A COLLECTION OF NOTES OF UNREPORTED CASES

IN THE

SUPREME COURT OF CANADA

From its Organization, in 1875, to 1st January, 1907

COMPILED FROM THE RECORDS

BY

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SOMETIME A LAW REPORTER OF THE COURT

TORONTO, CANADA:
THE CARSWELL COMPANY, LIMITED
1907

CONTENTS.

ERRORS AND OMISSIONS.

Errors and omissions in citations of cases have been corrected in the List of the Cases Cited.

Page 12, line 21, the reference should be to *Severn* v. *The Queen*.

Page 35, line 26, add *re Arabin*, p. 95 *post*; *re Tellier*, p. 100 *post*.

Page 50, last line, read "16 N. S. Rep. 37."

Page 53, line 3 from bottom of page, read "22 N. B. Rep. 576."

Page 113, line 13, for "larger" read "longer."

Page 179, line 4, for "8" read "68."

PREFACE.

Prior to 1896, when the present system of reporting the cases before the Supreme Court of Canada was put into force, under regulations by the Minister of Justice, there had been a number of appeals and references decided and opinions rendered by the judges, which have never been published in the official reports of the court or noted in any of the digests, or Mr. Cameron's collection of cases. Since that time, there have been some cases in which appeals stood dismissed upon equal division of opinion among the judges, which, on further appeal, have been finally decided in the Privy Council, and have, consequently, become useful for reference as precedents or otherwise. In a large number of cases since the organization of the court, in 1875, appeals have been summarily decided, settled or abandoned, and there has been nothing published to afford means of reference to what happened in relation to them.

It is the object of the compiler of this collection, by the present work, to afford ready reference to the decisions hitherto unreported, and the disposal of all these classes of cases or matters which have come before the court, and thus furnish a completed published record of them to the present time.

Ottawa, Canada, 1st January, 1907.

NAMES

OF

CASES REPORTED OR NOTED.

A.

B.

G.

H.

S.

T.

NAMES OF CASES CITED.

G.

H.

S.

T.

U.

V.

W.

Z.

A COLLECTION OF

NOTES AND DECISIONS

OF CASES IN

The Supreme Court of Canada

1875-1907

[S. C. File No. 2.]

KELLY v. FANE.

APPEAL from the Supreme Court of Prince Edward Island.

Entered, but never prosecuted.

(7th March, 1876.)

IN RE "THE BROTHERS OF THE CHRISTIAN SCHOOLS IN CANADA."

1876

*April 4.

Legislative jurisdiction—Constitutional law—Education—Companies—Private bills—Questions referred for opinions—Construction of statute—B. N. A. Act, 1867, ss. 92, 93—38 Vict. ch. 11, s. 53 (D.).

The incorporation of a society as a company of teachers for the Dominion of Canada is *ultra vires* of the Parliament of Canada.

Per RITCHIE, C.J.—It is doubtful whether the judges of the Supreme Court of Canada should express opinions as to the constitutional right of Parliament to pass a private bill, in virtue of the provisions of section 53 of the Supreme and Exchequer Courts Act, 38 Vict. ch. 11 (D.).

NOTE.—Cf. *Exp. Renaud et al.* (14 N. B. Rep. 273; 3 Rev. Crit. 132); Doutre on the Constitution of Canada, pp. 325-329. Also R. S. C. (1906) ch. 139, sec. 61.

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*PRESENT: RITCHIE, C.J., and STRONG and FOURNIER, JJ.

1876

IN RE CHRISTIAN BROTHERS' SCHOOLS.

REFERENCE from the Senate of Canada (Senate Journals, 1876, p. 155) to the judges of the Supreme Court of Canada, under section 53 of the Supreme and Exchequer Courts Act, 38 Vict. c. 11, for their opinion as to whether or not a bill intituled "An Act to incorporate the Brothers of the Christian Schools in Canada" was a measure falling within the class of subjects exclusively allotted to provincial legislatures under section 92, sub-section 11 of the "British North America Act, 1867," relating to "The Incorporation of Companies with Provincial Objects;" and section 93 relating to "Education."

Their Lordships recited the provisions of the bill, as submitted, by which it was proposed to incorporate the society as a company of teachers with powers to exercise their functions as such throughout the whole of the Dominion of Canada, and transmitted the following opinions:—

STRONG and FOURNIER, JJ.—In pursuance of the order of reference of your Honourable House of the fourth day of April, 1876, we have considered the bill intituled "An Act to incorporate the Brothers of the Christian Schools in Canada," and we are of opinion that it is a measure which falls within the class of subjects exclusively allotted to provincial legislatures under section 93 of "The British North America Act, 1867."

RITCHIE, C.J.—I doubt if the legislature, by the 53rd section of the "Supreme and Exchequer Courts Act," intended that the judges should, on the reference of a private bill to them, express their opinion on the constitutional right of the Parliament of Canada to pass the bill, and, for that reason, I have not joined in the accompanying opinion, and not because I differ from the conclusion of the learned judges who have signed it.

Opinion transmitted to Senate.

[S. C. File No. 5.] 1876

ANDERSON v. THE NORTHERN RAILWAY COMPANY OF CANADA.

APPEAL from the Court of Appeal for Ontario (25 U. C. C. P. 301).

Entered, but never prosecuted.

(19th May, 1876.)

[S. C. File No. 13.]

PERKINS v. NYE.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed with costs for want of prosecution.

(See Stephens' Digest, vol. 2, p. 678.)

(12th February, 1881.)

[S. C. File No. 37.]

G. G. DUNNING & SONS v. GIROUARD ET AL.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed with costs for want of prosecution.

(18th September, 1877.)

1877

[S. C. File No. 38.]

MILNER v. HAYS.

APPEAL from the Supreme Court of Nova Scotia.

Entered, but never prosecuted.

(17th July, 1877.)

(See 11 N. S. Rep. 522.)

[S. C. File No. 42.]

CROSS v. THE BRITISH AMERICA ASSURANCE CO.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side (22 L. C. Jur. 10).

Entered, but never prosecuted.

(15th September, 1877.)

[S. C. File No. 49.]

POPE v. MACDONALD.

APPEAL from the Supreme Court of Prince Edward Island.

Entered, but never prosecuted.

(13th November, 1877.)

[S. C. File No. 52.] 1879

GAREAU v. GAREAU.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Not prosecuted. Dismissed, without costs.

(20th June, 1879.)

(See 24 L. C. Jur. 248.)

[S. C. File No. 55.]

ROBINSON v. SULLIVAN.

APPEAL from the Supreme Court of New Brunswick.

The case was heard, by consent, on the factums filed, and the appeal dismissed with costs.

(15th April, 1879.)

[S. C. File No. 64.]

BREDON v. BANNATYNE.

APPEAL from the Court of Queen's Bench for Manitoba.

Settled out of court.

(4th February, 1879.)

1879 [S. C. File No. 66.]

YUILE v. SIMPSON.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

After the hearing of the case judgment was reserved, and subsequently the appeal was allowed to be struck off the list.

(24th January, 1879.)

(See 22 L. C. Jur. 229.)

[S. C. File No. 68.[

1878

*March 16.

IN RE FRASER.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Appeal—Special leave to proceed in formâ pauperis—Dispensing with security for costs — Mode of bringing appeal — Construction of statute—38 Vict. ch. 11 (D.) ss. 24, 28, 31 and 79—Right of appeal.

The approval of security for costs is the proper mode of granting leave to the Supreme Court of Canada. Neither the Supreme Court of Canada, nor a judge thereof, has power to grant leave to bring an appeal *in formâ pauperis* or to dispense with security for costs.

The powers given under section 24 of the Supreme and Exchequer Courts Act, 38 Vict. ch. 11 (D.), are restricted to proceedings taken subsequently to the institution of the appeal, where the statute and existing rules do not apply; the procedure may be in conformity with that followed by the Judicial Committee of the Privy Council, but the right of appeal arises solely under the statute, which can give no power respecting the exercise of prerogative rights such as may be advised by the Judicial Committee.

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* PRESENT: RICHARDS, C.J., in Chambers.

1878

IN RE FRASER.

NOTE.—This case is noted in Cass. Dig. (2 ed.), p. 695, and is reproduced here with the notes of the Chief Justice.

(Cf. *Dominion Cartridge Co.* v. *McArthur*, Cout. Dig. 124; *Fraser* v. *Abbott*, Cout. Dig. 111.)

APPLICATION, in chambers, for special leave to appeal from the judgment of the Court of Queen's Bench, appeal side, Province of Quebec, in the case of *Fraser* v. *Abbott* (see Stephens' Digest, vol. 2, p. 644), and to dispense with the giving of security for the costs of the appeal as required by the statute.

Upon the application His Lordship, the Chief Justice, delivered judgment, refusing the application, without costs, as follows:—

RICHARDS, C.J.—I do not consider this court or a judge has any power to allow an appeal, either *in formâ pauperis*, or in any other way. The only right to bring an appeal here arises under the statute, and that must be exercised according to the statute. The Privy Council advises Her Majesty to exercise her prerogative rights to grant an appeal, and she may dispense with sureties, and allow an appellant to prosecute an appeal *in formâ pauperis*, but this court has no such power.

The 28th section of the Supreme and Exchequer Court Act declares that no writ shall be required or issue to bring an appeal in any case to or into this court, but it shall be sufficient that the party desiring so to appeal shall, within the time thereinbefore limited in the case, have given the security required, and obtained the allowance of the appeal.

The 31st section declares that no appeal shall be allowed (except only the case of appeal in proceedings for or upon a writ of habeas corpus) until the appellant has given proper security to the extent of five hundred dollars, to the satisfaction of the court from whose judgment he is about to appeal, or a judge thereof, that he will effectually prosecute his appeal, and pay such costs and damages as may be

1878

IN RE FRASER.

awarded in case the judgment appealed from be affirmed. Provided, that the section should not apply to appeals in election cases.

The 28th section shows the mode of bringing the appeals into this court is giving security in proper time and obtaining the allowance of the appeal; and the 31st section declares that no appeal shall be allowed until the proper security to the extent of $500 is given to the satisfaction of the court whose judgment is appealed from.

This court has decided that the approving of the security is a mode of allowing the appeal, and until that is done I fail to see how the case can be brought to or before this court. I do not think I have the power of granting the order applied for, and I must therefore refuse it.

I do not consider the 24th section of the Act gives this court the power to allow appeals because Her Majesty may be recommended to allow appeals by the Judicial Committee of the Privy Council, nor do I think it is in the power of the judges of this court to make rules or orders for the allowance of appeals though such rules as to proceedings in appeal may be made by them when the statute or rules do not apply to the proceedings in the appeal. Such proceedings may be in conformity with those of the Judicial Committee of Her Majesty's Privy Council.

I have also considered the 79th section in relation to this matter, and do not consider it gives the court or judge any power to grant or to make rules for the granting the prayer of a petition to be allowed to have or prosecute an appeal *in formâ pauperis*.

I have looked at the cases referred to in Mr. Macpherson's book, but, as I have already intimated, I do not think this court has the power to allow an appeal, though Her Majesty in Her Privy Council has undoubtedly a right to do so, as well as to dispense with the security.

Application refused without costs.

[S. C. File No. 70.] 1878

HUS v. MILLET.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Not prosecuted. Dismissed with costs.

(17th April, 1878.)

(See 2 Legal News, 229.)

[S. C. File No. 75.]

THE CANADA FIRE AND MARINE INSURANCE CO. v. THE NORTHERN ASSURANCE COMPANY OF ABERDEEN AND LONDON.

APPEAL from the Court of Appeal for Ontario.

Entered, but never prosecuted.

(6th May, 1878.)

[S. C. File No. 78.]

IN RE MARGARET WATERS.

WRIT of habeas corpus issued by order of HENRY, J., upon a commitment by the Police Magistrate of the City of Ottawa.

On return of the writ the prisoner was discharged.

(21st May, 1878.)

1878

[S. C. File No. 79.]

SHANNON v. THE GORE DISTRICT MUTUAL FIRE INSURANCE COMPANY.

APPEAL from the Court of Appeal for Ontario (2 Ont. App. R. 396).

Entered, but never prosecuted.

(31st July, 1878.)

[S. C. File No. 80.]

IN RE CYRILLE GOSSELIN.

PETITION for writ of habeas corpus on a commitment by the acting Police Magistrate of the City of Ottawa.

Petition dismissed.

(30th July, 1878.)

[S. C. File No. 81.]

PLAMONDON v. WAIT.

APPEAL from the Court of Appeal for Ontario.

Dismissed with costs, after hearing.

(7th May, 1878.)

[S. C. File No. 85.]

1879

*Feb. 6, 12.
*June 19.

THE WESTERN COUNTIES RAILWAY COMPANY (DEFENDANTS)

APPELLANTS;

AND

THE WINDSOR AND ANNAPOLIS RAILWAY COMPANY (PLAINTIFFS)

RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—Jurisdiction—Supreme Court Act (1875), 38 Vict. ch. 11—Demurrer—Final Judgment—Costs.

On appeal from a judgment overruling a demurrer (12 N. S. Rep. 376; Russ. Eq. Dec. 287);

Held, per FOURNIER, TASCHEREAU and GWYNNE, JJ. (THE CHIEF JUSTICE and STRONG, J., *contra*), that, under the circumstances, the judgment appealed did not dispose of the matters in controversy finally, and the appeal was quashed for want of jurisdiction under the Supreme Court Act of 1875, with costs of a motion to quash.

(Cf. 7 App. Cas. 178.)

APPEAL from the judgment of the Supreme Court of Nova Scotia (12 N. S. Rep. 376), affirming the judgment of the judge in equity (Russ. Eq. Dec. 287), overruling a demurrer by the defendants, appellants.

When the case was first on for hearing (6th Feb., 1879), counsel objected that points not taken in the factum were being argued, and the hearing was enlarged (Cout. Dig. 1129). On the hearing being resumed (12th Feb., 1879), the plaintiffs, respondents, moved to quash the appeal for want of jurisdiction.

The circumstances under which the appeal was taken fully appear in the reports of the decisions in the courts below.

*PRESENT: SIR WILLIAM RITCHIE, C.J., and STRONG, FOURNIER, TASCHEREAU, GWYNNE and HENRY, JJ.

1879

WESTERN COUNTIES RAILWAY CO. v. WINDSOR AND ANNAPOLIS RAILWAY CO.

McCarthy, Q.C., and *H. McD. Henry*, for the motion. The judgment appealed from is not final, and the matters involved in the demurrer, which was thereby dismissed, are still open to the parties upon the hearing on the merits. There can, therefore, be no appeal to the Supreme Court of Canada, under the provisions of the Act, 38 Vict. ch. 11. As to the question of jurisdiction, we rely upon Mitford Ch. Pl. 180; Conkling, U. S. Courts, 36; *Rutherford* v. *Fisher* (1); *Beebe* v. *Russell* (2); *Bently* v. *Jones* (3); *King* v. *Stafford* (4).

Bethune, Q.C., contra. We submit that the words of section 17 of the Supreme Court Act, 1875, when read in connection with section 11, give this court jurisdiction to entertain appeals from judgments overruling demurrers; the court must construe these sections together in such a manner as to make them each operative and effectual; the court has already done so in several cases. The judgment is final as to the point presented for decision: *Wallace* v. *Bossom* (5); Daniel, Ch. Prac. (5th ed.), 850; *Walker* v. *Jones* (6); *Bickford* v. *Grand Junction Railway Co.* (7); *Nicholls* v. *Cumming* (8); *The Queen* v. *Severn* (9); *The Queen* v. *Taylor* (10).

On 19th June, 1879, the appeal was quashed for want of jurisdiction, the CHIEF JUSTICE and STRONG, J., dissenting. The minutes, taken by the Registrar in court, at the time when judgment was pronounced, state the reasons as follows:

The CHIEF JUSTICE was of opinion that, although coming up on a demurrer, the judgment appealed from was final and appealable, and that the motion to quash the appeal should be dismissed.

(1) 4 Dallas, 22.
(2) 19 How. 283.
(3) 4 How. Pr. 334.
(4) 4 How. Pr. 30.
(5) 2 Can. S. C. R. 488
(6) L. R. 1 P. C. 50.
(7) 1 Can. S. C. R. 696.
(8) 1 Can. S. C. R. 395.
(9) 2 Can. S. C. R. 70.
(10) 1 Can. S. C. R. 65.

STRONG, J. (orally) expressed his concurrence with the opinion of the CHIEF JUSTICE, as he considered that the judgment appealed from was a final one within the meaning of the statute.

FOURNIER, J., was of opinion that the appeal should be quashed, as the judgment appealed from was on a demurrer and not appealable.

TASCHEREAU, J., concurred in the opinion of FOURNIER, J.

GWYNNE, J., was of opinion that the appeal should be quashed, as the judgment dismissing the demurrer was not a final judgment within the meaning of the Supreme Court Act, 1875.

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

Appeal quashed, with costs of a motion to quash.

Solicitor for the appellants, *N. H. Meagher.*
Solicitor for the respondents, *Hugh McD. Henry.*

[S. C. File No. 88.]

THE COUNTY OF BROME v. COOEY.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

On consent filed, an order was made setting aside the judgment appealed from, and allowing the judgment of the Circuit Court, District of Bedford (21 L. C. Jur. 182), to stand as the final judgment.

(11th June, 1879.)

1878

[S. C. File No. 89.]

IN RE JANE SMITH.

PETITION for a writ of habeas corpus upon a commitment by the Police Magistrate of the City of Ottawa.

By order of HENRY, J., the petitioner was discharged from custody.

(27th November, 1878.)

[S. C. File No. 91.]

IN RE MARY STANLEY ET AL.

PETITION for writ of habeas corpus on a commitment by the Police Magistrate of the City of Ottawa.

On the return of the writ, HENRY, J., refused to discharge the petitioners from custody.

(9th December, 1878.)

[S. C. File No. 95.]

1879

IN RE JOHN DUNNING.

PETITION for writs of habeas corpus and certiorari on commitment by a magistrate at the City of Ottawa, in the County of Carleton, in Ontario.

On the return of the writs, an order was made by HENRY, J., discharging the prisoner from custody.

(13th January, 1879.)

[S. C. File No. 95.] 1879

IN RE EDWARD O'BRIEN.

PETITION for writs of habeas corpus and certiorari on commitment by a magistrate at the City of Ottawa, in the County of Carleton, in Ontario.

On the return of the writs, an order was made by HENRY, J., discharging the prisoner from custody.

(13th January, 1879.)

[S. C. File No. 97.]

IN RE CHARLES C. PARKER.

PETITION for a writ of habeas corpus upon a commitment by the Police Magistrate of the City of Ottawa, filed and writ issued, but no further proceedings taken.

(15th January, 1879.)

[S. C. File No. 99.]

ROY v. MARTIN.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed, for want of prosecution.

(29th January, 1879.)

1879

*Dec. 27.

1880

*Jan. 10.
**April 10.
**June 10.

[S. C. Files Nos. 100, 101.]

MONTMORENCY ELECTION CASE—VALIN v. LANGLOIS—LANGLOIS v. VALIN.

Practice—Costs—Counsel fee.

MOTION, in chambers, by way of appeal from the order on taxation of costs by the Registrar of the Supreme Court of Canada, by which an allowance of $25 was taxed to cover all fees to attorney and counsel on the appeal, to have a fee of $400 taxed instead thereof, or for revision of the taxation, and an order directing the Registrar to increase the fee to such an amount as the court might direct.

The arguments on the motion in chambers were heard on the 27th of December, 1879.

McIntyre, for the motion.

McCaul, contra.

Judgment was reserved and, on the 10th of January, 1880, the following judgment was delivered by

STRONG, J.—My inclination is to direct the Registrar to revise his taxation, but I find that the CHIEF JUSTICE has sanctioned a different principle in the case of *Wallace* v. *Bossom* (1), and although no order was made in that case, I think I ought not to go counter to his view. I think the

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* PRESENT: STRONG, J., in Chambers.

**PRESENT: SIR WM. RITCHIE, C.J., and FOURNIER, TASCHEREAU, GWYNNE and HENRY, JJ.

(1) NOTE.—The case of *Wallace* v. *Bossom* is reported on the merits (2 Can. S. C. R. 488), but no record is to be found of the decision of the Chief Justice (SIR W. B. RICHARDS), although upon the bill of costs, as taxed, a pencilled memorandum appears as follows: "$20 only to be allowed if decided that appellant not entitled to counsel fee; $60 if a counsel fee."

parties had, therefore, better ask permission to speak to the case shortly when the court meets on 3rd February next, 1880. 1880

MONTMORENCY ELECTION CASE.

MOTION to the Court in banc.

On 10th April, 1880, the motion was renewed before the full court and judgment was reserved, after hearing counsel.

On 10th June, 1880, judgment was delivered dismissing the appeal with costs, on the view taken by the CHIEF JUSTICE, TASCHEREAU and GWYNNE, JJ.

FOURNIER and HENRY, J.J., dissented, taking the view that the motion ought to be granted.

No order was made as to the costs of the motion.

Motion dismissed.

[S. C. File No. 102.]

HALL v. VILLE DE LEVIS. 1879

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Appeal entered, but not prosecuted.

(22nd March, 1879.)

[S. C. File No. 105.]

FRASER v. THE QUEEN.

APPEAL from the Exchequer Court of Canada.

Appeal entered, but never prosecuted.

(14th February, 1879.)

1879

[S. C. File No. 111.]

IN RE GEORGE DAVIS.

