinct tenements, and each with a fence in the rear, but with certain ground between the two fences used to some extent in common:—

Held, that the specific devise was confined to No. 32 A. street, and the lands appertaining to it, to the exclusion of the house on P. street and the lands appertaining to it, which passed under the residuary devise. *Scanlon* v. *Scanlon*, 91.

2. *Devise without mentioning what—Intention—Unintentional omission—Words read into will.*]—A testator being possessed of personalty and realty bequeathed pecuniary legacies to a much greater amount than the personalty left by him, and then bequeathed to his "executors * * in trust, to dispose thereof to best advantage in trust, to be divided and paid over to my children in the sums mentioned and as soon as may be agreeable to the terms and conditions of certain mortgages and leases now standing against the property" without mentioning any property:—

Held, that the words "my property" presumably unintentionally omitted should be read into the will. *Colvin* v. *Colvin et al.*, 142.

3. *Construction—Devise to sons without words of limitation—"Die without lawful issue"—"Survivor"—Estate in fee simple—Estate tail.*]—The testator died in 1845, and by his will devised a farm to his two sons, without words of limitation, to be equally divided between them, adding: "And in case either of my sons should die without lawful issue of their bodies, then his share to go to the remaining survivor":—

Held, that the gift in the earlier

part of the devise, though without words of limitation, was sufficient to carry the fee to the sons, unless a lesser estate appeared to be intended on the face of the will.

Both sons outlived the father; one died in 1874 leaving issue; the other died without issue in 1890 :—

Held, that the son who first died had an estate in fee simple absolute in one-half of the land; and, as the other left no survivor, he was not within the words of the will, and nothing had happened to divest him of the estate in fee given by the earlier part of the will, and therefore he also died seized in fee simple of one-half of the land.

The word "survivor" is to be read as meaning "longest liver," not "other."

The words "die without issue" do not mean an indefinite failure of issue which would give rise to an estate tail. *Ashbridge* v. *Ashbridge et al.*, 146.

4. *Devise—Direction to devisee to pay legacies—Charge on land—Registration of will—Notice—Priority of legatees over mortgagees—R. S. O. ch. 110, secs. 8, 22.*]—A testator by his will devised land to his son James, subject to the payment of an annuity to his widow for her life, after the expiration of a lease given by the testator; and directed his executors to apply the rent derived from the land so devised in payment of an incumbrance thereon, "so that my son may have the said property, at the expiration of the said lease, free from all incumbrance"; and he then directed that his son James should pay one-half of the sums thereinafter bequeathed to each of his daughters, as soon as his son Daniel should attain the age of twenty-one; and to the latter he devised other land, and directed him also to pay one-half of the bequests to the daughters. Then followed the bequests to his daughters, with names and amounts, to be paid to them in equal shares by his sons James and Daniel on the latter attaining the age of twenty-one. The will was entirely silent as to the debts of the testator.

James adopted the devise to him, took possession of the land, and dealt with it as his property for many years :—

Held, that the one-half of the legacies to the daughters was charged upon the land devised to James :—

Robson v. *Jardine*, 22 Gr. 424, followed.

The will was duly registered prior to the dates or registry of certain mortgages created by James upon the land devised to him :—

Held, that the mortgagees must be taken to have had, at the time of advancing these moneys, full notice of the will and its contents; and were bound to see to the application of the moneys advanced by them; and that, not having done so, the legatees were entitled to priority :—

Held, also, that that part of section 22 of R. S. O. ch. 110 which provides that the four preceding sections "shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies," is of general application, and applies to wills coming into operation as well after as before the 18th September, 1865 :—

Held, lastly, that section 8 of R. S. O. ch. 110 (sec. 15 of R. S. O. ch. 102), did not apply; because the money was not money payable upon an express or implied trust, or for a limited purpose, within the meaning of the section :—

McMillan v. *McMillan*, 21 Gr. 594, and *Moore* v. *Mellish*, 3 O. R 174, distinguished. *Gray et al.* v. *Richmond et al.*, 256.