PETITION for writs of habeas corpus and certiorari upon a commitment by the Police Magistrate of the City of Ottawa.

Petition filed and writs of habeas corpus and certiorari issued, but no further proceedings taken.

(15th March, 1879.)

[S. C. File No. 113.]

HOWE v. THE HAMILTON AND NORTH-WESTERN RAILWAY CO.

APPEAL from the Court of Appeal for Ontario (3 Ont. App. R. 336).

Appeal entered, but never prosecuted.

(2nd May, 1879.)

[S. C. File No. 121.]

1880

PETERKIN v. McFARLANE ET AL. AND BURKE.

APPEAL from the Court of Appeal for Ontario (see 6 Ont. App. R. 254).

After hearing, judgment was reserved and subsequently the appeal was dismissed with costs.

(21st June, 1880.)

(Cf. *Rose* v. *Peterkin*, (13 Can. S. C. R. 677; Cass. Dig. (2 ed.), 535; Cout. Dig. 1232.)

[S. C. File No. 129.] 1879

KETCHUM v. LAWRENCE ET AL.

APPEAL from the Court of Appeal for Ontario (4 Ont. App. R. 92).

After hearing of the arguments on the merits, the case was settled out of court.

(6th December, 1879.)

[S. C. File No. 133.]

NORTH ONTARIO ELECTION CASE—WHEELER v. GIBBS. 1881

*March 3.

Taxation of costs—Stay of execution—Setting-off costs in Court below—Amending minutes of judgment—Practice.

APPEAL from the Controverted Elections Court (see 3 Can. S. C. R. 374, and 4 Can. S. C. R. 430).

Execution issued out of the Supreme Court on 27th January, 1881, for the costs taxed and allowed to the appellant. On 5th February, 1881, TASCHEREAU, J., on motion on behalf of the respondent, ordered stay of proceedings upon the writ of fi. fa. until the then next sittings of the court.

On 15th February, 1881,

MOTION on behalf of the respondent for an order amending the decree of the court made on 10th June, 1879, by making provision in respect to the costs in the Court of Queen's Bench for Ontario, and ordering payment to the petitioner of the costs which had been allowed to him in respect of so much of his petition in which he was successful

* PRESENT: SIR WILLIAM RITCHIE, C.J., and STRONG, HENRY, TASCHEREAU and GWYNNE, JJ.

1881

WHEELER v. GIBBS.

and judgment rendered in his favour and not appealed against, and that such costs should be set off against the costs allowed to the appellant in the Supreme Court of Canada, and for stay of proceedings, etc.

On 3rd March, 1881,

THE COURT delivered a judgment ordering that the costs which had been previously allowed to the appellant in the Supreme Court of Canada should be set off against whatever costs might be taxed and allowed to the respondent in the court below, and should be satisfaction *pro tanto* of said last mentioned costs, when so set off, and that all proceedings upon the execution should, in the meantime, be stayed.

Motion granted.

[Cf. *Rutledge* v. *United States S. & L. Co.* (38 Can. S. C. R. 103).]

1879

[S. C. File No. 138.]

FAIRBANKS v. TUCKER.

APPEAL from the Supreme Court of Nova Scotia.

Appeal dismissed for want of prosecution.

(13th September, 1879.)

[S. C. File No. 150.]

ROSSIN HOUSE HOTEL COMPANY v. CROSSMAN.

APPEAL from the Court of Appeal for Ontario.

Not prosecuted.

(13th October, 1879.)

(S. C. File No. 151.) 1879

ROSSIN HOUSE HOTEL COMPANY v. IRISH.

APPEAL from the Court of Appeal for Ontario.

Not prosecuted.

(13th October, 1879.)

[S. C. File No. 158.]

BERGER v. POITRAS. 1880

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side (10 R. L. 214).

Appeal entered; motion to dismiss refused by HENRY, J., but the appeal was not further prosecuted.

(22nd January, 1880.)

[S. C. File No. 163.]

IN RE JOHN STEWART—THE KINGSTON ELECTION CASE. 1880

*Feb. 5.

Controverted election—Appeal to Supreme Court of Canada—Jurisdiction—Practice—37 Vict. c. 10, ss. 35, 56 (D.), 38 Vict. c. 11, s. 48 (D.).

APPLICATION, *ex parte*, by John Stewart, for an order that his name should be substituted for that of the petitioner in the controverted election case, under the provisions of the Controverted Elections Act, 1874, and to have leave to appeal from the judgment of the Chief Justice of

* PRESENT: HENRY, J., in Chambers.

1880

KINGSTON ELECTION CASE.

the Court of Common Pleas for the Province of Ontario, rendered on the 26th of December, 1879.

The questions at issue are stated in the judgment of His Lordship Mr. JUSTICE HENRY, to whom the application was made, in chambers.

The application was made by Mr. Stewart, in person, and no counsel were heard.

The application was refused, and the following judgment delivered by

HENRY, J.—An application was made, *ex parte*, to me, at chambers, a few days ago by Dr. John Stewart, an elector of the electoral division of Kingston, Ontario, for orders for an appeal from the decision of the learned Chief Justice of the Court of Common Pleas in the case of two election petitions; one against the return of the sitting member for that district, and the other against another candidate at the same election.

Although no notice of the application was shewn to have been given, I permitted the applicant to make the motion and to file an affidavit and other documents in support of it, but not with the intention of passing the order, even if I considered there were any grounds for the motion, without hearing the parties interested.

At the hearing, I intimated to the applicant that I had no power in such a case, but it may prevent any misunderstanding if my rejection of the motion be recorded.

The statutory provision for the appeal to this court in such cases is very plain. Within eight days from the day on which the judge has given his decision, the party against whom it is given is entitled to appeal by depositing one hundred dollars as security for costs, and ten dollars as a fee to the clerk for forwarding the record to this court. Upon receipt of which the registrar of this court shall inscribe the case for hearing. Within three days after such inscription,

or such further time as the judge who tried the petition may allow, notice thereof must be given to the opposite party. It is not necessary to obtain leave from any judge to appeal. The appeal is a matter of right, but contingent on the prescribed conditions being fulfilled. If, therefore, the security be not given within the prescribed time and the fee paid, no appeal lies, and there is no power in a judge of this or any other court to order one.

No security was alleged to have been given or money deposited. The record has not been returned, and therefore, neither this court nor any judge of it has any jurisdiction whatever in the matter.

Application refused.

[S. C. File No. 164.]

THE CREDIT VALLEY RAILWAY CO. v. THE GRAND TRUNK RAILWAY CO.

MOTION for leave to appeal from the Court of Chancery (Ontario), PROUDFOOT, V.C. (27 Gr. 232).

Refused, by TASCHEREAU, J.

(6th February, 1880.)

[S. C. File No. 172.]

CLAYES v. BAKER—MISSISQUOI ELECTION CASE.

APPEAL from the Controverted Elections Court.

Appeal discontinued, and struck off the roll by order of FOURNIER, J.

(13th October, 1880.)

(See 23 L. C. Jur. 194.)

1880 [S. C. File No. 176.]

READ ET AL. v. COPP ET AL.

APPEAL from the Supreme Court of New Brunswick.

Entered, but not prosecuted.

(15th April, 1880.)

1880 [S. C. File No. 177.]

*April 14.
*June 16.

IN RE NEW BRUNSWICK PENITENTIARY.

Constitutional law—Penitentiaries—Imprisonment of criminals—Expense of maintenance—B. N. A. Act, 1867—Legislative jurisdiction of Parliament—Provincial legislation—Practice on references by the Governor-General-in-Council.

The legislative jurisdiction of the Parliament of Canada in respect to the establishment, maintenance and management of penitentiaries, cannot be in any way limited, restricted or affected by any provincial legislation in the Province of New Brunswick, either previous or subsequent to the confederation of the provinces under the British North America Act, 1867.

Where no Dominion statute authorizes the confinement in a penitentiary of certain classes of convicts, who, before the B. N. A. Act, 1867, came into force, might, under the laws then in force, have been sentenced to imprisonment and confined in the Saint John Penitentiary, there is no obligation upon the Government of Canada to make provision for their imprisonment and maintenance, at the expense of the Dominion, in the penitentiary.

Semble, that, on references by the Governor-General-in-Council, it is improper for the Supreme Court of Canada to express opinions upon cognate subjects not falling within the terms of the questions as submitted for consideration.

SPECIAL CASE referred by the Governor-General-in-Council, on the 8th of April, 1880, to the Supreme Court of

* PRESENT: RITCHIE, C.J., and FOURNIER, HENRY, TASCHEREAU and GWYNNE, JJ.

Canada, for hearing and consideration under the provisions of section 52 of the Supreme and Exchequer Courts Act.

1880

IN RE NEW BRUNSWICK PENITENTIARY

The reference was in regard to the power of the Parliament of Canada to legislate in certain respects as to prisoners to be confined in the New Brunswick Penitentiary. The legislation affecting the subject, and the material facts relating to the questions submitted, may be shortly stated as follows:—

In 1836, the Act 6 Wm. IV. ch. 30 (N.B.), empowered the justices of the City and County of Saint John to erect a House of Correction; and, in 1837, the Act of 7 Wm. IV. ch. 19 (N.B.), gave them further powers as to borrowing funds for that purpose. 1 Vict. ch. 15 (N.B.), authorized them to establish the House of Correction; 2 Vict. ch. 30 (N.B.), provided for its regulation and government; and 4 Vict. ch. 36, granted funds towards its cost. Further provincial legislation (4 Vict. ch. 44), provided for the taking of accounts relating to the House of Correction, and the vesting thereof in Her Majesty; payment by the Government of its cost; and by sections 14 and 15, authorized the commitment of "rogues, vagabonds, stragglers, idle, suspicious, or disorderly persons to the House of Correction." By 5 Vict. ch. 25, it was given the name of the Provincial Penitentiary; in the same year a grant was made to reimburse advances made in respect thereof. By 6 Vict. ch. 14, a portion of the ground was returned to the justices. A further grant of funds to the justices by 9 Vict. ch. 56, and another Act, 11 Vict. ch. 28, related to the management of the Provincial Penitentiary. The Act, R. S. N. B. (1854), ch. 91, secs. 12, 13 and 14, authorized the commitment to, and confinement therein, of vagabonds, suspicious or disorderly persons, and persons sentenced to be imprisoned in any house of correction or gaol with hard labour.

No change in these statutes appeared to have been made up to the time of confederation of the provinces under the B. N. A. Act, 1867; the penitentiary, before and up to the

1880

IN RE NEW BRUNSWICK PENITENTIARY

time of the union of the provinces, was used as a place for the imprisonment and maintenance therein of such classes of offenders as were specified in the statutes mentioned; it was the only penitentiary in the province before and at the time of union, the only other prisons being the common or county gaols, police stations and lock-up houses. At the time of the union, the Dominion of Canada took possession and charge of this penitentiary under section 9 of the B. N. A. Act, 1867.

The legislation by the Parliament of Canada affecting the subject of the reference was under the following Acts, viz.: "The Penitentiary Act of 1868," 31 Vict. ch. 75, sec. 11 (repealed by the "Penitentiary Act, 1875," wherein it was re-enacted as sec. 14); 32 & 33 Vict. ch. 29, secs. 93 and 96; 32 & 33 Vict. ch. 36, sec. 5; 33 Vict. ch. 30, sec. 5; 36 Vict. ch. 52; "The Penitentiary Act, 1875," 38 Vict. ch. 44, secs. 14, 15 and 68; 40 Vict. ch. 4, sec. 5; "The Penitentiary Act, 1877," 40 Vict. ch. 38, sec. 20; 41 Vict. ch. 20; 42 Vict. ch. 42.

The Act, 40 Vict. ch. 4, sec. 5, provided that when a joint penitentiary for the Provinces of Nova Scotia, New Brunswick, and Prince Edward Island was proclaimed, such building should be the penitentiary for those provinces, and that "offenders thereafter sentenced . . . to imprisonment for life, or for a term of two years or more," should be imprisoned and undergo their sentence therein. The building was constructed at Dorchester, N.B., and duly proclaimed as such penitentiary.

The Government of New Brunswick contended that under the B. N. A. Act, 1867, the Parliament of Canada had not power so to legislate as to prevent the sentencing to the Saint John Penitentiary and the maintenance therein, at the expense of the Dominion of Canada, of that class of persons who, before the 1st of July, 1867, might have been sentenced there under the laws then in force in the late Province of New Brunswick. On the other hand, the

Government of Canada contended that the Parliament of Canada had full legislative authority to pass the several Acts above referred to in respect to the joint penitentiary so established at Dorchester.

The opinion of the Supreme Court of Canada was desired upon the following questions:—

(1) Had the Parliament of Canada legislative authority to pass the several Acts above referred to, in so far as they would, after a certain date, restrict the admission to the Saint John Penitentiary? If not, in what respects are such Acts not within the powers of Parliament?

(2) Is there any legal obligation upon the Dominion Government, which the Parliament of Canada cannot affect, to make provision for the imprisonment and maintenance, at the Dominion expense, in the penitentiary, of the class of persons who, before the 1st July, 1867, under the laws then in force, have been sentenced to the Saint John Penitentiary?

Lash, Q.C., Deputy Minister of Justice, appeared for the Attorney-General of Canada.

King, Q.C., Attorney-General of New Brunswick, appeared for the Government of the Province of New Brunswick.

After hearing counsel on behalf of both Governments interested, the court reserved the subject for further consideration, and, on a subsequent day, delivered the following opinion:

BY THE COURT.—The opinion of the court is respectfully certified to His Excellency the Governor-General-in-Council, as follows:—

By the 91st section of the British North America Act, 1867, the Dominion Parliament has the exclusive power of legislation in reference to criminal law, except the constitution of courts of criminal jurisdiction, but including the

1880

IN RE NEW BRUNSWICK PENITENTIARY

procedure in criminal matters, and also as to the "establishment, maintenance and management of penitentiaries."

Under one, or other, or both, of these powers, the Dominion Parliament may pass any law which shall define a criminal offence and the punishment to be imposed, and, as a necessary consequence, may declare for what offences and for what terms of imprisonment convicted criminals may be sentenced to and confined in the Dominion penitentiaries, and may change the law in respect thereof from time to time as Parliament in its wisdom may deem expedient and proper, and the power so conferred on Parliament is in no way limited, restricted or affected by any legislation in the Province of New Brunswick, either previous to or subsequent to confederation.

While, of course, it is the duty of the Dominion to make provision for the imprisonment and maintenance of prisoners authorized to be and who are confined in any Dominion penitentiary, if the Dominion law does not now authorize to be sent to a Dominion penitentiary a certain class of prisoners who, before the first of July, 1867, might, under the laws then in force, have been sentenced to imprisonment and confined in the Saint John Penitentiary, it is self-evident that there can be no obligation on the part of the Dominion Government

to make provision for the imprisonment and maintenance, at the Dominion expense, in the penitentiary

of such class of persons, for the single reason that there is no law justifying their being sentenced to or confined in a penitentiary.

Mr. King, Q.C., on behalf of the Province of New Brunswick, desired the court to read and answer the questions submitted as if couched in these terms:—

Upon whom lies the responsibility of providing a place for the imprisonment and the maintenance of persons sentenced for criminal offences against the laws of Canada *for less than two years* with hard labour; namely, whether upon the provincial or Dominion Government?

1880

IN RE NEW BRUNSWICK PENITENTIARY

Mr. Lash, Q.C., who appeared before the court as counsel for the Government of Canada, contended that this was not within the terms of questions asked, and that the Governor-in-Council did not desire the question, as propounded by Mr. King, to be answered, and, as it is the opinion of the court that the questions submitted cannot be construed as Mr. King suggested, we certify no opinion on the question proposed by him.

Opinion transmitted accordingly.

[S. C. File No. 180.]

1880

IN RE ALBERT McINTYRE.

PETITION for a writ of habeas corpus on a conviction by W. H. Butler, Esq., J.P., at the City of Ottawa.

On 29th April, 1880, TASCHEREAU, J., refused to make an order for the issue of the writ.

On 3rd May, 1880, the writ was ordered to issue, on a subsequent application, by HENRY, J., and, on the return of the writ, the petitioner was discharged from custody.

(17th June, 1880.)

[S. C. File No. 181.]

ROONEY v. ROONEY.

APPEAL from the Court of Appeal for Ontario (4 Ont. App. R. 255).

Appeal entered, but never prosecuted.

(4th May, 1880.)

1880

[S. C. File No. 182.]

THE NATIONAL INSURANCE CO. v. BLACK ET AL.

Appeal—Jurisdiction—Amount in controversy.

PETITION for leave to appeal from the Court of Queen's Bench, Province of Quebec, appeal side.

The action was instituted on 11th June, 1877, to recover $1,800, with interest from 10th November, 1876, and costs, and was dismissed in the Superior Court District of Montreal.

On appeal the Court of Queen's Bench reversed this judgment and condemned the company, defendants, to pay $1,800, with interest from 18th July, 1877, which, at the date of the judgment, amounted to $261, and with costs, then amounting to $602.69. The petitioner contended that the amount involved in the controversy upon the judgment appealed from thus amounted to $2,663.69, and that an appeal would lie to the Supreme Court of Canada. On application to MR. JUSTICE MONK, one of the judges of the court appealed from, the approval of the bond of security for costs on appeal was refused by him on the ground that the amount in controversy was less than $2,000.

The Supreme Court refused to entertain the petition by way of appeal from the decision rejecting the security bond.

Petition dismissed.

(17th May, 1880.)

(See 24 L. C. Jur. 65.)

[S. C. File No. 199.] 1881

MOFFATT v. BELL.

APPEAL from the Supreme Court of New Brunswick.

Dismissed, with costs for want of prosecution.

(15th February, 1881.)

(See 9 N. B. Rep. 261; 20 N. B. Rep. 121.)

[S. C. File No. 208.]

RAY ET AL. v. LOCKHART ET AL.

APPEAL from the Supreme Court of New Brunswick.

Dismissed, with costs.

(11th April, 1881.)

(See 20 N. B. Rep. 129.)

[S. C. File No. 223.]

DOUTNEY v. RICHARD.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side (24 L. C. Jur. 30).

Dismissed, for want of prosecution.

(30th March, 1881.)

1882

[S. C. File No. 225.]

WESTERN COUNTIES RAILWAY CO. AND ATTORNEY-GENERAL FOR CANADA v. THE WINDSOR AND ANNAPOLIS RAILWAY CO.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed, with costs without argument.

(2nd May, 1882.)

(Cf. 7 App. Cas. 178.)

[S. C. File No. 226.]

1881

KENWAY v. KERR.

APPEAL from the Court of Queen's Bench for Manitoba.

Notice given; appeal never prosecuted.

(12th May, 1881.)

[S. C. File No. 228.]

IN RE CLARENCE BAULNE.

SUMMONS to shew cause why a writ of habeas corpus should issue upon a conviction by the Police Magistrate for the City of Ottawa.

Order refused by STRONG, J.

(3rd June, 1881.)

1881

[S. C. File No. 240.]

IN RE JAMES F. B. HELY.

APPLICATION for writs of habeas corpus and certiorari upon a conviction by James Johnston, J.P., at Gloucester, in the County of Carleton, in Ontario.

Fiat for writs granted by STRONG, J., on 16th August, 1881.

On filing of the warrant of commitment and evidence, etc., the fiat was cancelled and the application refused by STRONG, J.

(17th August, 1881.)

[S. C. File No. 244.]

SEWELL ET AL. v. THE BRITISH COLUMBIA TOWING AND TRANSPORTATION CO. ET AL.

MOTION to the Court for leave to appeal *per saltum* from the judgment of the Chief Justice of the Supreme Court of British Columbia, refused with costs.

Subsequently an appeal *de plano* was heard and decided on the merits.

(See 9 Can. S. C. R. 527.)

(25th October, 1881.)

[S. C. File No. 246.]

EVANS v. FLINN ET AL.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed, for want of prosecution.

(10th October, 1881.)

1882 [S. C. File No. 254.]

HUGHES v. HUGHES.

APPEAL from the Court of Appeal for Ontario.

Dismissed, for want of prosecution.

(2nd May, 1882.)

1881 [S. C. File No. 256.]

IN RE GEORGE MASON.

APPLICATION for writs of habeas corpus and certiorari upon a conviction by David Scott and R. C. W. MacCuaig, JJ.P., at the City of Ottawa.

Writs issued on the order of FOURNIER, J., who, on the return of the writs, refused to discharge the prisoner.

(3rd October, 1881.)

1882 [S. C. File No. 263.]

McGREEVY v. MARCHAND.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed with costs for want of prosecution.

(20th February, 1882.)

[S. C. File No. 270.]

1882

IN RE POLLY HAMILTON.

*March 9.
*March 11.

Criminal law — Habeas corpus—Certiorari—Conviction—Keeping a house of "ill-fame"—Reviewing evidence—Construction of statute —29 & 30 Vict. c. 45, ss. 1, 5 (Can.)—R. S. O. (1877), c. 70, ss. 1, 8—Liberty of the subject.

Under the provisions of the Act, 29 & 30 Vict. ch. 45 (Can.), (R. S. O. 1877, ch. 70), it is the duty of the Judge of a Superior Court in Ontario, before whom writs of habeas corpus *ad subjiciendum* and certiorari are returned, to review and consider the evidence upon which the prisoner has been convicted, and to decide as to its sufficiency.

In the absence of proof that the person occupying a house knowingly kept therein persons of bad reputation or guilty of lewd conduct, general evidence that the keeper of the house was of evil reputation, or guilty of lewd conduct, is insufficient to support a conviction for keeping a house of "ill-fame" under the Act 32 & 33 Vict. ch. 28 (D.), and its amendments.

The Queen v. *Mosier* (4 Ont. P. R. 64), and *The Queen* v. *Levêque* (30 U. C. Q. B. 509), referred to.

(NOTE.—Cf. R. S. O. (1887) ch. 70, ss. 1, 5, and R. S. O. (1897) ch. 83,ss. 1, 5. The Act of 1866, 29 & 30 Vict. ch. 45 (Can.), was not consolidated in the Rev. Stats. of Can. 1886. See Sch. B. at p. 2502. See also R. S. L. C, c. 95, ss. 22-26, *Re Trepanier* (12 Can S. C. R. 111); *Ex p. Macdonald* (27 Can. S. C. R. 683), *per* GIROUARD, at pp. 686-7, and *Re Richard* (38 Can. S. C. R. 394.))

APPLICATION, before Mr. JUSTICE HENRY, in Chambers, upon the return of writs of habeas corpus and certiorari, for the discharge of the prisoner from custody in the Common Gaol for the County of Carleton, in Ontario, upon the commitment of the Police Magistrate for the City of Ottawa, who sentenced her to a term of confinement in the Andrew Mercer Reformatory for Females.

The circumstances of the case are stated in the judgment of His Lordship, Mr. JUSTICE HENRY, now reported.

Mosgrove, appeared for the prisoner.

* PRESENT: MR. JUSTICE HENRY, in Chambers.

1882

IN RE HAMILTON.

After hearing counsel on behalf of the prisoner, His Lordship reserved judgment, and, on a subsequent day, ordered that the prisoner should be discharged from custody for reasons stated as follows:—

HENRY, J.—The prisoner was on the fourth day of March instant, convicted by M. O'Gara, Esquire, Police Magistrate in and for the City of Ottawa—

For that she, the said Polly Hamilton, on the twenty-third day of February, A.D. 1882, at the City of Ottawa aforesaid, did unlawfully keep a house of ill-fame contrary to the form of the statute in such case made and provided;

And for which offence she was, by the said Police Magistrate, adjudged

to be imprisoned in the Andrew Mercer Ontario Reformatory for Females for the Province of Ontario at Toronto, and there kept for the space of fifteen months.

On an application made to me on the sixth instant, by petition of the prisoner, attested to, setting forth amongst other things, that the

evidence taken against her before the police magistrate was not sufficient in law to support the said conviction,

I allowed a writ of habeas corpus to issue, and also a writ of certiorari, commanding the police magistrate in question to return the information, evidence, depositions, papers, commitment and proceedings before him taken in connection with the commitment and restraint of liberty of the prisoner.

The prisoner was brought before me under the former writ on the eighth instant, and the papers duly returned by the police magistrate. The prisoner was represented by counsel, but no one appeared to oppose the discharge of the prisoner.

The two writs were issued under the provisions of the statute of Canada, passed in 1866, intituled "An Act for more effectually securing the liberty of the subject," re-enacted in the Revised Statutes of Ontario, chapter 70, page 840:

1882

IN RE HAMILTON.

"Whereas the writ of habeas corpus has been found by experience to be an expeditious and effectual method of restoring any person to his liberty who has been unjustly deprived thereof; and whereas, extending the remedy of such writ and enforcing obedience thereunto, and preventing delays in the execution thereof, will be advantageous to the public; and whereas the provisions made by an Act passed in England in the thirty-first year of King Charles the Second, intituled "An Act for the better securing the liberty of the subject, and for the prevention of imprisonment beyond the seas," only extends to cases of commitment or detainer for criminal or supposed criminal matter.

Therefore Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

Section 1. Where any person shall be confined or restrained of his or her liberty (except persons imprisoned for debt, or by process in any civil suit, or by the judgment, conviction or decree of any court of record, court of oyer and terminer, or general gaol delivery, or court of general sessions of the peace), any of the judges of either of the superior courts of law or equity may, and they are hereby required upon complaint made to them by or on behalf of the person so confined or restrained, if it appears by affidavit or affirmation (in cases where by law an affirmation is allowed), that there is a probable and reasonable ground for such complaint, to award, in vacation time, a writ of habeas corpus *ad subjiciendum* under the seal of the court wherein the application is made directed to the person or persons in whose custody or power the party so confined or restrained is, returnable immediately before the person so awarding the same, or before any judge in chambers for the time being.

See also 29 & 30 Vict. ch. 45, s. 1 (D.).

Section 5 of the Act 29 & 30 Vict. ch. 45 (D.), provides as follows:

In all cases in which a writ of habeas corpus shall be issued under the authority of this Act, or of the said Act of the thirty-first year of the reign of King Charles the Second or otherwise, it shall and may be lawful for the judge or court ordering the issuing of such writ, or for the judge before whom such writ shall be returnable, either in term time or vacation, to direct the issuing of a writ of certiorari out of the court from which such writ of habeas corpus shall have issued, directed to the person or persons by whom or by whose authority any such person shall be confined or restrained of his or her liberty, or other person having the custody or control thereof, requiring him to certify and return to any judge in chambers, or to the court as by the said writ shall be provided, all and singular the

1882

IN RE HAMILTON.

evidence, depositions, convictions, and all proceedings had or taken, touching or concerning such confinement or restraint of liberty, to the end that the same may be viewed and considered by such judge or court, and to the end that the sufficiency thereof to warrant such confinement or restraint may be determined by such judge or court.

The preamble clearly shows that the intention of the legislature was to extend the remedy of the writ of habeas corpus that the provisions of thirty-first Charles the Second, as extending only "to cases of commitment or detainer for criminal or supposed criminal matter," were considered insufficient. Section 5 was therefore enacted to extend the remedy by habeas corpus by providing for the return under writ of certiorari of

all and singular the evidence, depositions, convictions and all proceedings had or taken . . . to the end that the same may be viewed and considered by such judge or court, and to the end that the sufficiency thereof to warrant such confinement or restraint, may be determined by such judge or court.

It is patent to my mind that it is not only the right, but the duty, of the judge to look at and consider the evidence, and decide as to the sufficiency of it. The Act was passed, as the preamble states, to extend the power and duty of the judge, and the object of his considering the evidence is unequivocally stated to be to ascertain the sufficiency of it.

I have but little to consider in regard to the policy of the enactment, but in view of the absolute power of a police magistrate to try, without the consent of the accused before him, not only misdemeanours, but felonies, involving the consequences of lengthened imprisonment and heavy fines, without any appeal from his conviction, it may have been properly considered that some review of his finding should, in the public interest, be provided.

In a case which came before me two years ago, I reviewed and considered the evidence upon which the conviction was had; and finding it amounted to but hearsay of a very unsatisfactory and loose character, I ordered the discharge of the prisoner. Previous to the statute of 1866, before re-

ferred to, no such power existed, and possibly was found unnecessary; but since the passage of that statute two decisions under it have been given in the Court of Queen's Bench in Ontario, one, in 1867, in the case of *The Queen* v. *Mosier* (1), and the other, in 1870, in the case of *The Queen* v. *Leveque* (2).

In the former case the head notes are as follows:

The Act 29 & 30 Vict. ch. 45, had in view and recognizes the right of every man committed on a criminal charge to have the opinion of a judge of a superior court upon the cause of his commitment by an inferior jurisdiction.

The judges of the superior court are bound when a prisoner is brought before them under that statute to examine the proceedings and evidence anterior to the warrant of commitment, and to discharge him if there does not appear sufficient cause for his detention.

Mr. Justice (now CHIEF JUSTICE WILSON) in his judgment in that case, puts the same construction that I have done on the fifth section of the Act, and says:

Adopting the views I expressed I cannot help holding that a judge is bound to examine the proceedings anterior to the warrant, to see if they authorize it; and if they do not, that he is bound to determine whether they warrant the detention, and if not to discharge him.

One of the head notes to the report of the latter cited case is as follows:

Semble—Proceedings having been taken under 29 & 30 Vict. ch. 45 (D.), that the evidence might be looked at, and if so it was plainly insufficient in not shewing that the place in which she was found was within the statute, or that she was a common prostitute.

The witness in that case stated that—Last night, about nine o'clock, the defendant was with a soldier in the barrack yard. He put her up against the wall and took up her clothes, and the soldier struck me.

That was strong circumstantial evidence, but was held insufficient.

Having determined that it is my duty to consider the evidence in this case I shall briefly do so.

(1) 4 Ont. P. R. 64. (2) 30 U. C. Q. B. 509.

1882

IN RE HAMILTON.

The charge against the prisoner is "for keeping a house of ill-fame." It is so charged in general terms both in the information, in the conviction, and in the warrant of commitment. Parties are tried before the police magistrate on the information against them. The evidence is therefore referable to the charge or complaint made in it. The statute, however, allows that a party may be convicted for an offence not formally charged in the information. That, however, does not affect this case, as the same offence is stated in the same words in both the information and conviction, and that, as I before said, is for keeping a house of ill-fame. Whether or not it be necessary to set out in the conviction the circumstances which are relied upon to constitute a house of ill-fame, as to which I here give no opinion, it is at all events necessary to prove them.

I have attentively considered the evidence in this case, and shall briefly review those parts of it in support of the charge as far as I consider necessary.

The first witness examined was William Deane, a constable who said he knew the prisoner and her residence; that he was on duty for a month in that neighbourhood, and passed the house frequently at night; saw men go there between eleven o'clock at night and one in the morning; did not know the men; saw cabs standing there, one at a time, on two occasions. The men went in twos, threes, and singly. There is no business carried on in the house. The prisoner and another girl stop there. He then speaks of being in the house but once, and that was three months previous. The prisoner he found there alone. He does not say what he saw or heard there, and neither he nor any other witness describes the house in any way or how it was furnished, or fitted up, or in what manner occupied. There is nothing, so far, in this testimony as to the character of the house. This is the substance of his evidence, except the statement,

They (referring to the prisoner and Eva Rose) live by prostitution to the best of my knowledge.

So they might, and still even if evidence at all, which it is not, it is not evidence that the prostitution was carried on in that house. He says he speaks only from observing the men go there and what he heard.

Daniel O'Leary, sergeant-major of police, who laid the information, was the next witness examined. He seems to know nothing more of the house than the previous witness. Without further knowledge, how is a judge or jury to know that the men were there for illegal or improper purposes? Without such evidence what right has anyone in a judicial position to assume the guilt of the prisoner?

We cannot convict anyone of a criminal offence by proof of circumstances which do not necessarily shew guilt. We are to construe doubtful transactions in favour of innocence. This witness again, like Deane, says the prisoner and Eva Rose lived by prostitution, but he admits he knows nothing but from hearsay.

The bad reputation of the prisoner and Eva Rose is furnished altogether by hearsay statements. In some of the United States general evidence of public notoriety has been allowed in prosecutions for the keeping of bawdy houses. The meaning of that term is, however, well understood, and the term is a technical one. The term "ill-fame" is one, however, not so well defined. It is used as another term for bawdy-house, but it may properly be understood by many as being a disorderly house, where persons of loose conduct and habits meet solely for drinking, gambling, and other evil practices, other than those in bawdy houses. When, therefore, a witness uses the term generally it may admit of more than one construction, and one witness may construe it differently from another. Before evidence in general terms, as to the charge of keeping a house of ill-fame, is of value, it should be ascertained how the witness intended it to be applied, and what he meant by the term. A woman may have a bad reputation, but proof thereof is not sufficient to convict her of keeping a house of ill-fame, nor would evidence that she herself was guilty of lewd conduct be suffi-

1882

IN RE HAMILTON.

cient unless her house was otherwise a disorderly house. In a charge of that kind it is necessary to shew that she knowingly kept in her house others who were similarly guilty. The only evidence in support of that position is that in respect of Eva Rose. That evidence, however, does not shew any improper conduct on her part after she went to reside with the prisoner. She might have lived by prostitution for ten years previously, but that could not affect the prisoner without proof of knowledge by her of the fact, and that with her knowledge she was guilty of lewd conduct in her house. Not a scintilla of evidence appears, however, on that important point. In other important particulars the charge was unsustained by the evidence.

In this case the circumstances, as far as the evidence goes, are not actually inconsistent with the conclusion of guilt, but in the first place the facts proved are *per se* insufficient, and in the next they are not inconsistent with any other rational conclusion than that the prisoner is guilty. As to the latter there is a total failure.

Sir William Russell in his work on Crimes, Vol. 3, p. 215, says:

> There is no difference between civil and criminal cases with reference to the modes of proof by direct and circumstantial evidence, except that in the former, where civil rights are ascertained, a less degree of probability may be safely adopted as a ground of judgment than in the latter, which affect life and liberty.

There is, however, another presumption of law that is important, to be always remembered when judicially considering a criminal charge, but which is sometimes forgotten, and that is the presumption of law that arises in favour of innocence until the contrary is proved. The proof of the contrary in this case is in my opinion wholly defective.

The desire for shutting up of houses of ill-fame or disorderly houses in any community, and for the prevention of crime generally, is highly commendable, and should be

seconded by all legal means, and by the aid of all judicial officers of every rank, but it must be done in such a way as not to violate most valuable and important principles and rules of evidence upon which depend the safety of life, liberty and property.

1882

IN RE HAMILTON.

Having thus stated my views in this matter, I have only to add that I think the evidence insufficient to warrant the conviction and restraint of liberty of the prisoner, and that she is, in my opinion, entitled to be discharged from custody.

Prisoner discharged from custody.

[S. C. File No. 272.]

1882

*March 27.
*March 30.

IN RE THE QUEBEC TIMBER COMPANY.

Constitutional law—Legislative jurisdiction—Incorporation of trading companies—Foreign corporations—Judicial opinions on references —Private rights— 45 Vict. c. 119 (D.).

It is inexpendient that opinions should be given upon matters referred for examination and report under the provisions of the Supreme and Exchequer Courts Act, where the questions may affect private rights that may come before the court judicially, and which ought not to be passed upon without a trial.

The objects for which the company in question was incorporated, by the statute 45 Vict. ch. 119, are within the jurisdiction of the Canadian Parliament, and are out of the exclusive jurisdiction of provincial legislatures, and consequently such a company may be incorporated by Parliament.

REFERENCE made by resolution of the Senate of Canada, on 24th March, 1882, under the provisions of section 53

* PRESENT: SIR WILLIAM RITCHIE, C.J., and FOURNIER, HENRY, TASCHEREAU and GWYNNE, JJ.

1882

IN RE THE QUEBEC TIMBER COMPANY.

of "The Supreme and Exchequer Courts Act," 38 Vict. ch. 11 (R. S. C. c. 135, s. 38).

A bill intituled "An Act to incorporate the Quebec Timber Company (Limited)," for the incorporation of a manufacturing and trading company with powers to transact business throughout the Dominion of Canada, was referred by the Select Committee of the Senate of Canada on Standing Orders and Private Bills to a sub-committee, which recommended that the Senate should, under its 55th rule, refer the matter to the Supreme Court of Canada.

On motion, it was ordered that the said report should be adopted, and the bill referred as recommended.

The reference was accordingly made and transmitted for examination and report thereon, and more particularly upon the questions following:—

"1. Whether a company already incorporated under the 'Companies Act of 1862 to 1880,' of the Imperial Parliament, for the purposes mentioned in the bill, has a legal corporate existence in Canada; and, if so, whether a second corporate existence can, upon its own application as a company, be given to it by the Canadian Parliament?

"2. Whether the objects for which incorporation is sought are such as take the bill out of the exclusive jurisdiction of the Legislature of the Province of Quebec?"

THE COURT, having examined the bill, and taken it into consideration, reported thereon to the Senate as follows:—

As to the first part of the first question submitted, namely, "Whether a company already incorporated under 'The Companies Act of 1862 to 1880,' of the Imperial Parliament, for the purposes mentioned in the bill, has a legal corporate existence in Canada?" The court pray to be excused from answering this question, on the ground that

1882

IN RE THE QUEBEC TIMBER COMPANY.

the question affects private rights which may come before it judicially, and which ought not to be passed upon without a trial.

As to the second part of the question, "Whether a second corporate existence can, upon its own application as a company, be given to it by the Canadian Parliament?"—this court presumes means—Whether the Dominion Parliament can give the company corporate existence in Canada? The court are of opinion that the Dominion Parliament can incorporate such a company for objects coming within the jurisdiction of the Parliament of the Dominion.

And, as to the second question (above recited):—

The court are of the opinion that the objects mentioned in this bill are within the jurisdiction of the Dominion Parliament, and are out of the exclusive jurisdiction of the Legislature of the Province of Quebec.

The report was duly transmitted to the Clerk of the Senate, together with a copy of the articles of association of the company, and the company was, subsequently, incorporated by the statute, ch. 119 of the Acts of the Parliament of Canada, passed in 1882, 45th Victoria.

[S. C. File No. 273.]

1882

McGREEVY v. PERRAULT.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed, for want of prosecution.

(5th April, 1882.)

1883

[S. C. File No. 277.]

THE QUEEN v. T. STEWART.

APPEAL from the Exchequer Court of Canada.

The appeal depended upon the same evidence and circumstances as the appeal in the case of *The Queen* v. *McLeod* (1), the cases were heard together, and the appeals allowed with costs.

The reasons of the Court are reported in the case of *The Queen* v. *McLeod* (1), above referred to.

(30th April, 1883.)

[S. C. File No. 278.]

THE QUEEN v. HELIWELL.

APPEAL from the Exchequer Court of Canada.

The appeal depended upon the same evidence and circumstances as the appeal in the case of *The Queen* v. *McLeod* (1), the cases were heard together, and the appeals allowed with costs.

The reasons of the court are reported in the case of *The Queen* v. *McLeod* (1), above referred to.

(30th April, 1883.)

(1) 8 Can. S. C. R. 1.

[S. C. File No. 279.] 1883

THE QUEEN v. MURPHY.

APPEAL from the Exchequer Court of Canada.

The appeal depended upon the same evidence and circumstances as the appeal in the case of *The Queen* v. *McLeod* (1), the cases were heard together, and the appeals allowed with costs.

The reasons of the court are reported in the case of *The Queen* v. *McLeod*, above referred to.

(30th April, 1883.)

[S. C. File No. 280.]

THE QUEEN v. MACDONALD.

APPEAL from the Exchequer Court of Canada.

The appeal depended upon the same evidence and circumstances as the appeal in the case of *The Queen* v. *McLeod* (1), the cases were heard together, and the appeals allowed with costs.

The reasons of the court are reported in the case of *The Queen* v. *McLeod* (1), above referred to.

(30th April, 1883.)

(1) 8 Can. S. C. R. 1.

1882

*May. 5.
*May 10.

[S. C. File No. 281.]

IN RE CANADA PROVIDENT ASSOCIATION.

Legislative jurisdiction—Constitutional law—Companies—Private bill —Property and civil rights—Construction of statute—B. N. A. Act, 1867, s. 92—45 Vict. c. 107.

The objects of the Act to incorporate the "Canada Provident Association" (45 Vict. ch. 107 (D.)), for carrying on business as a mutual benefit society throughout the Dominion of Canada do not fall within the class of subjects allotted to the provincial legislatures under section 92 of the "British North America Act, 1867."

Per RITCHIE, C.J., and FOURNIER, J.—There may be a doubt as to whether so much of the first section of the Act as enables the company to hold and deal in real estate beyond what may be required for their own use and accommodation, or so much of the second section as enacts that certain funds shall be exempt from execution for the debt of any member of the association, could be *intra vires* of the Parliament of Canada.

REFERENCE from the Senate of Canada (2), to the Supreme Court of Canada for their opinion, whether the bill for the incorporation of the "Canada Provident Association" is not a measure which falls within the class of subjects allotted to provincial legislatures under section 92 of the "British North America Act, 1867."

The bill, as submitted to the court, was in the terms of the Act subsequently enacted as chapter 107 of the Statutes of Canada for the year 1882 (45 Vict.).

Their Lordships, the judges of the Supreme Court of Canada, transmitted the following opinions (3):—

STRONG, HENRY, TASCHEREAU and GWYNNE, JJ.—We are of opinion that the bill intituled, "An Act to Incorporate the 'Canada Provident Association,'" referred by the

(2) Senate Journals, 1882, p. 273.
(3) See Senate Journals, 1882, pages 301-302.

* PRESENT: SIR WILLIAM RITCHIE, C.J., and FOURNIER, STRONG, HENRY, TASCHEREAU and GWYNNE, JJ.

Honourable the Senate for the opinion of the Supreme Court, is not a measure which falls within the class of subjects allotted to provincial legislatures, under section 92 of the "British North America Act, 1867."

1882

IN RE CANADA PROVIDENT ASSOCIATION.

The CHIEF JUSTICE and FOURNIER, J.—We think the bill intituled "An Act to Incorporate the 'Canada Provident Association,'" having for its objects the carrying on of business and operating throughout the Dominion of Canada, is a measure which does not fall within the class of subjects allotted to provincial legislatures, under section 92 of the British North America Act, 1867."

But we are not, in the very short time allowed us for consideration, prepared to say that so much of section one as enables this company to hold and deal in real estate, beyond what may be required for their own use and accommodation, or so much of section two as enacts that,

> such fund or funds shall be exempt from execution for the debt of any member of the association, and shall not be liable to be seized, taken or appropriated by any legal or equitable process to pay any debt or liability of any member of the association.

are *intra vires* of the Parliament of Canada.