5. *Construction—Devise—Estate in fee—"Absolutely"—"In the event of her death"—R. S. O. ch. 109, sec. 30.*]—A testator, who died on the 9th April, 1891, seized in fee, by his will devised and bequeathed all his real and personal estate to his wife absolutely, and in the event of her death to be equally divided among his children :—

Held, that the will was to be construed as if the words "in my lifetime" followed the words "in the event of her death," and that the widow took an estate in fee simple in the lands.

Construction of section 30 of the Wills Act, R. S. O. ch. 109. *Re Walker and Drew*, 332.

6. *Devise—Right to remain and live on "place" while unmarried—Interest in—Use of.*]—A testator by his will devised as follows :—"I will devise and bequeath to my wife S. J., all my real and personal property during her natural life, and that my daughter S. J., shall remain and live on said place as long as she remains unmarried." The only real estate or "place" the testator owned was his farm, on which his widow remained with the daughter until the former's death :—

Held, that the daughter had the right, after the mother's death, to live on the property so long as she remained unmarried, and that she had an estate in, and was entitled to the use of it, as she might choose to use it, for that period. *Judge et al.* v. *Splann et al.* 409.

7. *Legacy—Interest.*]—A testatrix by her will directed that a legacy should be paid out of the proceeds of the sale of lands, and that the lands should be sold at any time within two years after her death :—

Held, that interest upon the legacy should be allowed from the day when the two years expired; or, if the lands were sooner sold, from the date of sale. *Re Robinson, McDonell* v. *Robinson*, 434.

8. *Defeasible fee—Sale of land—Condition of sale—Good title—Time within which to raise objection—Specific performance — Costs.*]—A testatrix devised separate lots of land to each of her two daughters, A. and B., and then provided that if "either of my daughters die without lawful issue, the part and portion of the deceased shall revert to the surviving daughter, and in case of both dying without issue, then I authorize" * * naming her executors and other living persons to subdivide the estate among her relatives as they should deem right and equitable. B. conveyed the lot devised to her to a purchaser through whom in B.'s lifetime title was sought to be made :—

Held, that B. only took a defeasible fee simple with a devise over to her sister and her heirs in case B. should die leaving no issue at her death. B. being still alive, it was impossible to say that a conveyance from her passed a good title: *Little* v. *Billings*, 27 Gr. 353, followed.

Ashbridge v. *Ashbridge*, 22 O. R. 146, not followed.

Notwithstanding a condition in an agreement for the sale of land that "the vendee is to examine the title at his own expense, and to have ten days * * for that purpose, and shall be deemed to have waived all objections to title not raised within that time," in the absence of a condition that he shall take a bad title, the vendee is entitled to have a good title; and at any time before conveyance to shew that the vendor cannot make any title to the property in question.

Under the circumstances of this case, it was held that the vendee had not, by his conduct and delay, waived his right to object to the title, but as he had not raised the objection in the proper manner at the proper time, he was allowed no costs of his action. *Nason* v. *Armstrong et al.*, 542.

9. *Gift contained in direction to pay—Postponement of enjoyment—Time of vesting.*]—A testator by his will directed that his estate should be divided upon his youngest child attaining the age of twenty-one years, the income of the estate in the meantime to be paid to the wife, for the benefit of herself and the children. The only gift was contained in the direction to pay and divide upon the arrival of the period of distribution:—

Held, that the gift vested prior to the enjoyment of the *corpus* of the estate which was only postponed in order to provide for the maintenance of the family:—

Held, also, that the gift vested in each child upon attaining the age of twenty-one, and that no child who did not attain that age was intended to take a share of the *corpus*. *Re Douglas—Kinsey* v. *Douglas*, 553.

10. *Devise—Legacy charged on land—Sale by executors in order to pay the legacy.*]—A testator devised to his daughter a lot of land charged with a legacy. The daughter predeceased the testator, leaving two children to whom the lot descended.

On an application by the executors at the instance of the Official Guardian, it was:—

Held, that it was the duty of the executors to sell the land and pay the legacy. *Re Eddie*, 556.