We think, before a positive opinion is expressed on these clauses, the matter should be argued before the court.

Opinion transmitted accordingly.

[S. C. File No. 304.] 1882

IN RE ALEXANDER McKINNON.

PETITION for writs of habeas corpus and certiorari upon a conviction by James Johnston, Esq., J.P., at Gloucester, in the County of Carleton, in Ontario.

The writs issued on order of FOURNIER, J., and, on the return, the prisoner was discharged from custody.

(4th October, 1882.)

1883

[S. C. File No. 316.]

MUIR v. HETT; ESQUIMALT ELECTION CASE.

APPEAL from the Controverted Elections Court.

Notice of appeal given; appeal never prosecuted.

(8th January, 1883.)

[S. C. File No. 336.]

BANK OF NOVA SCOTIA ET AL. v. CUNDALL.

PETITION for leave to appeal from the Supreme Court of Prince Edward Island.

Notice given, but appeal never prosecuted.

(10th February, 1883.)

[S. C. File No. 347.]

WOOD v. SMITH.

APPEAL from the Supreme Court of Nova Scotia.

Appeal withdrawn.

(24th October, 1883.)

(See 16 N. B. Rep. 37.)

[S. C. Files Nos. 349 and 353.] 1883

GENEVIEVRE v. CHARLEBOIS.

APPEALS from the Province of Quebec entered.

Orders granted by FOURNIER, J., allowing eighteen copies of "Cases" to be filed, by consent of parties.

Appeals never prosecuted.

(11th and 16th April, 1883.)

[S. C. File No. 354.]

BELL v. LEE.

APPEAL from the Court of Appeal for Ontario (8 Ont. App. R. 185).

Entered, but never prosecuted.

(5th October, 1883).

[S. C. File No. 356.]

IN RE EMMA OUELETTE.

SUMMONS to shew cause why a writ of habeas corpus should not issue upon a conviction by the Police Magistrate for the City of Ottawa.

Order refused by HENRY, J.

(5th May, 1883.)

1883

[S. C. File No. 357.]

DOYLE v. JACKSON; SOUTH NORFOLK ELECTION CASE.

APPEAL from Controverted Elections Court (Province of Ontario).

Entered, but never prosecuted.

(11th October, 1883.)

[S. C. File No. 360.]

DESBARRES v. TREMAIN.

APPEAL from the Supreme Court of Nova Scotia.

Entered, but never prosecuted.

(27th July, 1883.)

(See 16 N. S. Rep. 215.)

[S. C. File No. 361.]

DICKIE v. THE MERCHANTS MARINE INSURANCE COMPANY OF CANADA.

APPEAL from the Supreme Court of Nova Scotia (16 N. S. Rep. 244).

Dismissed with costs.

(3rd November, 1883.)

[S. C. File No. 366.] 1883

IN RE WILLIAM JOHN LOGAN.

SUMMONS to shew cause why a writ of habeas corpus should not issue.

Writ refused by HENRY, J. Subsequently a summons was issued to shew cause why the prisoner should not be admitted to bail and a writ issued, but no further proceedings were taken.

(24th July, 1883.)

[S. C. File No. 377.]

CORBITT v. RAY.

APPEAL from the Supreme Court of Nova Scotia (16 N. S. Rep. 407).

Case on appeal entered, but never prosecuted.

(4th September, 1883.)

[S. C. File No. 381.]

GILBERT v. DOE *d.* SIMONDS.

APPEAL from the Supreme Court of New Brunswick (22 N. Rep. 576).

Case on appeal entered, but never prosecuted.

(9th October, 1883.)

1883 [S. C. File No. 392.]

THE QUEEN AND MANNING, McDONALD, McLAREN & CO.

ORDER by the Chief Justice, appointing Alexander H. Light, of the City of Quebec, Engineer of Government Railways of the Province of Quebec, third arbitrator, in the arbitration between Her Majesty The Queen, represented by the Hon. J. H. Pope, Minister of Railways and Canals, and Manning, McDonald, McLaren & Co., to be had in pursuance of certain orders in council, and an agreement of reference in respect to a contract for the construction of section B of the Canadian Pacific Railway.

(23rd November, 1883.)

1884 [S. C. File No. 401.]

GALBREATH ET AL. v. MEYER.

APPEAL from the Supreme Court of British Columbia.

Entered, but never prosecuted.

(14th January, 1884.)

[S. C. File No. 412.]

VACHON v. BUREAU.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Case and factums filed, but appeal not further prosecuted.

(18th February, 1884.)

[S. C. File No. 415.] 1884.

PARSONS v. MACLEAN.

APPEAL from the Supreme Court of Nova Scotia (17 N. S. Rep. 45).

Case withdrawn after inscription for hearing.

(10th November, 1884.)

[S. C. File No. 416.]

PEER ET AL. v. McNABB.

MOTION for leave to appeal from the Court of Appeal for Ontario (32 U. C. C. P. 545), refused.

(22nd February, 1884.)

[S. C. File No. 436.]

CHARD v. JELLETT.

APPEAL from the Court of Appeal for Ontario.

Dismissed, for want of prosecution.

(16th June, 1884.)

[S. C. File No. 447.]

IN RE FRANCIS MONTGOMERY.

PETITION for writ of habeas corpus upon the conviction by J. Horsey and Charles Desjardins, Esqs., JJ.P. Writ ordered to issue by STRONG, J., and, on return, the prisoner was discharged.

(31st July, 1884.)

1884

[S. C. File No. 451.]

WATSON v. GREEN ET AL.

APPEAL from the Court of Appeal for Ontario (10 Ont. App. R. 113).

The appeal was argued on 4th December, 1884, and judgment was reserved, but no judgment appears to have been rendered.

(4th December, 1884.)

1886

[C. C. File No. 464.]

MOLSONS BANK v. THE ST. LAWRENCE AND CHICAGO FORWARDING COMPANY.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed, for want of prosecution.

(17th September, 1886.)

1884

[S. C. File No. 476.]

IN RE ALEXANDER JOHNSTON.

PETITION for a writ of habeas corpus upon the commitment by three justices of the peace for the United Counties of Prescott and Russell.

On return of the writ, HENRY, J., refused to discharge the petitioner.

(22nd November, 1884.)

[S. C. File No. 477.] 1884

IN RE RAPHAEL SUPERIOR.

PETITION for a writ of habeas corpus on the commitment by three justices of the peace for the United Counties of Prescott and Russell.

On return of the writ the petitioner was admitted to bail by order of HENRY, J.

(22nd November, 1884.)

[S. C. File No. 508.] 1885

IN RE JENNIE BATES.

PETITION for writs of habeas corpus and certiorari upon the commitment by the Police Magistrate for the City of Ottawa.

Writs issued on order of HENRY, J.

On return of the writs the petitioner was discharged by HENRY, J.

(28th February, 1885.)

[S. C. File No. 518.]

HENRY v. WATEROUS ENGINE WORKS COMPANY.

APPEAL from the Court of Queen's Bench for Manitoba (2 Man. L. R. 169).

Dismissed, for want of prosecution.

(16th May, 1885.)

1886

[S. C. File No. 522.]

BARRAS v. CITY OF QUEBEC.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side (11 Q. L. R. 42).

Dismissed, for want of prosecution.

(18th January, 1886.)

1885

[S. C. File No. 523.]

IRVING v. HAMILTON.

APPEAL from the Supreme Court of British Columbia.

Notice of motion given, but no further proceedings were taken.

(26th March, 1885.)

[S. C. File No. 529.]

THE QUEEN v. LECLERC.

APPEAL from the Exchequer Court of Canada.

After inscription for hearing, the appeal was withdrawn.

(28th May, 1885.)

[S. C. File No. 530.] 1885

THE QUEEN v. DORION.

APPEAL from the Exchequer Court of Canada.

After inscription for hearing, the appeal was withdrawn.

(28th May, 1885.)

[S. C. File No. 531.]

THE QUEEN v. BOURRASSA.

APPEAL from the Exchequer Court of Canada.

After inscription for hearing, the appeal was withdrawn.

(28th May, 1885.)

[S. C. File No. 532.]

THE QUEEN v. RAYMOND.

APPEAL from the Exchequer Court of Canada.

After inscription for hearing, the appeal was withdrawn.

(28th May, 1885.)

[S. C. File No. 533.]

THE QUEEN v. MARQUIS.

APPEAL from the Exchequer Court of Canada.

After inscription for hearing the appeal was discontinued.

(30th June, 1885.)

1885

[S. C. File No. 535.]

DAVIES v. LUMSDEN ET AL.

APPEAL from the Court of Appeal for Ontario (11 Ont. App. R. 585).

Case on appeal entered, but never prosecuted.

(1st June, 1885.)

[S. C. File No. 536.]

PATERSON v. THOMSON.

APPEAL from the Queen's Bench Division, High Court of Justice for Ontario (9 Ont. App. R. 326).

Dismissed, for want of prosecution.

(24th June, 1885.)

[S. C. File No. 549.]

THE CANADIAN LAND AND EMIGRATION COMPANY v. THE MUNICIPALITY OF DYSART, ET AL.

APPEAL from the Court of Appeal for Ontario (12 Ont. App R. 80).

Case on appeal entered, but never prosecuted.

(24th July, 1885.)

[S. C. File No. 559.] 1886

STAIRS v. CURRIE; "THE SECORD."

APPEAL from the Supreme Court of New Brunswick.

Settled between the parties and withdrawn.

(24th February, 1886.)

[S. C. File No. 564.] 1887

THE WESTERN ASSURANCE COMPANY v. THE CITY OF HALIFAX.

APPEAL from the Supreme Court of Nova Scotia (18 N. S. Rep. 387).

Dismissed, with costs.

(18th November, 1887.)

[S. C. File No. 565.]

THE OCEAN MUTUAL INSURANCE COMPANY v. THE CITY OF HALIFAX.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed with costs.

(18th November, 1887.)

1887

[S. C. File No. 566.]

THE PROVIDENCE WASHINGTON INSURANCE COMPANY v. THE CITY OF HALIFAX.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed, with costs.

(18th November, 1887.)

[S. C. File No. 567.]

THE LONDON AND LANCASHIRE FIRE INSURANCE COMPANY OF LONDON v. THE CITY OF HALIFAX.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed, with costs.

(18th November, 1887.)

[S. C. File No. 568.]

JONES ET AL. v. THE CITY OF HALIFAX.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed, with costs.

(18th November, 1887.)

[S. C. File No. 578.] 1886

McDONALD v. MURRAY.

APPEAL from the Court of Appeal for Ontario (11 Ont. App. R. 101).

Appeal inscribed for hearing, but not further prosecuted.

(1st February, 1886.)

[S. C. File No. 586.]

MACDONALD v. McCALL.

APPEAL never prosecuted, after notice filed.

(See *McCall* v. *Macdonald* (13 Can. S. C. R. 247).

(18th January, 1886.)

[S. C. File No. 594.]

JOHNSON v. THE CONSOLIDATED BANK OF CANADA.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed for want of prosecution.

(6th February, 1886.)

1886

[S. C. File No. 596.]

JOHN SCOTT v. THE QUEEN.

APPEAL from the Court of Queen's Bench, Province of Quebec, on a reserved case.

Dismissed on default of appearance for the appellant.

(20th March, 1886.

[S. C. File No. 602.]

PAINT v. McLEAN.

APPEAL from the Supreme Court of Nova Scotia (3 N. S. Dec. 316).

Dismissed, with costs for want of prosecution.

(6th April, 1886.)

1885

[S. C. File No. 606.]

GOSSELIN v. THE QUEEN.

APPEAL from the Exchequer Court of Canada.

Appeal inscribed for hearing and subsequently abandoned.

(29th December, 1885.)

[S. C. File No. 612.] 1886

IN RE HUGH CALEY.

APPLICATION for a writ of habeas corpus upon the commitment of Jeremiah Travis, Esq., stipendiary magistrate for the North-West Territories of Canada, for contempt of court.

After filing of the petition and exhibits, proceedings were not further prosecuted.

(27th March, 1886.)

[S. C. File No. 617.]

MUNRO ET AL. v. BRICE.

APPEAL from the Court of Appeal for Ontario (12 Ont. App. R. 453).

The case was inscribed for hearing, and no one appearing for either of the parties, the case was struck off the list. No further proceedings were taken.

(27th May, 1886.)

[S. C. File No. 625.] 1887

DARLING v. RYAN.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

A motion to quash the appeal was refused (Cass Dig. 2 ed., 435).

The respondent subsequently filed a factum and no further proceedings were taken.

(8th January, 1887.)

1886

*Sept. 22.

[S. C. File No. 627.]

THE CANADIAN PACIFIC RAILWAY CO. v. CONMEE & McLENNAN.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal — Jurisdiction — Order for stay of proceedings — Matter of procedure—Judgment delivered out of court—Practice.

APPEALS from two judgments of the Court of Appeal for Ontario ordering stay of proceedings in actions taken by the appellants.

Motions to quash the appeals, on the ground that the orders were merely matters of procedure, and not in the nature of final judgments, were heard on 22nd June, 1886, and judgments reserved to admit of the filing of written arguments by the parties.

It appeared, later on, that there was urgent necessity for pronouncing judgment upon the motions at an early date, and on 22nd September, 1886, the Chief Justice and judges who had heard the arguments, transmitted opinions to the Registrar of the court, by mail and telegraph, the majority being of opinion that the appeals should be quashed for want of jurisdiction.

FOURNIER, J., dissented.

Nothing further was done in respect to these appeals till 2nd October, 1888, when on motion before the court, *in banco*, for the entry of judgments in conformity with the opinions so expressed, it was ordered that formal judgments should be entered quashing the appeals with costs for want of jurisdiction.

Appeals quashed with costs.

* PRESENT: SIR WILLIAM RITCHIE, C.J., and FOURNIER, STRONG, TASCHEREAU and GWYNNE, JJ.

[S. C. File No. 628.] 1886

IN RE JOHN H. W. CADDY.

PETITION for a writ of habeas corpus refused by TASCHEREAU, J.

Subsequently a motion for leave to appeal from this decision was refused by the court.

(20th May, 1886.)

[S. C. File No. 629.]

STARNES ET AL. v. ROSS.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed, without costs, by GWYNNE, J., for want of prosecution.

(7th June, 1886.)

[S. C. File No. 634.] 1887

ANCHOR MARINE INS. CO. v. ALLEN.

APPEAL from the Court of Queen's Bench, appeal side (13 Q. L. R. 4), Province of Quebec.

The appeal was first submitted on factums. Subsequently supplementary factums were filed, by leave of the court, and it was ordered that counsel should be heard. The appeal was not further prosecuted.

(11th May, 1887.)

1889

[S. C. File No. 639.]

THE UNION BANK OF LOWER CANADA v. THE HOCHELAGA BANK.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed, with costs.

(18th March, 1889.)

(See 14 R. L. 410; 12 Legal News, 179.)

1887

[S. C. File No. 656.]

HARDY ET AL. v. THE MASSEY MANUFACTURING COMPANY.

APPEAL from the Court of Appeal for Ontario.

Struck off list of inscriptions without costs, by consent.

(16th March, 1887.)

[S. C. File No. 663.]

THE QUEEN v. DAVIE.

APPEAL from the Exchequer Court of Canada.

Inscribed for hearing but never prosecuted.

(13th January, 1887.)

[S. C. File No. 672.] 1891

THE QUEEN v. GUSTAVUS B. WRIGHT.

APPEAL from the Exchequer Court of Canada.

Judgment appealed from reversed.

(23rd November, 1891.)

[S. C. File No. 673.]

THE QUEEN v. EBERTS.

APPEAL from the Exchequer Court of Canada.

Judgment appealed from reversed.

(23rd November, 1891.)

[S. C. File No. 674.]

THE QUEEN v. PERRY ET AL.

APPEAL from the Exchequer Court of Canada.

Judgment appealed from reversed.

(23rd November, 1891.)

[S. C. File No. 675.]

THE QUEEN v. MARTIN ET AL.

APPEAL from the Exchequer Court of Canada.

Judgment appealed from reversed.

(23rd November, 1891.)

1887 [S. C. File No. 679.]

WISE v. TUTTLE ET AL.

APPEAL from the Supreme Court of British Columbia. Case not filed.

Motion to dismiss appeal dismissed by GWYNNE, J.

No further proceedings taken.

(3rd May, 1887.)

[S. C. File No. 691.]

STAR KIDNEY PAD COMPANY v. McCARTHY.

APPEAL from the Supreme Court of New Brunswick.

Case settled between the parties.

(3rd May, 1887.)

(See 23 N. B. Rep. 83; 24 N. B. Rep. 95.)

1889 [S. C. File No. 692.]

GRIFFIN v. McDOUGALL ET AL.

APPEAL from the Supreme Court of Nova Scotia (19 N. S. Rep. 254).

A motion to quash the appeal on the ground that it was asserted from a judgment which was, in its nature, interlocutory only, was withdrawn.

A suggestion by the appellant was filed notifying the death of one of the respondents, and praying that the appeal might be continued against the surviving respondent.

No further proceedings taken.

(23rd January, 1889.)

[S. C. File No. 694.]

1887

*April 25, 27.
*May 4.

IN RE PHILIP CURLEY.

Criminal law—Summary convictions and orders—Procedure by magistrates—Delay in issuing commitment—Term of imprisonment—Commencement of sentence—32 & 33 Vict. c. 29—"Canada Temperance Act, 1878"—32 & 33 Vict. c. 31.

The Chief Justice of Prince Edward Island had refused to discharge the prisoner from custody on the ground that he had been arrested and was confined under a commitment issued after the expiration of two months from the date when he was convicted and sentenced to a term of two months' imprisonment. A subsequent application, by summons, in the Supreme Court of Canada, to shew cause why a writ of habeas corpus should not issue and the prisoner be discharged, which was supported on similar grounds, was refused by His Lordship MR. JUSTICE HENRY.

(Cf. *Ex parte Smitheman* (35 Can. S. C. R. 189).

APPLICATION for the issue of a writ of habeas corpus upon the commitment of the applicant by the stipendiary magistrate, at Charlottetown, P.E.I., taken by way of appeal from the judgment of the Chief Justice of Prince Edward Island, refusing to discharge the prisoner from custody.

The prisoner was convicted on the 15th of October, 1886, for a third offence against the provisions of the "Canada Temperance Act, 1878," and was, on the same day, sentenced to be imprisoned in the Common Gaol of Queen's County, P.E.I., for the period of two months, by the stipendiary magistrate for the City of Charlottetown, P.E.I. Upon the said conviction, an order nisi was issued by the Chief Justice of Prince Edward Island, directed to and served on the said stipendiary magistrate, in another case under the same statute against the same defendant for a similar offence, requiring him to shew cause why a writ of prohibition should not issue staying all further proceedings in the matter of said prosecution on the ground that his appointment as such stipendiary magistrate was illegal, and that all acts done by him in

* PRESENT: MR. JUSTICE HENRY, in Chambers.

1887

IN RE CURLEY.

virtue of such an office were irregular, null and void, and said order nisi likewise ordered the stay of all proceedings by him pending the judgment upon the rule. The magistrate, accordingly, without admitting the defendant to bail, refused to issue a commitment, upon his said conviction, until after the said rule had been argued before the court.

An order was made discharging the rule, when, on 28th February, 1887, the magistrate issued his warrant of commitment, and on 17th March, 1887, the applicant was arrested under the warrant of commitment so issued, and committed to gaol to serve the term of imprisonment to which he had been sentenced, on the 15th of October, 1886.

Upon his arrest the prisoner obtained the issue of a writ of habeas corpus, under which he was brought up before the CHIEF JUSTICE of Prince Edward Island, and his discharge prayed for on the ground that, at the time of his arrest, the term of imprisonment to which he had been sentenced had expired, as the period of imprisonment should be reckoned from the date of the conviction, and not from the date when he was arrested and taken into custody. After hearing counsel on this application, the Chief Justice, on 26th March, 1887, discharged the writ, and ordered that the prisoner should be remanded to the custody of the gaoler to serve out the remainder of his term.

The learned Chief Justice stated his reasons for judgment, as follows:

"PALMER, C.J.—The Dominion statute, 32 & 33 Vict. ch. 29, as its title declares, is passed respecting procedure in criminal cases. Sections 2 to 7, inclusive, regulate the procedure before justices of the peace, and the latter section declares what the procedure shall be before justices of the peace out of sessions; first, by the existing statute in relation to persons charged with indictable offences; and, secondly, by the existing statute in relation to summary convictions and orders: thus pointing out two statutes already in force,

which, together with the five sections next preceding said section 7, are to regulate the procedure before justices of the peace.

"Section 7 expressly provides that, in the following out these two existing statutes, the justices of the peace in their procedure must be

> subject to any special provision contained in any Act relating to the particular offence with which the offender is charged.

The statute, having thus provided for the manner of procedure before justices of the peace, then, by its 8th and consecutive following sections, proceeds to set forth the mode of procedure in the higher courts of law; the process of indictments, trial by jury, challenges of jurors, witnesses, variances in records, appeals, new trials, punishments, penitentiary, etc., until it arrives at the 91st section, which provides:—

> The period of imprisonment in pursuance of any sentence shall commence on and from the day of passing any sentence, but no time during which the convict may be out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced.