11. *Mortmain — Impure personalty—Legacy to promote temperance legislation—Validity of bequest.*]—Where a testator bequeathed a sum of money to trustees upon trust "to apply the same in such lawful ways as in their discretion they may deem best in order to promote the adoption by the parliament of the Dominion of Canada of legislation prohibiting totally the manufacture or sale in the Dominion of intoxicating liquor to be used as a beverage, and in order to give practical aid in the enforcement of such legislation when adopted, whether by educating and developing a strong public sentiment in its favour or by other and more direct means, or in such other ways as my trustees shall think best":—

Held, a good charitable legacy, being for a lawful public or general purpose and not contrary to morality or to public policy.

The testator merely sought to promote a desirable change in the law by constitutional means:—

Held, also, that a promissory note payable to the testator collaterally secured by mortgage on land was impure personalty.

Where one of several residuary legatees was also a witness to the will:—

Held, that the will must be read as if the gift to her had been blotted out by the testator and the residuary gift distributed ratably among the other residuary legatees as if she were non-existent. *Farewell* v. *Farewell*, 573.

12. *Devise — Division of corpus after death of wife—Dower—Election.*]—A testator having by his will blended his real and personal estate into a fund from which payments of income were to be made to his wife and other devisees, postponed the division of the *corpus* until after the death of the wife :—

Held, that the wife was not bound to elect between her dower and the testamentary bestowments.

Re Quimby, Quimby v. *Quimby*, 5 O. R. 744, distinguished.

The testator also gave a house for the residence of his wife during her life, and also another house for the use of certain nephews and nieces until the youngest attained twenty-one, or until they married :—

Held, that this right of personal occupation of the nephews and nieces was, while it lasted, inconsistent with a claim of the widow to have one-third of the house set apart for her use as dowress, but that the deprivation of dower for a time in part of the real estate was not sufficient to put her to her election as to the residue of the estate.

Cowan v. *Besserer*, 5 O. R. 624, followed.

The widow was held put to her election as to both houses.

The judgment in *Amsden* v. *Kyle*, 9 O. R. at p. 441, corrected. *Leys* v. *The Toronto General Trusts Company*, 603.

WILLS ACT.

See WILL 5.

WINDING-UP ACT (Dom.)

See COMPANY, 1, 3.

WINDING-UP PROCEEDINGS.

See COMPANY, 1, 2, 3.

WORKMAN'S COMPENSATION FOR INJURIES' ACT.

See MASTER AND SERVANT, 1, 2.

WITNESSES.

Absence of, to document intended as a will.]—*See* INSURANCE, 4.

Being interested.]—*See* CRIMINAL LAW, 2.

Devise to witness to a will.]—*See* WILL, 11.

WORDS.

"*Absolutely.*"]—*See* WILL, 5.

"*Children.*"]—*See* INSURANCE, 6.

"*Construction.*"]—*See* DRAINAGE TRIALS ACT, 1891.

"*Die without issue.*"]—*See* WILL, 3.

"*Die without lawful issue.*"]—*See* WILL, 3.

"*In my lifetime.*"]—*See* WILL, 5.

"*In the event of her death.*"]—*See* WILL, 5.

"*Legal heirs.*"]—*See* INSURANCE, 1.

"*Letting, hiring, and otherwise departing.*"]—*See* RAILWAYS, 1.

"*Located and maintained.*"]—*See* RAILWAYS, 2.

"*Longest liver,*" *meaning of.*]—*See* WILL, 3.

"*My property*" *read into a will.*]—*See* WILL, 2.

"*Other,*" *meaning of.*]—*See* WILL, 3.

"*Owner.*"]—*See* LIEN, 3.

"*Operation.*"] — *See* DRAINAGE TRIALS ACT, 1891.

"*Payments.*"]—*See* LIEN, 2.

"*Place.*"]—*See* WILL, 6.

"*Sell and absolutely dispose of.*"]—*See* MORTGAGE, 1.

"*Survivor,*" *meaning of.*] — *See* WILL, 3.

WRONGFUL ACTION.

See MALICIOUS PROSECUTION.