"This section, therefore, evidently appears to belong to criminal proceedings of the higher class, and those when conducted in the higher courts, and I think was not intended to be nor is it incorporated with proceedings before justices of the peace in offences heard before them. In chapter 181 of the newly Revised Statutes of Canada, this section (91), with an amendment, is introduced under the general head 'Imprisonment,' indiscriminately with all other sections of all other Acts relating to imprisonment, but if, by its introduction there with its amendment, it were intended to be extended to proceedings in summary cases before justices of the peace, it would not affect the present case if the Revised Statutes, in their amended parts, are excepted from a retrospective operation.

"The 'Canada Temperance Act,' by section 107, enacts as follows:—

1887

IN RE CURLEY

Every offence against the second part of this Act may be prosecuted in the manner directed by the "Act respecting the duties of Justices of the Peace out of Sessions in relation to Summary Convictions and Orders," so far as no provision is hereby made for any matter or thing which may be required to be done with respect to such prosecution, and all the provisions contained in the said Act shall be applicable to such prosecutions, and to the judicial and other officers before whom the same are hereby authorized to be brought in the same manner as if they were incorporated in this Act, and as if all such judicial and other officers were named in the said Act.

"Now, in this Act, there is nothing said about the period of imprisonment for an offence within it being required to commence 'on and from the day of passing sentence, etc.' Long before the passing of this Act the law on that question was well settled by the decisions of the courts of common law, viz., that the period of imprisonment should commence only and run from the day of the offender's being committed to close confinement; and, therefore, had the legislature intended that it should commence from the period of the hearing or judgment of conviction, the legislature would surely have enacted so in plain terms.

"It was argued by the prisoner's counsel that the 91st clause of the Act, 32 & 33 Vict. ch. 29, should be read with or deemed a part of the above mentioned Act of 32 & 33 Vict. ch. 31, but this, I think, could not possibly have been the intention of the legislature; and, if we look at and duly regard the various special provisions respecting procedure contained in the 'Canada Temperance Act,' the Act, in its vital parts, would become almost nugatory, if it were made subject to the said 91st section of the Act, 32 & 33 Vict. ch. 29."

On the return of the summons, before MR. JUSTICE HENRY, it was argued that the commencement of the term of imprisonment ran from the time of the sentence, 15th October, 1886; that, at the time of the arrest, 17th March, 1887, the term of imprisonment (two months) had expired; and that, as the prisoner had not been released upon recognizance, but was permitted to go at large from the time he

1887

IN RE CURLEY.

was sentenced until the date of his arrest, imprisonment must be presumed from the date of the sentence, and he was consequently illegally held in custody. The following cases were relied upon:—*Reg.* v. *Riel* (1); *Cornwall* v. *The Queen* (2); *Ex parte Gervais* (3); Payley on Convictions (6 ed.), 338, and cases there cited: *The Queen* v. *Castro* (4), *per* BRETT, L.J., at page 516; *Rex* v. *Wilkes* (5), cited with approval in *Castro* v. *The Queen* (6), *per* SELBORNE, L.J., at page 237; *Reg.* v. *Cutbush* (7).

Hodgson, Q.C., appeared for the prisoner.

Davies, Q.C., for the Crown.

After hearing counsel for and against the application, His Lordship, MR. JUSTICE HENRY, reserved judgment, and on a subsequent day refused the application.

Summons for writ dismissed.

[S. C. File No. 695.] 1887

MERCHANTS MARINE INSURANCE COMPANY v. PRITCHARD.

APPEAL from the Supreme Court of New Brunswick (26 N. B. Rep. 232).

Notice of appeal entered but never prosecuted.

(28th April, 1887.)

(1) 1 N. W. Ter. Rep. 23; 10 App. Cas. 675.
(2) 33 U. C. Q. B. 106.
(3) 6 Legal News, 116.
(4) 5 Q. B. D. 490.
(5) 4 Burr. 2527, 2577.
(6) 6 App. Cas. 229.
(7) L. R. 2 Q. B. 379.

1887 [S. C. File No. 696.]

WORTS v. SUTHERLAND.

APPEAL from the Court of Appeal for Ontario.

Dismissed, with costs.

(18th November, 1887.)

1888 [S. C. File No. 701.]

JOHNSTON ET AL. v. THE CANADIAN PACIFIC RAILWAY CO.

APPEAL from the Supreme Court of British Columbia.

Dismissed, for want of prosecution.

(6th March, 1888.)

1887 [S. C. File No. 718.]

RYKERT v. PATTISON; LINCOLN AND NIAGARA ELECTION CASE.

APPEAL from the Court of Appeal for Ontario.

Allowed without costs by consent of the parties.

(25th October, 1887.)

1887

[S. C. File No. 719.]

BENDER v. CARRIER.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Case on appeal filed, but never prosecuted.

(5th October, 1887.)

(See 11 Legal News, 85.)

[S. C. File No. 720.]

MONTREAL AND EUROPEAN SHORT LINE RAILWAY CO. v. STEWART.

APPEAL from the Supreme Court of Nova Scotia (20 N. S. Rep. 115).

Allowed with costs by consent of counsel.

(26th October, 1887.)

[S. C. File No. 732.]

LOW v. BAIN.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side (31 L. C. Jur. 289).

Motion for leave to file case on appeal, after the expiration of time limited, refused with costs.

(21st October, 1887.)

1887 [S. C. File No. 737.]

THE QUEEN v. STILLWELL.

SUMMONS to shew cause why a writ of habeas corpus should not issue on the commitment of the prisoner upon an indictment for libel, at the Cornwall Autumn Assizes, 1887.

Never prosecuted.

(2nd November, 1887.)

MOSS v. THE QUEEN.

APPEAL from the award of the Dominion Official Arbitrators.

Notice of appeal and record filed. No further proceedings taken.

(11th November, 1887.)

1888 [S. C. File No. 743.]

SPROULE v. EDWARDS; RUSSELL ELECTION CASE.

APPEAL from the Controverted Elections Court in Ontario.

Discontinued and appeal dismissed.

(21st February, 1888.)

[S. C. File No. 745.] 1887

MARINE v. PETERSON.

APPEAL from the Supreme Court of New Brunswick.

Dismissed, for want of prosecution.

(9th December, 1887.)

[S. C. File No. 749.]

THE QUEEN v. POULIOTT.

APPEAL from the Exchequer Court of Canada (1 Ex. C. R. 313).

Notice given, but appeal not prosecuted.

(15th December, 1887).

[S. C. File No. 752.] 1889

POIRIER v. FISET; RIMOUSKI ELECTION CASE.

APPEAL from the Controverted Elections Court.

Discontinued, and appeal dismissed with costs.

(15th January, 1889.)

1888 [S. C. File No. 754.]

HEARN v. McGREEVY; QUEBEC WEST ELECTION CASE.

APPEAL from the Controverted Elections Court.

Dismissed with costs for want of prosecution.

(15th March, 1888.)

[S. C. File No. 755.]

McGREEVY v. McDOUGALL.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed, for want of prosecution.

(24th February, 1890.)

1888 [S. C. File No. 759.]

BELANGER v. CASGRAIN; L'ISLET ELECTION CASE.

APPEAL from judgment on preliminary objections in the Controverted Elections Court.

Quashed with costs for want of jurisdiction. Order made same as in *L'Assomption Election Case* (14 Can. S. C. R. 429).

(27th February, 1888.)

[S. C. File No. 760.] 1888

MARINE v. KRINKE.

APPEAL from the Supreme Court of New Brunswick.

Notice given, appeal never prosecuted.

(26th January, 1888.)

[S. C. File No. 768.]

COULOMBE v. CARON ET AL.: MASKINONGE ELECTION CASE.

APPEAL from the Controverted Elections Court.

Dismissed with costs.

(26th October, 1888.)

[S. C. File No. 769.]

CAUCHON v. LANGELIER: MONTMORENCY ELECTION CASE.

APPEAL from the Controverted Elections Court.

Quashed, for want of jurisdiction.

(27th February, 1888.)

1888

[S. C. File No. 772.]

COOK v. FAIRALL; EAST SIMCOE ELECTION CASE.

APPEAL from the Controverted Elections Court.

Allowed, on motion, without costs.

(8th October, 1888.)

[S. C. File No. 776.]

LA SOCIETE PERMANENTE DE CONSTRUCTION DES ARTISANS v. OUIMET.

Appeal—Jurisdiction—Amount in controversy.

MOTION for leave to appeal from a judgment of the Court of Queen's Bench, Province of Quebec, appeal side.

The action was to recover $810.54, alleged to have been an overcharge made by the society against the plaintiff (respondent), on a settlement of certain hypothecary obligations charged upon real estate, being the difference between $3,652.27, exacted by the society, and $28.73, the balance actually due them by the plaintiff. The plaintiff's action was maintained in the courts below, and the defendants (appellants), applied to TESSIER, J., in the court appealed from, for approval of security upon an appeal to the Supreme Court of Canada. This application was refused.

A similar application to the Registrar of the Supreme Court of Canada, in chambers, was refused on 1st March, 1888, and on 10th March, 1888, notice of motion by way of appeal was given, but the motion was never brought to a hearing before the full court.

[S. C. File No. 783.] 1888

MOORE v. THE CITIZENS FIRE INSURANCE COMPANY OF CANADA ET AL.

APPEAL from the Court of Appeal for Ontario (14 Ont. App. Cas. 582).

Upon consent, dismissed without costs.

(27th Oct., 1888.)

[S. C. File No. 787.]

KENNEDY v. FREEMAN.

APPEAL from the Court of Appeal for Ontario.

Entered, but never prosecuted.

(18th May, 1888.)

(See 15 Ont. App. R. 166, 216.)

[S. C. File No. 788.]

BOOTH v. DAVISON ET AL.

APPEAL from the Court of Appeal for Ontario.

Entered, but never prosecuted.

(2nd May, 1888.)

1888 (S. C. File No. 792.)

KENNEDY v. MYLES.

APPEAL bond filed. Appeal never prosecuted.

(18th May, 1888.)

1889 [S. C. File No. 796.]

*Nov. 26, 27. JOHN BAIRD (DEFENDANT) APPELLANT;

AND

1890 ELLIOTT ET AL. (PLAINTIFFS) RESPONDENTS.

*March 10. ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Rivers and streams—Obstructions in channel—Water-power—Mill-dam—Diversion of water—Riparian rights—Land covered by water

Judgment of the Court of Appeal for Ontario reversing the judgment of Proudfoot, J., which in effect confirmed the judgment of the Chancellor of Ontario (26 Gr. 549), affirmed.

APPEAL from the judgment of the Court of Appeal for Ontario, reversing the judgment of the trial court (1) with costs.

A statement of the case as presented before His Lordship, the Chancellor of Ontario, is given in the report of his judgment (1). On an appeal, the suit was remitted back for further trial, and additional pleadings were filed and new evidence taken. No judgment was pronounced on account of the Chancellor's appointment as Chief Justice of Ontario, and the case was, subsequently, argued before Mr. Justice Proudfoot, who held that the new evidence put in shewed that blasting had taken place, and the waters of the tail-race had been diverted in 1872 (see the report of the case above referred to at p. 556), by the plaintiffs (respondents), but that they had

* PRESENT: SIR WILLIAM RITCHIE, C.J., and STRONG, TASCHEREAU and GWYNNE, JJ.

(1) 26 Gr. 549.

not shewn that they had a right exercised and acquiesced in for twenty years to build the dam in question and blast the new race so as to divert the waters; that the defendant (appellant) was entitled to have the waters of the tail-race flow by the ordinary channel, and that the Chancellor's decree should stand.

On a second appeal, the Court of Appeal, on 3rd April, 1888, declared that the plaintiffs were entitled to the free and uninterrupted flow of the waters, reversed the trial court judgments and restrained the defendant from fouling the tail-race, or otherwise hindering or impeding the flow of waters to the paintiffs' mill.

S. H. Blake, Q.C., and *W. Cassels*, Q.C., for the appellant.
C. Moss, Q.C., and *Jamieson*, for the respondents.

The CHIEF JUSTICE and STRONG and TASCHEREAU, JJ., were of the opinion that the appeal should be dismissed with costs.

GWYNNE, J.—This appeal must, in my opinion, be dismissed with costs, whether the appellant was or was not a riparian proprietor on the south branch of the Mississippi River at the place where, as he contends the mill race constructed by Shipman, and which is in question, was originally made by him to discharge its waters. He is not, however, in point of fact, at this point, a proprietor of any land abutting on the Mississippi River or the mill race. He is the proprietor of a small piece of land called lot "M" abutting on the river some chains further down, and he is seized of the bed of the river at the point where as he contends the mill race was originally made to discharge its waters into the river from a rocky eminence about 18 or 20 feet perpendicularly above the bed of the river. What he claims is not a right to have the waters of the race flowing in the channel of the River Mississippi to and past his lot "M," situate on the bank of that river, for that they do now, being discharged into the river on the property of the respondents above the said lot "M," but a right to prevent and restrain

1890

BAIRD v. ELLIOTT.

the respondents from drawing the waters of the said race as they run over and past a piece of land of which the respondents are seized in fee under title derived from the same Shipman who constructed the race, to a mill of the respondents erected upon the said piece of land, and from discharging the waters of the race into the river at the point where they are discharged, being a point lower down in the river's bank than that which is insisted upon by the appellant as being the place where the waters of the said race were originally discharged and would still discharge themselves into the said river but for such diversion and use of them by the respondents; the appellant's object being to intercept the waters of the said race at the point where, as he contends, they were originally made to descend from what is now the property of the Mississippi River Improvement Company, at a perpendicular elevation of 18 or 20 feet above the river, of the bed of which the appellant is now seised in fee, so that the appellant may be enabled to conduct the waters of the said river through a flume to be constructed by him, and rested upon supports placed in the bed of the river, with a rapid fall to a mill, which he contemplates, in such case, erecting on his said lot "M," thereby obtaining what is contended by the appellant would be an infinitely superior mill-privilege and water-power than could be obtained by the waters of the race being discharged into, and flowing in the channel of the river; and thus, if the appellant's contention should prevail he would utterly destroy the respondents' mill property, and would deprive them of all benefit from the waters of the race as heretofore enjoyed by them and those through whom they claim under title derived from the said Shipman.

The appellant's claim thus rests for its foundation upon the assumption that in point of fact Shipman, who constructed the said race by drawing from the Mississippi River, upon his own land at a point much higher up, the waters flowing into and through the said race, so constructed it that it should discharge its waters again into the river still upon his own land at the point contended for by the appellant, and

where he desires in virtue of his seisin of the bed of the river at that place to intercept them and conduct them by a flume constructed as aforesaid to his lot "M."

I do not think it at all necessary to review at large the evidence which has been so fully reviewed by two of the learned judges of the Court of Appeal for Ontario, or to do more than say that I entirely concur in the conclusion arrived at by those learned judges, namely, that the evidence establishes (very conclusively, as I think), that the said race was not made by Shipman so as to discharge its waters into the river at the point insisted upon by the appellant, but that on the contrary, when the race reached the land whereof the respondents are now seized in fee, its waters were suffered to flow upon and across and alongside the said land, and to follow the natural inclination of the land, and that they did in doing so flow over and alongside of the land whereof the respondents are seised, and did, after certain user thereof by the respondents and those through whom they claim, discharge themselves into the Mississippi River at the place where they are now discharged after user by the respondents at their mills.

Under these circumstances it is unnecessary to consider whether the appellant in virtue of his seisin of the bed of the river at the place which he insists upon as being the place where the waters of the race were originally made to discharge themselves into the river, would, if such had been established to be the fact, have a right to prevent the respondents from utilizing the waters of the race as they flow past and through their lands, and from discharging such waters after being used by them into the river at the place where they are now discharged, which is a point above lot "M," whereof the appellant is seized.

Appeal dismissed with costs.

Solicitors for the appellant; *Blake, Lash, Cassels & Holman.*

Solicitors for the respondents; *Jamieson & Greig.*

1889

[S. C. File No. 799.]

BONNER v. ANDERSON ET AL.

APPEAL from the Court of Appeal for Ontario.

Dismissed, with costs by consent of parties.

(25th January, 1889.)

1888

[S. C. Files Nos. 802, 803.]

THE QUEEN v. THE J. C. AYER CO. ET AL.

APPEALS from the Exchequer Court of Canada (1 Ex. C. R. 232).

Discontinued.

(20th December, 1888.)

1889

[S. C. File No. 805.]

CHURCH v. CHRISTIE ET AL.

APPEAL from the Supreme Court of Nova Scotia (20 N. S. Rep. 468).

Appeal allowed and decree entered by consent.

(19th January, 1889.)

[S. C. File No. 807.] 1889

SAMSON v. THE QUEEN.

APPEAL from the Exchequer Court of Canada (2 Ex. C. R. 30).

Discontinued.

(10th Sept., 1889.)

[S. C. File No. 832.] 1888

THE TEMPERANCE COLONIZATION SOCIETY v. FAIRFIELD.

APPLICATION for leave to appeal from the Common Pleas Division of the High Court of Justice for Ontario.

Notice filed; appeal never prosecuted.

(9th October, 1888.)

(See 17 Ont. App. R. 205.)

[S. C. File No. 845.] 1889

LATOUR v. GRANT.

APPEAL from the Court of Queen's Bench, appeal side, Province of Quebec.

Dismissed with costs for want of prosecution.

(8th March, 1889.)

1888 [S. C. File No. 846.]

EASTERN DEVELOPMENT CO. v. MACKAY.

APPEAL from the Supreme Court of Nova Scotia (20 N. S. Rep. 325).

Notice filed; appeal never prosecuted.

(17th October, 1888.)

1890 [S. C. File No. 851.]

BANQUE D'HOCHELAGA v. GARTH ET AL.

APPEAL from the Court of Queen's Bench, Province of Quebec (14 R. L. 548), appeal side.

Discontinued.

(9th September, 1890.)

1891 [S. C. File No. 853.]

HEIRS YOUNG v. THE QUEEN.

APPEAL from the Exchequer Court of Canada.

Appeal allowed and case referred back to the Exchequer Court.

(19th January, 1891.)

1889

[S. C. File No. 862.]

THE COUNTY OF SIDNEY v. OSTROM.

APPEAL from the Court of Appeal for Ontario.

Discontinued, with costs.

(24th January, 1889.)

[S. C. File No. 877.]

HOOD v. McCULLOCH.

APPEAL from the Queen's Bench Division of the High Court of Justice for Ontario.

Notice filed; appeal never prosecuted.

(29th March, 1889.)

[S. C. File No. 878.]

ROWLANDS v. CANADA SOUTHERN RAILWAY COMPANY.

APPEAL from the Court of Appeal for Ontario.

Notice of appeal entered, but never prosecuted.

(2nd April, 1889.)

1890 [S. C. File No. 879.]

ALLEN v. REID.

APPEAL from the Court of Queen's Bench for Lower Canada, appeal side (14 Q. L. R. 126).

By consent of parties the judgments of the Superior Court and of the Court of Queen's Bench were reversed, the patents of invention in question were declared good and valid, and the respondent restrained by injunction from the use of such inventions, the appellant paying the costs in all the courts.

(6th March, 1890.)

1889 [S. C. File No. 886.]

EX PARTE PATRICK DOHERTY.

APPEAL from the Supreme Court of New Brunswick (27 N. B. Rep. 405).

On the case coming on for hearing no person appeared on behalf of the appellant, and the case was struck off the roll.

No further proceedings were taken.

(10th May, 1889.)

[S. C. File No. 889.]

CLARK v. WALKER.

APPLICATION for leave to appeal *per saltum* from the Queen's Bench Division of the High Court of Justice for Ontario, refused.

(27th April, 1889.)

[S. C. File No. 918.] 1890

PICARD v. THE NORTH SHORE RAILWAY COMPANY.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Judgment appealed from reversed, by consent of parties.

(3rd June, 1890.)

[S. C. File No. 930.] 1889

MUIR v. MOAT.

APPEAL from the Court of Appeal for Ontario.

Case on appeal and factums deposited and inscribed for hearing. No further proceedings taken.

(7th October, 1889.)

[S. C. File No. 938.]

McFATRIDGE v. HOLSTEAD.

APPEAL from the Supreme Court of Nova Scotia.

Discontinued.

(31st October, 1889.)

1889 [S. C. File No. 943.]

HUTTON v. ANDERSON.

APPEAL from the Court of Appeal for Ontario.

Notice of appeal filed, but never prosecuted.

(21st December, 1889.)

1890 [S. C. File No. 949.]

MANDIA v. McMAHON.

APPEAL from the Court of Appeal for Ontario (17 Ont. App. R. 34).

Notice of appeal filed; never prosecuted.

(25th January, 1890.)

[S. C. File No. 952.]

HUTTON v. MORDEN ET AL.

APPEAL from the Court of Appeal for Ontario.

Appeal inscribed for hearing but not further prosecuted.

(14th March, 1890.)

[S. C. File No. 956.] 1890

THE QUEEN v. THE CITY OF TORONTO.

APPEAL from the Exchequer Court of Canada.

Entered, but never prosecuted.

(21st March, 1890.)

[S. C. File No. 964.] 1890

IN RE ARABIN *alias* IREDA. *April 12.

Habeas corpus—Certiorari—Jurisdiction of Judges of Supreme Court of Canada—Reviewing evidence—Construction of statute—29 & 30 Vict. c. 45 (Can.)—R. S. C. c. 135, ss. 32, 36.

In re Trepanier (12 Can. S. C. R. 111), and *In re Mosier* (4 Ont. P. R. 64), referred to.

(NOTE.—Cf. *In re Hamilton*, p. 35, *ante*; *In re Tellier*, p. 110, *post*.

APPLICATION for writs of habeas corpus and certiorari refused by MR. JUSTICE PATTERSON, the following reasons for judgment being delivered:—

PATTERSON, J.—Mr. Ward has applied to me for a writ of habeas corpus addressed to the keeper of the common gaol, and a writ of certiorari addressed to the police magistrate of the City of Ottawa.

The application is made upon the petition and affidavit of the prisoner, who shews that he was charged before the police magistrate for that he did

unlawfully and without lawful excuse point a revolver at the prosecutor, contrary to the form of the statute in such case made and provided,

and that he was convicted for that offence and sentenced to thirty days in the common gaol, where he is now confined

* PRESENT: PATTERSON, J., in Chambers.

1890

IN RE ARABIN.

under that sentence. He sets out fully the evidence given for the prosecution and that of several witnesses called by him in his defence, shewing also that he tendered his own evidence, contending that the offence charged was only a common assault, but the magistrate rejected his evidence.

The power of a judge of the Supreme Court—assuming the legislative jurisdiction of Parliament to confer such power on judges of this court—is that which was given to a judge of one of the courts of law or equity in Upper Canada by the Act, 29 & 30 Vict. ch. 45. That Act authorized the issue of a writ of habeas corpus by a judge upon the complaint of a person restrained of his liberty, only when it appeared by affidavit that there was a probable and reasonable ground for such complaint. Power was given by the fifth section of the Act to a judge to issue a writ of certiorari for the production of the

> evidence, depositions, convictions, and all proceedings had or taken, touching or concerning such confinement or restraint of liberty, to the end that the same may be reviewed and considered by such judge or court, and to the end that the sufficiency thereof to warrant such confinement or restraint may be determined by such judge or court.

I am not prepared, at present, to hold that this power to issue a certiorari passed to the judges of this court by the Supreme and Exchequer Courts Act, R. S. C. ch. 135, sec. 32, but am inclined to agree with the view expressed in *Trepanniers Case* (1), that the power is confined to that conferred by section 36, which applies only to proceedings in appeal before this court. That is, however, immaterial on this application, because all the materials that could be returned on a certiorari are fully set out, with the exception, perhaps, of a formal conviction which has probably not been drawn up. I have no idea that the Upper Canada law contemplated the use of the evidence, etc., when returned, as a foundation for reviewing the decision of the magistrate as on an appeal. My impression is that its office

(1) 12 Can. S. C. R. 111.

1890

IN RE ARABIN.

was meant to be in aid of the power given by section three of the statute to try the truth of the return to the writ of habeas corpus, which is by no means the same thing as reviewing the decision on the weight of evidence. I do not understand the decision *In re Mosier* (2), to go further than that, although the learned judge who gave the decision may not have so limited the opinions he expressed.

But we have in the evidence accompanying this petition direct proof of the charge amply sufficient to warrant the conviction. The charge itself is in the very language of the statute, R. S. C. ch. 148, sec. 4 (Burbidge's Criminal Law, 78), substituting "revolver" for "firearms," which, if it involved any ambiguity, is shewn by the witnesses on both sides to have been understood as a weapon of the designated class.

I am of opinion that the petitioner has not shewn a probable and reasonable ground for his complaint. On the contrary, I think the evidence, etc., which he sets out would, if it were formally before the court, insure his remand. I, therefore, refuse the application.

Application refused.

[S. C. File No. 973.]

1890

THE QUEEN v. THE MONTREAL AND EUROPEAN SHORT LINE RAILWAY COMPANY.

APPEAL from the Exchequer Court of Canada (2 Ex. C. R. 159).

Entered, but never prosecuted.

(23rd April, 1890.)

(2) 4 Ont. P. R. 64.

1890

[S. C. File No. 974.]

RE UPPER CANADA IMPROVEMENT FUND.

REFERENCE by the Governor-General-in-Council, filed and inscribed for hearing during October sessions of 1890.

The question referred related to the distribution between the Provinces of Ontario and Quebec of proceeds of sales of Common School Lands and Crown Lands, $124,685.18 and $101,771.68, respectively, belonging to the late Province of Canada.

On 11th November, 1890, a motion to set down the reference for hearing at the end of the Ontario list was refused by the court. No further proceedings were taken

(NOTE. — See report *In re Common School Fund and Lands; Province of Ontario and Province of Quebec* v. *Dominion of Canada*, 28 Can. S. C. R. 609.)

The case of *The Province of Ontario* v. *The Dominion of Canada* (10 Ex. C. R. 292), was pending on appeal to the Supreme Court of Canada while this volume was being printed.

[S. C. File No. 976].

MACDONELL ET AL. v. PURCELL.

APPEAL from the Supreme Court of Nova Scotia.

Discontinued with costs.

(19th May, 1890.)

1891

[S. C. File No. 977.]

JACKSON v. WALKER.

APPEAL from the Court of Appeal for Ontario, dismissing an appeal from the judgment of the Chancellor, which dismissed the action with costs.

1891

The action was by one Clarke to have a mechanics' lien registered against property in the City of Toronto vacated and set aside, and also to have a judgment in a case of *Virtue* v. *Hayes*, to enforce another mechanics' lien, registered against the same lands, vacated and set aside. The Chancellor of Ontario dismissed the action, and his decision was affirmed by the judgment appealed from. The present appellant became plaintiff by revivor, and entered the appeal to the Supreme Court of Canada. The appeal was heard on 29th January, 1891, and judgment was reserved. On 22nd June, 1891, the appeal was dismissed with costs.

[Cf. *Virtue* v. *Hayes* (16 Can. S. C. R. 721). See also *Clark* v. *Walker*, p. 92, *ante*.]

1890

[S. C. File No. 1002.]

SEYMOUR v. TOBIN.

APPEAL from the Supreme Court of Nova Scotia.

Entered, but never prosecuted.

(25th September, 1890.)

1894

[S. C. File No. 1008.]

CONNOR v. MIDDAGH.

APPEAL from the Court of Appeal for Ontario (16 Ont. App. R. 356).

The arguments took place on the 7th June, 1892, and the court being equally divided in opinion, a new argument was ordered.

On 10th February, 1894, a suggestion was filed stating that the case had been settled between the parties.

(10th February, 1894).

1894

[S. C. File No. 1009.]

HILL v. MIDDAGH.

APPEAL from the Court of Appeal for Ontario (16 Ont. App. R. 356).

The arguments took place on the 10th of June, 1892, and the court being equally divided in opinion, a new argument was ordered.

On 10th February, 1894, a suggestion was filed stating that the case had been settled between the parties.

(10th February, 1894.)

1890

*Oct. 9.

[S. C. File No. 1019.]

FOURNIER v. LEGER.

Appeal—Jurisdiction—Expiration of time for appealing.

Where the time limited for bringing an appeal to the Supreme Court of Canada has expired, there is no jurisdiction in the Supreme Court of Canada or a judge thereof to approve a bond of security for the costs of appeal.

Cf. *The News Printing Company of Toronto* v. *Macrae* (26 Can. S. C. R. 695); *Canadian Mutual Loan & Investment Company* v. *Lee* (34 Can. S. C. R. 224).

APPLICATION to the Registrar in Chambers, for approval of security bond on appeal from the Court of Queen's Bench, Province of Quebec, appeal side, made on 8th October, 1890.

Affidavits were filed shewing that the judgment had been rendered on 21st May, 1890; that the amount in controversy exceeded $2,000; that notice of appeal to the Supreme Court of Canada was given on 27th May, 1890, and that the pre-

* PRESENT: THE REGISTRAR, in Chambers.

sentation of the petition for approval of the security bond could not be made, although continued from time to time, on each date fixed for hearing, until the 24th of September, 1890, by reason that, on each occasion, all the judges of the court appealed from, to whom the same was addressed, were absent from the Court House at Montreal, at the time when the petition should have been heard. On the last mentioned date, the petition was dismissed by Baby, J., one of the judges of said court, in consequence of the expiration of the time fixed for appealing under the provisions of the Supreme and Exchequer Courts Act.

On the present application, after hearing counsel on behalf of both parties, the Registrar refused the application, and, after reciting the circumstances, said:—

THE REGISTRAR.—Considering that the judgment from which it is sought to appeal was pronounced or rendered more than sixty days before the date of the application, to wit, on the 21st day of May, last past, without any extension of the delay fixed by law for bringing said appeal having been granted, and considering that no jurisdiction has been given to this court or a judge thereof to extend the delay for bringing said appeal, it is, therefore, ordered that the said application be, and the same is, refused.

Application refused.

[S. C. File No. 1022.]

SPARROW v. BANNERMAN.

BILL OF SALE transmitted (without any statement or explanations) by order of ROULEAU, J., from the Supreme Court of the North-west Territories.

No proceedings taken.

(4th October, 1890.)

1890

[S. C. File No. 1031.]

MACFARLANE v. FATT.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Not prosecuted.

(20th November, 1890.)

1891

[S. C. File No. 1037.]

UNITED COUNTIES OF PRESCOTT AND RUSSELL v. FLATT ET AL.

APPEAL from the Court of Appeal for Ontario (18 Ont. App. R. 1).

Entered, but never prosecuted.

(9th January, 1891.)

1892

[S. C. File No. 1041.]

WINDSOR AND ANNAPOLIS RAILWAY CO. v. McLEOD.

Discretionary order—Reduction of verdict—Costs.

APPEAL from the Supreme Court of Nova Scotia (23 N. S. Rep. 69).

Upon the argument of the appeal the court suggested a settlement reducing the verdict to $300, in which case the appeal should carry no costs but costs for the plaintiff in the courts below, otherwise the appeal to be allowed with costs and a new trial ordered.

Subsequently the appeal was discontinued and an agreement filed.

(7th January, 1892.)

1891

[S. C. File No. 1045.]

STEADMAN ET AL. v. BAIRD; IN RE PROHIBITION.

APPEAL from the Supreme Court of New Brunswick (29 N. B. Rep. 200).

Entered, but never brought to a hearing.

(18th February, 1891.)

[S. C. File No. 1049.]

STEADMAN v. BAIRD; IN RE ATTACHMENT.

APPEAL from the Supreme Court of New Brunswick (29 N. B. Rep. 200).

Entered, but never brought to a hearing.

(18th February, 1891.)

[S. C. File No. 1050.]

BERTRAND v. THE QUEEN.

APPEAL from the Exchequer Court of Canada (2 Ex. C. R. 285).

Not prosecuted.

(13th February, 1891.)

1891

[S. C. File No. 1057.]

JUDAH v. THE ATLANTIC AND NORTH-WEST RAILWAY CO.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Quashed without costs for want of jurisdiction.

(21st May, 1891.)

NOTE.—For a statement of this case, see Cameron's S. C. Prac. p 114.

[S. C. File No. 1059.]

BRODIE v. THE ESQUIMALT AND NANAIMO RAILWAY CO.

APPEAL from the Supreme Court of British Columbia.

An affidavit filed in this case states that the matters in issue were similar to those in the case of *Hoggan* v. *The Esquimalt and Nanaimo Railway Co.* (1), which was dismissed with costs, this judgment having been affirmed, on an appeal, by the Judicial Committee of the Privy Council in 1894.

The appeal was not further prosecuted.

(10th April, 1891.)

(1) 20 Can. S. C. R. 235; [1894] A. C. 429.

[S. C. File No. 1068.] 1891

ROBILLARD v. DUFAUX.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side (16 R. L. 235; 31 L. C. Jur. 231).

Dismissed with costs, for want of prosecution.

(23rd October, 1891.)

[S. C. File No. 1075.]

THE CANADIAN PACIFIC RAILWAY CO. v. SINCLAIR AND TAPPAN.

APPEAL from the Supreme Court of British Columbia.

Entered, but never prosecuted.

(8th June, 1891.)

[S. C. File No. 1080.] 1893

CANADIAN PACIFIC RAILWAY CO. v. CONMEE & McLENNAN.

APPEAL from the Court of Appeal for Ontario.

After hearing, the court reserved judgment and, on a subsequent day, by consent of the parties, judgment was entered varying the judgment appealed from, and ordering that a judgment should be entered in favour of the respondents for $175,000, as of 1st November, 1892, each party to bear their own costs in all the courts.

(22nd March, 1893.)

(Cf. 11 Ont. P. R. 149, 222, 297, 356; 12 Ont. App. R. 744, and 16 O. R. 639.)

1891

[S. C. File No. 1084.]

BLACK v. HUOT.

Execution for costs—Practice.

APPEALS from Court of Queen's Bench, Province of Quebec, appeal side.

Motions to have security approved and for leave to appeal were refused by the Registrar in chambers, and subsequently orders were made dismissing both motions for leave to appeal with costs.

(11th September, 1891.)

NOTE.—Writs of fi. fa. were issued on 13th Nov., 1891, directed to the Sheriff of the District of Iberville, on præcipe filed by solicitors for the respondents.

1892

[S. C. File No. 1088.]

GRIFFITH & CO. v. CROCKER.

APPEAL from the Court of Appeal for Ontario (18 Ont. App. R. 370).

Discontinued.

(6th April, 1892.)

1891

[S. C. File No. 1092.]

BUREAU v. DELISLE; PORTNEUF ELECTION CASE.

APPEAL from the Controverted Elections Court.

Dismissed by order of the CHIEF JUSTICE, on the ground that the defendant had no *locus standi* as required by the Dominion Controverted Elections Act, and also for want of prosecution.

(12th December, 1891.)

[S. C. File No. 1099.] 1891

THE ACCIDENT INSURANCE COMPANY OF NORTH AMERICA v. McFEE.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Discontinued.

(25th September, 1891.)

[S. C. File No. 1100.]

MOSS ET AL. v. BROWN ET AL.

APPLICATION for leave to appeal from the Supreme Court of New Brunswick.

Dismissed, with costs.

(9th October, 1891.)

(See 31 N. B. Rep. 554.)

[S. C. File No. 1106.] 1892

SEYMOUR v. DOULL ET AL

APPEAL from the Supreme Court of Nova Scotia.

Settled out of court.

(18th February, 1892.)

(See 23 N. S. Rep. 364.)

1891 [S. C. File No. 1111.]

ONTARIO AND QUEBEC RAILWAY CO. v. LES CURE, ETC.

SEARCH made for lodging of an appeal which does not appear to have been entered.

(10th October, 1891.)

1893 [S. C. File No. 1121.]

ARCHIBALD v. THE QUEEN.

APPEAL from the Exchequer Court of Canada (2 Ex. C. R. 374).

Abandoned.

(18th September, 1893.)

1891 [S. C. File No. 1122.]

COTTER v. EDWARDS; HALDIMAND ELECTION CASE.

APPEAL from the Controverted Elections Court.

Entered, but never prosecuted.

(16th November, 1891.)

[S. C. File No. 1123.] 1892

BOWMAN v. ANTHONY; NORTH WATERLOO ELECTION CASE.

APPEAL from the Controverted Elections Court.

Never brought to a hearing.

(15th January, 1892.)

[S. C. File No. 1125.] 1891

KNELL v. BOWMAN; NORTH WATERLOO ELECTION CASE.

APPEAL from the Controverted Elections Court.

Entered, but never brought to hearing.

(23rd November, 1891.)

[S. C. File No. 1135.] 1892

HARGRAFT v. GRAVELY; WEST NORTHUMBERLAND ELECTION CASE.

Controverted election—Dismissal on default of appearance—Reinstating appeal—Practice.

APPEAL from the Controverted Elections Court.

The appeal was entered on 8th January, 1892; subsequently the record was amended. On 10th February, 1892, a motion to quash the appeal was dismissed with costs. When the case came on for hearing, on 16th February, 1892, no counsel appeared, and the appeal was dismissed with costs. On 18th February, 1892, a motion to reinstate the appeal and stay entry of judgment was dismissed, and a certificate of the judgment dismissing the appeal was transmitted to the Speaker of the House of Commons.

(19th February, 1892.)

1892

[S. C. File No. 1152.]

LEGRIS v. LECLERC; MASKINONGE ELECTION CASE.

APPEAL from the Controverted Elections Court.

Dismissed, without costs, by consent.

(11th June, 1892.)

[S. C. File No. 1154.]

WILLIAMS v. LANDERKIN; SOUTH GREY ELECTION CASE.

APPEAL from the Controverted Elections Court.

Dismissed, by consent.

(9th May, 1892.)

1892

*March 3.

IN RE JEROME D. TELLIER.

Habeas corpus—Criminal law—Jurisdiction of judge of Supreme Court of Canada—Issue of writ out of jurisdiction of provincial courts—Concurrent jurisdiction—R. S. C. c. 135, s. 32—Construction of statute—Constitutional law—Powers of Parliament—"Inland Revenue Act." R. S. C. c. 34, s. 159 (c)—Selling and delivering a still and worm—Cumulative charge—Summary conviction—Adjournment—Conviction in absence of accused.

On an application for a writ of *habeas corpus ad subjiciendum* on a commitment under a conviction in a criminal matter, to a term of

* PRESENT: PATTERSON, J., in chambers.

imprisonment in the common gaol of the County of Richelieu, in the Province of Quebec, made in chambers at the City of Ottawa in Ontario, His Lordship Mr. Justice Patterson considered that, under these circumstances, he had no jurisdiction to issue the writ there, as the concurrent jurisdiction given by the statute in such matters was limited to that of a judge of the Superior Court of the Province of Quebec.

[NOTE.—The views above expressed by His Lordship are not in accord with the established jurisprudence of the court. Cf. *In re Trepanier* (12 Can. S. C. R. 111); *In re Sproule* (12 Can. S. C. R. 140); *In re Boucher* (Cout. Dig. 635); *Ex p. Macdonald* (27 Can. S. C. R. 683); *In re Richard* (38 Can. S. C. R. 394). See also *In re Hamilton* (p. 35 *ante*); and *In re Arabin* (p. 95).]

A charge that the person accused "sold and delivered a still and worm" without the necessary license under the "Inland Revenue Act," R. S. C. ch. 34, constitutes only one offence under section 159 (c) of that Act.

Irregularities in procedure by a magistrate under the "Summary Convictions Act" are not properly open to review by a judge of the Supreme Court of Canada on an application for a writ of *habeas corpus ad subjiciendum*.

Semble, that the jurisdiction given by the Act was intended to be limited to cases of emergency, or those in which, for some reason, there might be an obstacle in the way of effective resort to provincial courts.

Quære—Has the Parliament of Canada power to confer such original jurisdiction upon judges of the Supreme Court of Canada?

APPLICATION, in chambers, for a writ of *habeas corpus* to inquire into the commitment of the applicant to the common gaol of the County of Richelieu, in the Province of Quebec, under a warrant issued by Charles Dorion, Esquire, a justice of the peace, upon conviction by him on a charge of selling and delivering a still and worm to one Guévremont, without the necessary license required by "The Inland Revenue Act," S. S. C. chap. 34, sec. 159 (c).

The circumstances of the case are stated in the judgment now reported.

Belcourt appeared in support of the application.

The learned judge refused the issue of the writ and delivered the following judgment.

1892

IN RE TELLIER.

PATTERSON, J.—Tellier is in custody in the common gaol of the County of Richelieu under a warrant, dated 15th February, 1892, issued by Charles Dorion, J.P., which recites a conviction, dated 24th March, 1891, convicting Tellier for having, on 20th August, 1886, or about that date, illegally and without having a license, then in force, under the "Inland Revenue Act," sold and delivered to one Guévremont a still and worm, contrary to the statute in such case made and provided, and sentencing him to one month's imprisonment in the common gaol, and to a fine of one hundred dollars, besides costs of the prosecution.

The most important objection is to the conviction, which, it is alleged, is for two offences, while the penalty is the minimum penalty under the statute for one offence. Therefore, it is urged there is an uncertainty which would disable the applicant from successfully pleading this conviction in bar of a second charge for either of the two offences.

The charge is under the "Inland Revenue Act," R. S. C. chap. 34, sec. 159, sub-section (*c*). I think the objection misapprehends the effect of the sub-section. The person liable to conviction under the terms of sub-section (*c*), is every person who, without having a license under the Act then in force,

> imports, makes, commences to make, sells, offers for sale or delivers any still, worm, rectifying or other apparatus suitable for the manufacture of wash, beer or spirits, or for the rectification of spirits, or any part of such apparatus.

In other words, it is made penal to make, sell, etc., any distillery apparatus. Some parts of such apparatus are enumerated, e.g., "still and worm." How many more are covered by the words "or any part of such apparatus," and are capable of being separately named, I cannot say. To make or sell any one of them by itself, is made penal, but I apprehend that a sale of a complete apparatus, with all the parts combined, is only one offence and not as many offences as there are parts that might be sold separately. So the charge of selling the still and the worm, which appears to have been but one transaction, appears to me to be a single

charge. If it is to be expanded into two, it might as well be counted as six; viz., (1) offering for sale, (2) selling, and (3) delivering each of the two pieces of distillery apparatus. And the minimum penalty of $100 might, on the same mode of construction, have been made $600, exceeding the maximum penalty for a first offence—the imprisonment being expanded on the same scale.

The other objections of which notice is given are equally hopeless on an application like the present. They do not appear on the face of the conviction, and are very much in the nature of an appeal from the provincial tribunals.

It is said that the magistrate adjourned the proceedings before him for a larger period than the one week limited by section 48 of the "Summary Convictions Act," R. S. C. chap. 178. The accused was on bail and appeared after the adjournment.

Then it is said that the magistrate, having on the 4th of February, 1891, fixed the 25th of March, 1891, for giving judgment, actually pronounced his judgment on the 24th of March, in the absence of the accused, though after notice given at his residence.

Whatever force these objections might have before a provincial tribunal, authorized to review the proceedings of the magistrate, I do not think they are proper for discussion on the present application. I do not, however, consider them more at length because, in my opinion, I have no jurisdiction to entertain the application.

The "Supreme and Exchequer Courts Act" declares, in section 32, that every judge of this court shall have concurrent jurisdiction with the courts or judges of the several provinces to issue the writ of *habeas corpus ad subjiciendum* for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada. I have, before this, had occasion to intimate doubts of the legislative jurisdiction of Parliament to confer this original jurisdiction on the judges of this court. I still en-

1892

IN RE TELLIER.

tertain the opinion that the legislative jurisdiction is by no means clear. But, leaving that aside, what is the jurisdiction assumed to be conferred? It is concurrent with the courts or judges of the provinces. In this case, concurrent with the jurisdiction of a judge of the Superior Court of the Province of Quebec. But if I, sitting here in Ontario, order the issue of a writ into another province, I am exercising a jurisdiction not co-extensive with but exceeding that which a court or judge of the Province of Quebec possesses.

I do not construe the statute as intended to confer the power to order a person to be brought from the eastern or western boundaries of the Dominion to this City of Ottawa.

There are other considerations that affect the question which I may advert to without attempting discussion of them.

The case comes, I do not doubt, within the category mentioned in section 32. The commitment is under an Act of the Parliament of Canada, viz., under the "Summary Convictions Act." The offence is, moreover, created by an Act of the Parliament of Canada, viz., the "Inland Revenue Act," though, in my view, that is not very material as long as it is a criminal case (1). But, is it intended that the powers given to the judges shall be exercised whenever an application is made by one who shews that he is imprisoned against his will? I do not particularly refer to cases coming under 31 Car. II. chap. 2, or to the compulsory rights given in those cases. My impression is that when the powers already vested in the judges of the provincial courts were given to the judges of this court, not by way of appeal from the provincial tribunals, but by way of original jurisdiction, the intention must have been to provide for cases of emergency, or cases in which, for some reason or other, there may have been obstacles in the way of effective resort to the provincial courts, and not to invite a withdrawal from those courts of cases like the present, which may be more conveniently and with less expense dealt with there than here.

I refuse the writ.

Application refused.

(1) ED. NOTE. Cf. *In re Potvin* (Cout. Dig. 637).

[S. C. File No. 1161] 1892

SAVARD v. STURTON — CHICOUTIMI AND SAGUENAY ELECTION CASE.

APPEAL from the Controverted Elections Court.

Dismissed, for want of prosecution.

(17th May, 1892.)

[S. C. File No. 1164.]

MADDEN ET AL. v. CITY OF QUEBEC.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Discontinued.

(20th April, 1892.)

[S. C. File No. 1178.]

COUSINEAU v. HAMILTON.

APPEAL from the Court of Appeal for Ontario (19 Ont. App. R. 203).

Settled out of court.

(30th Sept., 1892.)

1892

[S. C. File No. 1182.]

CHOQUETTE v. ROBIN—MONTMAGNY ELECTION CASE.

APPEAL from the Controverted Elections Court.

Allowed, without costs.

(15th December, 1892.)

[S. C. File No. 1186.]

ALGIE v. TOWNSHIP OF CALEDON.

APPEAL from the Court of Appeal for Ontario (19 Ont. App. R. 69).

Settled out of Court.

(19th September, 1892.)

1893

[S. C. File No. 1197.]

STARK v. WHITNEY.

APPEAL from the Court of Appeal for Ontario.

Case settled out of court.

(1st May, 1893.)

[S. C. File No. 1198.] 1894

PLATT v. GRAND TRUNK RAILWAY COMPANY.

APPEAL from the Court of Appeal for Ontario (19 Ont. App. R. 403).

Case settled out of court.

(5th March, 1894.)

[S. C. File No. 1201.] 1892

RUMBLE ET AL. v. GORDON.

APPLICATION for approval of security bond on appeal from the Court of Appeal for Ontario (19 Ont. App. R. 440).

Dismissed with costs.

(1st Sept., 1892.)

[S. C. File No. 1203.]

McARTHUR v. McDOWELL.

APPEAL, probably from Manitoba, appears to have been contemplated, but was never prosecuted.

(8th August, 1892.)

1893

[S. C. File No. 1207.]

NOVA SCOTIA MARINE INSURANCE CO. v. EISENHAUER & CO. ET AL.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed with costs on the ground that the appeal was premature, and that no appeal could lie until after a new trial had been ordered.

(4th May, 1893.)

NOTE.—A subsequent appeal is reported, shortly, at p. 811 Cout. Dig.

(See 24 N. S. Rep. 205.)

1892

[S. C. File No. 1212.]

HUTCHISON v. McLAGGAN.

APPEAL from the Supreme Court of New Brunswick.

Entered, but never prosecuted.

(21st September, 1892.)

(See 30 N. B. Rep. 185.)

[S. C. File No. 1216.]

FLANAGAN v. WHETEN.

APPEAL from the Supreme Court of New Brunswick.

Not prosecuted.

(12th September, 1892.)

(See 31 N. B. Rep. 295, 607.)

[S. C. File No. 1220.] 1893

PRITTIE v. CITY OF TORONTO.

APPEAL from the Court of Appeal (19 Ont. App. R. 503), for Ontario.

Settled out of court.

(12th May, 1893.)

[S. C. File No. 1223.] 1892

O'MEARA v. O'MEARA.

APPEAL from the Court of Appeal for Ontario.

Discontinued with costs.

(11th October, 1892.)

[S. C. File No. 1227.] 1892

IN RE THE WINDING-UP ACT AND THE CENTRAL BANK OF CANADA. *Dec. 16.

GEORGE R. HOGABOOM, APPELLANT,

AND

THE CENTRAL BANK OF CANADA AND THE LIQUIDATORS THEREOF, RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Jurisdiction—Matter in controversy—Discretionary order—R. S. C. c. 129, s. 76—"Winding-up Act."

In order to give a right to appeal under section 76 of the "Winding-up Act" the existing real value of the matter in controversy must be shewn to exceed $2,000; mere suppositious valuations cannot be accepted.

*PRESENT: THE REGISTRAR in Chambers.

1892

HOGABOOM v. CENTRAL BANK OF CANADA.

Where no useful result can be obtained as the result of an appeal, the discretion of the judge should be exercised by the refusal of special leave to appeal under the "Winding-up Act."

(NOTE.—Cf. *Cushing Sulphite Fibre Co.* v. *Cushing*, (37 Can. S. C. R. 427). See also *In re Central Bank of Canada* (28 Can. S. C. R. 192.)

APPEAL from the Court of Appeal for Ontario affirming the order of MEREDITH, J., refusing an application by the appellant for the delivery to him of certain books and documents to which he claimed to be entitled upon a vesting order made upon the acceptance of his tender for the purchase of unrealized assets of the bank.

After hearing counsel for the parties upon an application for leave to appeal under section 76 of the "Winding-up Act," the Registrar refused the application with costs, and delivered judgment as follows:

THE REGISTRAR—This was an application for leave to appeal under section 76 of the "Winding-up Act," which reads as follows:—

76. An appeal shall lie to the Supreme Court of Canada, by leave of a judge of the said Supreme Court, from the judgment of the Court of Appeal for Ontario, the Court of Queen's Bench in Quebec, or the full court in any of the other provinces or in the North-West Territories, as the case may be, if the amount involved in the appeal exceeds two thousand dollars. (45 V. c. 23, s. 78, part.)

On the 22nd of July, tenders were asked for the purchase of the unrealized assets of the Central Bank, and the advertisement specified that the schedule of such assets might be seen during office hours at the office of the liquidators, where copies of the conditions of sale to be tendered might be obtained.

On the 3rd of October, 1891, a vesting order was made by the Master in Ordinary, ordering that the tender of the said George R. Hogaboom of $44,500 for the said unrealized assets as the same existed on the 22nd July, 1891, which

tender was opened on the 9th September, 1891, and approved on the 14th September, 1891, should be and the same was accepted, approved and affirmed, and it was further ordered that the purchaser should be allowed to deduct $2,500 from the amount of his tender on account of moneys received by the liquidators between the 22nd July, 1891, and the 9th of September, 1891.

And it was further ordered

that, upon payment to the said liquidators by the said George R. Hogaboom of the said sum of $44,500, less the deductions hereinbefore referred to, all the said unrealized assets and all the real and personal and hereditable and movable property, effects and choses in action of the said Central Bank of Canada referred to in the schedule marked "A," and in a book containing a list of the said unrealized assets of the said bank, each certified by the Master in Ordinary of the Supreme Court of Judicature from Ontario, as the schedule of the said assets referred to in this order, and one copy of the said schedule marked "A," and the said book being filed in the office of the said Master, at Toronto, Ontario, and all and every other real and personal and hereditable and movable property, effects and choses in action of the said bank, if any, of what nature and kind soever, and wherever situated and existing, to which the said bank was or appeared to be entitled, or which was in the custody or under the control of the said liquidators, and as the same existed on the 22nd day of July, 1891, only excepting the claim of the said liquidators, or of the said bank, against Messrs. McKelcan & Newburn of Hamilton, and any claims of the said Central Bank against the directors and officers of the bank for breaches of trust, but not including ordinary debts due by any of the said parties, shall be and they are and each of them is hereby vested in the said George R. Hogaboom, his heirs, executors, administrators and assigns for ever to and for his and their sole and only use, absolutely free from any and all conditions, reservations and deductions for expenses or otherwise whatsoever, but subject to the incumbrances, if any, existing, or the equities and conditions attaching to any particular asset or assets on the 22nd day of July, 1891, and all the estate, right, title, interest, claim, property and demand of the said Central Bank of Canada and of the liquidators thereof, therein and thereto, and the said liquidators are hereby ordered and directed upon such payment being made to the said liquidators by the said George R. Hogaboom, to forthwith assign, deliver and hand over the same and every part thereof, at the office of the said liquidators, to the said George R. Hogaboom or to whom he may appoint.

1892

HOGABOOM v. CENTRAL BANK OF CANADA.

This vesting order was, on the 23rd October, 1891, confirmed by the order of the Honourable The Chancellor, by an order expressed in the same words.

After some correspondence between the appellant or his solicitor and the liquidators or their solicitors, in which the appellant alleged that certain assets and property which belonged to the Central Bank and were intended to be included in the sale to him, had not been delivered to him, the appellant presented a motion to the court, on the 27th January, 1892, asking for an order with costs limiting the time within which the liquidators should assign, deliver and hand over certain property mentioned in the vesting order which the liquidators, he alleged, had refused to deliver, and asking that a writ of attachment should issue against the liquidators, or for a writ of sequestration for not delivering and handing over to the applicant the said property.

The schedule annexed to the notice of motion specified the following as the property claimed:—

1. The books of the said bank that were in existence at the time of the suspension that came to your hands as liquidators;
2. One large safe;
3. The documents, letters and correspondence referring to the various notes, choses in action and claims that were ordered to be transferred to the applicant;
4. The George Thompson mortgage for $1,894.33;
5. The Charles Smith mortgage for $2,660;
6. The mortgage, James Harris to Mary Irwin,, for $150;
7. Agreement between A. B. Lambe and William H. Jones for $180;
8. Scrip for the Toronto Window Blind Company;
9. Stock scrip for the Toronto Portable Gas Company;
10. Stock scrip for the ten shares in the Hand-in-Hand Company;
11. Past due bills, E. H. Fleming, numbered, respectively, 453, 500, 1,617, 1,805, and 2,052;
12. Past due bill, E. Williams, numbered 1,121;
13. Past due bill, S. B. Pollard, numbered 2,357;
14. Past due bills, Alex. Telfer, numbered, respectively, 705 and 1,657;
15. Past due bill, H. Schmidt, numbered 1,872;

16. Past due bill, W. A. Hope, numbered 1,289;
17. Past due bill, H. Howes, numbered 61;
18. Past due bill, A. Brunel, numbered 21;
19. Past due bill, A. E. McMillan, numbered 264;
20. Past due bill, C. R. Winter, numbered 1,644.

Mr. Justice Meredith, before whom the application was heard, held that, on a proper construction of the vesting order, the purchaser was not entitled to the books nor any of the property specified in the motion, except the safe, which he ordered to be delivered to the applicant and which has since been delivered and is, therefore, not in question in this appeal.

The Court of Appeal dismissed the appeal of the applicant from this judgment on the ground that the liquidators had not been in contempt and, the object of the proceeding being that they might be ordered to comply with the vesting order, by delivering up the property specified, the answer to the proceeding was that, since the judgment appealed from was given the liquidators had been regularly discharged from their office, and had no longer any property in the bank, and were no longer persons who could intermeddle with the bank's assets.

The Chief Justice also expressed the opinion that he agreed with Mr. Justice Meredith, that the purchaser of the assets was not entitled to the bank-books, and that the general words used in the vesting order did not cover the books.

In applications of this kind, the judge before whom they are made has to be satisfied, in the first place, that the amount involved in the appeal is $2,000; and, in the second place, that, in the exercise of a sound discretion, the case is one in which an appeal ought to be allowed.

As to the amount involved in the appeal it is incumbent upon the appellant to shew clearly that it exceeds $2,000. The value should not be a mere fancy value, or a value which the appellant alone would put on the subject matter, but a real existing value which can be established beyond dispute by

1892

HOGABOOM v. CENTRAL BANK OF CANADA.

evidence. If any doubt remains as to it in the mind of the judge he should decide in favour of the vested right which the respondent has acquired by his judgment.

* * * * * * * *

(The Registrar then analyzed the evidence on this point, referring to various affidavits filed, and the facts that, with respect to the mortgages, they were assigned to the liquidators among other assets belonging to the D. Mitchell McDonald Estate, at 26 cents in the dollar, that the subject matter in controversy, such as the mortgages, past due bills, etc., belonged to a bankrupt concern, the assets of which were sold *en bloc* with no pretence of their being worth their face value, and not supposed to be purchased at their face value, and that, therefore, no presumption could be urged in favour of the appellant that they were worth their face value; that the appellant did not shew that the various things claimed were more than mere evidences of title, in themselves of no intrinsic value, but valuable to him only in so far as useful to enable him to realize the assets sold to him, but not necessarily required, and their non-delivery not preventing him from realizing the assets, and that the applicant could have access to the books and have them produced to assist him in the prosecution of suits.

(The conclusion arrived at by the Registrar was that there was not satisfactory evidence that the amount involved exceeded $2,000.)

* * * * * * * *

Then, as to the second point, assuming the amount involved in the appeal to exceed $2,000. Is the case one in which, in the exercise of a sound discretion, leave to appeal should be given?

In this connection certain other facts have to be considered:—1. The nature of the application—an application made under the "Winding-up Act" to enforce delivery of

property alleged to be vested in the applicant by order of the court, the alternative being attachment of the liquidators, who are officers of the court; 2. The fact established by the evidence that, with the exception of the books and correspondence, the liquidators never had possession of the property and effects in question, and, therefore, in this form of proceeding, in the event of the appellant succeeding, the alternative remedy of attachment is the only one open; 3. The fact that the liquidators have been discharged and the books and papers deposited in court, in whose custody they now are, the liquidators no longer having the right or the power to intermeddle with them. And as the main controversy, according to Mr. Millar himself, is about the books, the continuing of the controversy further would practically result in a trial of conclusions not between the appellant and the respondents, but between the appellant and the court below, which has approved of the action of its officers, has discharged them from liability incurred as liquidators, and has received into its own possession and under its immediate control the books and papers which the applicant claims.

In these circumstances, in my opinion, the appeal ought not to be allowed.

Application refused with costs.

Solicitors for the appellant: *Millar, Riddell & Le Vesconte.*

Solicitors for the respondents: *Meredith, Clarke, Bowes & Hilton.*

[S. C. File No. 1243.]

1893

MINGEAUD v. PACKER ET AL.

APPEAL from the Queen's Bench Division of the High Court of Justice for Ontario (19 Ont. App. R. 290).

Dismissed with costs, by consent.

(30th January, 1893.)

1893

[S. C. File No. 1253.]

THE CANADIAN PACIFIC RAILWAY CO. v. HOLLINGER.

APPEAL from the Court of Appeal for Ontario (20 Ont. App. R. 244).

Settled out of court.

(9th September, 1393.)

[S. C. File No. 1257.]

STEWART v. ST. ANN'S MUTUAL BUILDING SOCIETY.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Motion for leave to appeal dismissed with costs for want of prosecution.

(7th March, 1893.)

See Q. R. 1 Q. B. 320.

[S. C. File No. 1261.]

CLARK v. KILLACKEY.

MOTION for leave to appeal from the Court of Appeal for Ontario.

Dismissed with costs for want of prosecution.

(20th March, 1893.)

1893

[S. C. File No. 1263.]

COUNTY OF YORK v. CHAPMAN.

APPEAL from the Court of Appeal for Ontario, which affirmed the decision of the Chancellor holding that the lands of the respondent were encroached upon by the Lake Shore Road, according to the plan referred to in the Act, 52 Vict. ch. 77 (Ont.).

The appeal was dismissed with costs, GWYNNE, J., dissenting.

(24th June, 1893.)

[S. C. File No. 1268.]

HORNE v. THE BANK OF NOVA SCOTIA.

APPEAL from the Supreme Court of Prince Edward Island.

Entered but never prosecuted.

(5th August, 1893.)

[S. C. File No. 1269.]

CAMERON v. HARPER.

APPEAL from the Supreme Court of British Columbia.

Entered, but never prosecuted.

(8th April, 1893.)

NOTE.—An appeal in a case between the same parties from a decision in the same court was dismissed by the Supreme Court of Canada, 28th June, 1892 (21 Can. S. C. R. 273).

1894

[S. C. File No. 1270.]

THE SAINT JOHN CITY RAILWAY CO. v. RAINNIE.

APPEAL from the Supreme Court of New Brunswick.

Withdrawn.

(14th February, 1894.)

See 31 N. B. Rep. 552.

[S. C. File No. 1283.]

1893

SMITH v. BIRKS.

APPEAL from the Court of Appeal for Ontario.

Settled out of court.

(18th September, 1893.)

[S. C. File No. 1284.]

PACAUD v. THE ATTORNEY-GENERAL FOR QUEBEC.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed with costs for want of prosecution.

(2nd June, 1893.)

See Q. R. 2 S. C. 89.

[S. C. File No. 1285.] 1893

METHE ET AL. v. MOREAU.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Entered, but never prosecuted.

(8th July, 1893.)

[S. C. File No. 1287.] 1894

McGREEVY v. McGREEVY.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed with costs for want of prosecution.

(22nd February, 1894.)

[S. C. File No. 1317.] 1893

THE SHIP "LYDIA" ET AL. v. HENDRY ET AL.

APPEAL from the Nova Scotia Admiralty District of the Exchequer Court of Canada.

Settled out of Court.

(9th December, 1893.)

1895

[S. C. File No. 1320.]

THE QUEBEC SKATING CLUB v. THE QUEEN.

APPEAL from the Exchequer Court of Canada (3 Ex. C. R. 387).

Withdrawn.

(3rd May, 1895.)

[S. C. File No. 1327.]

THE QUEEN v. LAFORCE.

APPEAL from the Exchequer Court of Canada (4 Ex. C. R. 14).

Withdrawn.

(9th January, 1895.)

1894

[S. C. File No. 1332.]

McDONALD v. McDONALD.

APPEAL from the Supreme Court of Nova Scotia.

Abandoned.

(14th February, 1894.)

See 24 N. S. Rep. 241.

[S. C. File No. 1335.] 1894

ADAMS v. TOWNSHEND.

APPEAL from the Supreme Court of Nova Scotia.

Allowed with costs, but without prejudice to the plaintiff's right to raise the same questions in an action instituted for the purpose of taking partnership accounts. TASCHEREAU, J., dissented, being of opinion that the appeal should be dismissed with costs.

(31st May, 1894.)

[S. C. File No. 1336.]

HARDY v. DESJARLAIS.

APPEAL from the Court of Queen's Bench for Manitoba.

Abandoned.

(February, 1894.)

[S. C. File No. 1337.] 1894

TROOP ET AL. (PLAINTIFFS), APPELLANTS, *May. 7, 8. *Oct. 9.

AND

EVERETT ET AL. (DEFENDANTS), RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Ships and shipping—Material used in construction—Sale of goods—Contract—Principal and agent—Misrepresentations — Mistake—Conversion—Trover—Evidence—Misdirection—New trial—Ship's husband—Pledging credit of owners — Necessary outfitting at home port.

While a three-masted schooner was in course of construction, E. obtained goods on credit from the plaintiffs (appellants) falsely re-

* PRESENT: SIR HENRY STRONG, C.J., and FOURNIER, TASCHEREAU, SEDGEWICK and KING, JJ.

1894

TROOP v. EVERETT.

presenting that his co-defendants were interested in the ship. The materials were built into the ship and used in rigging and equipping her, she was launched and registered in the name of E. as sole owner, and, subsequently, these co-defendants became *bonâ fide* purchasers of certain shares in the ship. E. was registered as her managing owner, and she was sent to sea.

Held, that sending the ship to sea was not such a conversion of the materials worked into the ship as could support an action in trover against the subsequent purchasers of shares in her.

After the purchasers of the above mentioned shares were registered as co-owners, E. obtained, on a further credit, metal sheathing and other goods from the plaintiffs which were used in sheathing and further outfitting the vessel, at the port where she had been built, and where the owners resided, before sending her out to sea.

Held, that the managing owner had power to pledge the credit of the owners for such necessary purposes. *The "Huntsman,"* ((1894) P. D. 214) followed.

The judgment appealed from (32 N. B. Rep. 147), which ordered a new trial on the ground of misdirection, was affirmed.

APPEAL from the judgment of the Supreme Court of New Brunswick (32 N. B. Rep. 147), setting aside the judgment entered by FRASER, J., at the trial, upon the findings of the jury, in favour of the plaintiffs (appellants), and ordering a new trial, FRASER, J., dissenting.

The questions raised upon this appeal are stated in the judgment of Mr. Justice King, now reported.

Pugsley, Q.C., and *Palmer*, Q.C., for the appellants.

McLeod, Q.C., for the respondents.

STRONG, C.J., concurred in the judgment of KING, J.

TASCHEREAU, J.—I would dismiss the appeal with costs. I adopt Mr. Justice Tuck's reasoning in the court below. The order for a new trial should, in my opinion, stand.

FOURNIER and SEDGEWICK, JJ., concurred with KING, J.

KING, J.—This suit was brought as an action for goods sold and delivered to recover the price of outfits and material

supplied by plaintiffs (appellants), a firm of ship-chandlers at St. John. N.B., for a vessel called the "Beaver." Two distinct claims were involved; one in respect of rope, canvas, anchors, chain and material used in the construction and outfitting of the vessel, supplied prior to her registration; the other for yellow metal sheathing, felt, etc., after the registration, and after defendants had acquired title. The order, in each case, was through one Eagles, for whom the vessel was built, and who, afterwards, became the managing owner.

As to the first alleged contract, the plaintiffs contended that the contract intended was one with Eagles and the defendants jointly, while the defendants maintained that if Eagles professed to contract on their account he acted without authority.

As to the second contract, this was made by Eagles as managing owner, and the question is as to the power of a managing owner to bind his co-owners by such a contract.

It appeared that the vessel was being built by one Murphy near St. John, in the summer of 1890, under contract with Eagles. She was launched in November. On 7th January, 1891, the builder's certificate in favour of Eagles for sixty-four one-sixty-fourth shares was registered. On 14th January, Eagles executed a bill of sale to defendant Peters of eight shares, to defendant Franke of four shares, and to defendant Everett of eight shares. These bills of sale, with two others to persons not included as defendants, were registered on 22nd January, 1891. On 20th January, he executed bills of sale to defendant Wilson of eight shares, and to defendant Collard of eight shares, and these, with other bills for four shares, were registered on 2nd February, 1891. This left sixteen shares remaining in Eagles, who was also put on the register as managing owner.

Several, if not all, of the transfers to defendants were out and out purchases for value.

The transactions first in question were based on an alleged contract, in July, 1890, negotiated by William McLachlan,

1894

TROOP v. EVERETT.

one of the plaintiffs, and by Eagles. The latter absconded prior to the action, and was not again in the province, and the proof of what took place rests upon the evidence of McLachlan, and, to a slight extent, on that of Milligan, a clerk of the plaintiffs. This evidence will be referred to hereafter. At present it is sufficient to say that the plaintiffs, being without any substantial evidence to prove Eagles's authority to contract for defendants, and the defendants having amply disproved any authority (proving, amongst other things, that they had no negotiations for a purchase of shares in the vessel until some time after the alleged contract), the plaintiffs applied for and obtained leave to amend the declaration by adding a count for trover in respect of these outfits. The alleged conversion was in the defendants having exercised dominion over the anchors, chains, and over the sails and rigging, which were made from the canvas and ropes and other things furnished, by sending the vessel to sea in February, 1891, after they became registered owners. It appeared that some of the material became part of and was upon the vessel before the defendant became registered owners, and that some became so afterwards.

In February or March, Eagles gave his promissory note for $3,568, at four months, which included a sum due by him to plaintiffs for supplies to other vessels of which also he was managing owner. The note was reduced upon three several renewals to $2,400. Before the note for the last mentioned sum fell due Eagles left the province, and this action was then begun.

The contention, under the substituted count, for trover, was that there was no contract with Eagles alone, and, therefore, that nothing could pass to defendants, even as innocent purchasers for value, the plaintiffs citing and relying upon *Hardman* v. *Booth* (1), and *Cundy* v. *Lindsay* (2).

The learned judge instructed the jury that if the goods were supplied upon the joint credit of Eagles and defendants

(1) 1 H. & C. 803. (2) 3 App. Cas. 459.

no property passed, as Eagles had no authority to contract for defendants, and that, in such case, the plaintiffs were entitled to recover, and left to the jury this question:—

Upon whose credit were the outfits furnished by the plaintiffs?

The jury answered:—

Credit was extended to the parties represented by Eagles as going into the vessel with him.

And a verdict was found for the plaintiffs with damages on the trover count to the amount of $2,288.34.

Upon motion for a new trial, the court (*per* Sir John Allen, C.J., and Tuck, J.; Fraser, J., the trial judge, dissenting), ordered a new trial, unless the plaintiffs should consent to reduce the verdict to the amount found for the yellow metal sheathing, felt, etc., supplied after defendants became registered owners. This the plaintiffs declined, and, instead, have brought this appeal from the judgment of the court granting a new trial.

Assuming that Eagles represented (and, of course, in such case, falsely), that he had authority to contract for and on account of defendants, and that the contract that was intended by the parties was one with Eagles and defendants jointly, the question is:—Was there, in fact a contract of sale? If not, the defendants, although innocent purchasers for value, are, under the general law, in no better position than Eagles. But, if there was in fact a contract of sale to Eagles then, although it might be voidable for his fraud, still innocent transferees from him for value before the plaintiffs have exercised their option to avoid the contract, are not affected by the infirmity of Eagles's title.

One who expressly or impliedly manifests an intention to contract with certain persons cannot, if that intention fails to take its proper effect, be taken to have contracted with another. This result follows whether the absence of true assent is due to error or fraud. *Boulton* v. *Jones* (1), was a case of

(1) 2 H & N. 564.

1894

TROOP v. EVERETT.

the former sort. *Hardman* v. *Booth* (2), *Higgins* v. *Burton* (3), and *Cundy* v. *Lindsay* (4), of the latter.

It is not easy to distinguish this case, in principle, from *Hardman* v. *Booth* (2), provided that the real transaction is such as is contended for by plaintiffs. In that case the plaintiff, Hardman, believed that he was selling the goods in question to a firm of which the person with whom he was dealing had falsely led him to believe that he was a member. Such person was a member of another firm, of which the plaintiff knew nothing, and pledged the goods so sold to the defendant for advances to the last mentioned business, and the defendant sold them. The action was in trover, and it was held that there was no contract of sale, as the facts shewed that the plaintiff believed that he was contracting with a certain firm which, however, had never authorized the person with whom he actually dealt to contract on their behalf, and so the defendant was held liable in trover for the amount for which he sold the goods.

Upon the assumption of the correctness of their view of the facts, the plaintiffs offered to sell to several parties jointly, contemplating, of course, in the case of an executory contract like this, the benefit of the character, credit and substance of the several parties, and it is no acceptance of such offer for one of the parties to accept professedly, but not really, for the whole.

The next question is whether the plaintiffs' view of the transaction is borne out by the facts. It seems to have been assumed rather too readily by the very learned judge who presided at the trial that there was but one interpretation of the evidence.

On his direct examination, and again on cross-examination, Mr. McLachlan gave an account of the transaction which bears quite a different meaning from that now con-

(2) 1 H. & C. 803. (3) 26 L. J. Ex. 342.
(4) 3 App. Cas. 459.

tended for, and it is only upon re-examination and with the aid of leading questions involving a misconception of what the witness had previously said, that any evidence is given from which it could reasonably be inferred that Eagles could have been supposed by plaintiffs to intend to pledge the credit of defendants.

Mr. McLachlan, on direct examination, says that Eagles called at plaintiffs' place of business, and, using his words:—

stated that he had about contracted with Mr. Murphy to build a three-masted schooner, and he was around disposing of shares. Wanted me to take an interest in the said vessel. I asked him the size, dimensions, etc., and then asked him who would be the co-owners. He said about the same company as the other vessels. Mr. Everett, Mr. Wilson and Mr. Peters would be part owners. Well, I told him I would think the matter over, and, when he called, I declined to take an interest. In a few days after that, he called for quotations for outfits.

Then, on 25th July, 1890, he gave Eagles a letter addressed to him, as follows:—

We will furnish you with outfits for your new three-masted schooner, to launch, say October 1st (then follows specification of goods, with prices). Four months credit on above.

(Sd.) TROOP & MCLACHLAN,
per W. W. McLachlan.

The following evidence was given:—

Q.—After he received that letter did you have any communication with him with reference to the goods?

A.—Eagles came back and accepted the offer.

Q.—Did he, at that time or subsequently, give any directions with reference to the duck and rope?

A.—Yes. He told me to deliver the duck to Mr. Brown, sail-maker.

Q.—With reference to the rigging material and wire rope?

A.—To deliver it to David Dearness (rigger).

This is the entire evidence, on direct examination, touching the making of the contract, and, clearly, there is nothing shewing that Eagles was professing to contract for the defendants, or from which plaintiffs could reasonably conclude that he was.

1894

TROOP v. EVERETT.

On cross-examination by Mr. McLeod, the witness again states that Eagles spoke of those who were going into the vessel. This, too, was in response to Mr. McLachlan's inquiry as to who would be co-owners, a question prompted by Eagles's request that plaintiffs should take shares. It is not a statement that they had taken an interest in the sense of being jointly engaged in the building of the vessel.

The following rather extraordinary questions are put on re-examination:—

Q.—You were examined by Mr. McLeod as to the accuracy of your memory regarding the persons who he said had taken an interest with him in the vessel; whom are you positive that he mentioned?

A.—Mr. Wilson and Mr. Everett.

Q.—And, after your attention has been called to the matter, is it still your recollection that he mentioned Mr. Peters as one of those who had taken an interest with him in the vessel?

A.—Yes.

The witness stood aside, and the next day was asked to explain how he came to charge the goods in his books to "Mr. Eagles's new schooner," while his letter of 26th July had spoken of furnishing "you (Eagles) with outfits for your new three-masted schooner," and Mr. McLachlan answers:—

He contracted for this schooner and had a co-partnership, as I understood from him. * * * He said he had contracted for this schooner, built by Mr. Murphy, and he would be the managing owner of that vessel, and had full power to contract, and at that time the vessel had no name. Consequently, we put it down for Eagles's new schooner as is customary.

Q.—In addressing this letter to him, you addressed it to him in his capacity as managing owner?

A.—Yes.

Q.—You say, before you gave him these quotations, he had told about these other persons being interested with you (him) in the vessel?

A.—Yes.

Q.—You never, at any time, agreed to give credit to him personally?

A.—No. I never did.

The way in which this evidence is brought out furnishes good reason why the rule for a new trial should not be disturbed.

1894

TROOP v. EVERETT.

The evidence is also open to the comments of the learned Chief Justice of New Brunswick, as to the mercantile effect of the statements made by Eagles.

But, however this may be, it was not sufficiently brought to the attention of the jury to consider whether this might not have been a contract with Eagles induced, perhaps, by his holding out that others were going to be part owners, but without any assumption by him of a right to bind the others, or any manifested intention on the part of the plaintiffs to sell to any particular person but Eagles, with the added right of looking to anyone who might, under any circumstances, afterwards appear to have been a real principal.

Then, while the taking of Eagles's own note, and the way in which he was dealt with, are not inconsistent with plaintiffs' contention, this, taken in connection with other circumstances, might well have received more attention in the direction. The assumption of the learned judge apparently was that, apart from the question of credibility, there was no real question as to the character of the transaction.

Then, as to the material that had been worked up and become incorporated with the vessel, and become a portion of her and her essential appurtenances, Eagles was the undoubted registered owner of the vessel and had the power under the statute of absolutely disposing of her; and the defendants, as *bonâ fide* purchasers from him, became entitled (according to their several interests) to the vessel as she then stood, and, when their new title was duly registered, they, in turn, acquired the absolute power of disposing of her as she stood. The vessel, in this sense, became vested in them by the statute.

Next, as regards the claim for yellow metal sheathing, felt, etc., the powers of the managing owner are thus stated in a recent case, *The 'Huntsman'* (5):

(5) [1894] P. D. 218.

1894

TROOP v. EVERETT.

The managing owner is deputed by the co-owners to employ the vessel for their benefit, and that can only be done by employing her in the ordinary course of trade suitable for such a vessel. It must follow as a necessary consequence that he has authority to conduct and manage on shore whatever concerns the employment of the ship and, for that purpose, has authority to give orders for the necessary repair, fitting and outfit of the vessel, in order to seeing that she is properly manned, properly sent to sea, and properly chartered for the voyage.

He has no power to make improvements in the vessel, as such, and, for the purpose of improving the property of the co-owners, unusual and structural alterations are, of course, *primâ facie* excluded. All that the managing owner does must have reference to the useful employment of the vessel in an ordinary course of trade suitable for such a vessel. He may, therefore, do what is reasonably necessary for the purpose of a contemplated employment of the vessel in the ordinary course of trade suitable for her. Whether, in any particular case, the contemplated employment is a user of the vessel in the ordinary course of trade suitable for such a vessel, and whether what is done may practically be regarded as a reasonable fitting out of the vessel for such an employment, are largely questions of fact.

Upon such inquiries, anything tending to establish an implied consent of the co-owners to anything done or proposed to be done by the managing owner respecting the vessel or her employment is, of course, material.

The result is that, upon the whole case, the order for a new trial should not be interfered with, and the appeal should, therefore, be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants: *Chas. A. Palmer.*

Solicitors for the respondents,
Everett, Wilson and Collard: *Hannington & Wilson.*

Solicitor for the respondents,
Franke and Peters: *Thomas Millidge.*

[S. C. File No. 1339.]

1894

*Feb. 26.
†April 6.

DUNCAN J. MACDONALD (PLAINTIFF), APPELLANT,

AND

GEORGE S. BRUSH (DEFENDANT), RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Appeal—Jurisdiction—Title to land—Trespass—Action possessoire—Demolition of works—Matter in controversy—R. S. C. c. 135, s. 29.

The plaintiff's action was for trespass against a neighbour in constructing a roof projecting over the plaintiff's land, for the demolition of the projecting portion of the roof, and a declaration that the plaintiff was proprietor of the land on which the trespass had been committed. On motion for the approval of security for the costs of an appeal from the judgment dismissing the action,

Held, that, as the title to the land was not in issue nor future rights therein affected, and as it did not appear that the matter in controversy amounted to the sum or value of $2,000, there could be no appeal to the Supreme Court of Canada.

(NOTE.—Cf. *The Emerald Phosphate Co.* v. *The Anglo-Continental Guano Works* (21 Can. S. C. R. 422); *Delorme* v. *Cusson* (28 Can. S. C. R. 66); *Parent* v. *The Quebec North Shore Turnpike Road Trustees* (31 Can. S. C. R. 556); *Davis* v. *Roy* (33 Can. S. C. R. 345); *Delisle* v. *Arcand* (36 Can. S. C. R. 23).

MOTION by way of appeal from the decision of the Registrar of the Supreme Court of Canada (Mr. Cassels) in chambers, refusing the approval of the security for costs of a proposed appeal from the judgment of the Court of Queen's Bench, appeal side, Province of Quebec, by which the plaintiff's action was dismissed with costs.

The circumstances of the case are stated in the notes of reasons for judgment given by the registrar, in which the judgment of Mr. Justice Hall, upon a similar application in the court below, is recited.

Lajoie, for the motion.

Atwater, K.C., contra.

* PRESENT: FOURNIER, J., in Chambers.

1894

MACDONALD v. BRUSH.

On 13th February, 1894, the registrar dismissed an application, in chambers, for approval of the security, and delivered his judgment as follows:—

THE REGISTRAR—By his declaration the plaintiff (appellant) alleges that he is possessor, *à titre de propriétaire*, and has been so for more than a year before the institution of the action (to wit, since 2nd December, 1843), of immovable property, numbered 1556 in St. Anne's Ward, in the City of Montreal, extending from the division line between lots 1555 and 1556 to the foundation of a factory of the defendant built on lot 1557; that during June and July, 1888, he has been troubled in his possession by the defendant (respondent) by the latter causing to project along the north-west boundary, to the extent of nearly one foot, the roof of a building, in possession of the defendant, on the neighbouring lot 1557; that the plaintiff is entitled to demand that the defendant should cause this trouble to cease, and that he, the defendant, should remove the part of his building which projects over the immovable of the plaintiff, and that the plaintiff should be maintained in his peaceable possession of his immovable. Therefore, the plaintiff concludes that he be declared possessor *à titre de propriétaire* of the above described immovable, and that the defendant be forbidden to trouble him in his possession in the manner set out by the projection mentioned, and that the defendant be condemned to demolish that part of his roof so projecting, within fifteen days of the judgment, and, in default, that the plaintiff himself be authorized to remove the projection at the cost of the defendant, the plaintiff reserving his recourse for damages, the whole with costs.

By his pleas, the defendant, besides a general issue, pleaded that, though it may be true that the plaintiff is in possession *à titre de propriétaire* of lot 1556, it is untrue that he has ever been troubled in his possession by the defendant who is owner and proprietor, and has been in possession *à titre de propriétaire*, by himself and his *auteurs*, since 1829, of lot 1557; that the building complained of has stood upon defendant's lot

1894

MACDONALD v. BRUSH.

since 1840, and does not encroach upon nor overlap, nor does the roof thereof overhang the said lot 1556; that the building was constructed entirely within lot 1557, and there always has been and is more than two feet distance from the division line of the said lots, over which space the defendant has always retained ownership and possession, as being part of lot 1557, as the same was and is, and the said building hath and always had windows in its side wall opening on this portion of lot 1557. Wherefore, defendant, reserving his rights to take such action as may be necessary to protect and define his rights in the said property, prays that it be declared that he has not troubled plaintiff in his possession of said lot 1556 and that plaintiff's action be dismissed with costs.

It was admitted that the property in question in the action was not worth more than one hundred dollars.

The Superior Court (Jetté, J.), dismissed the action with costs.

This judgment was affirmed by the Court of Queen's Bench for Lower Canada, on the 22nd December, 1893. Application was then made to Mr. Justice Hall of that court for allowance of security. This was refused. The learned judge said:—

Considering that the demand in this case was only to be reinstated in the possession of a certain piece of land without putting in issue the title to such land, that the rights in future are not bound by said judgment, and, therefore, that the matter in controversy does not come within the intent and meaning of the section of the Act allowing appeals to the Supreme Court of Canada.

The application was renewed before me on the 10th instant.

I agree with Mr. Justice Hall that this case does not come within section 29 of the Supreme and Exchequer Courts Act and dismiss the application with costs, fixed at $20.

On the motion, by way of appeal from the foregoing decision, after hearing counsel for the parties, Mr. Justice

1894

MACDONALD v. BRUSH.

Fournier reserved his judgment and, on a subsequent day, dismissed the motion with costs, for reasons stated as follows:—

FOURNIER, J.—This is a motion to obtain leave to appeal to the Supreme Court from a judgment rendered in this case by the Court of Queen's Bench for Lower Canada (appeal side) on the 22nd December, 1893, dismissing the plaintiff's action.

The plaintiff, by his action, complained of having been troubled in the possession of his land by the defendant, Brush, and prayed to be reinstated in the possession of his land.

The appellant in this case has already applied to the Honourable Mr. Justice Hall for leave to appeal to the Supreme Court and his application was refused on the ground that the action was for the sole purpose of getting back the possession of a certain piece of land, and, there being no contestation as to the title to the land in question, and also on the ground that the future rights of the plaintiff were not affected by the judgment.

This application for leave to appeal was renewed before the registrar of this court, who also refused to allow it, on the ground that it was not an appealable case. For the third time the application was renewed before me.

Having examined all the documents filed in the case, I am of opinion that the two decisions rendered by the Honourable Mr. Justice Hall and by the Registrar of this court are correct. The only subject matter in dispute in this case is as to the possession of a piece of land, the value of which has been admitted before the Registrar of this court not to be over $100, and, therefore, not of a sufficient amount to allow an appeal to this court, and, moreover, the title to the land in question has not been in any way contested by the parties. The future rights of the plaintiff are not affected by this judgment, as he will always be at liberty to rely upon his title deeds in support of any action which may be taken.

I am also of opinion that this application should be dismissed with costs, such costs to be taxed at $15.

1894

MACDONALD v. BRUSH.

Application dismissed with costs.

Solicitors for the appellant: *Bisaillon, Brosseau & Lajoie.*

Solicitors for the respondent: *Atwater & Mackie.*

[S. C. File No. 1356.]

TURRIFF ET AL. v. THE QUEBEC CENTRAL RAILWAY CO.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Withdrawn.

(14th May, 1894.)

See Q. R. 2 Q. B. 559.

[S. C. File No. 1361.]

THE MONTREAL AND SOREL RAILWAY CO. v. DENNONCOURT.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Discontinued, with costs.

(8th May, 1894.)

1894 [S. C. File No. 1365.]

WALLACE v. WISWELL.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed with costs, no person appearing when the case was called for hearing.

(7th November, 1894.)

[S. C. File No. 1375.]

MARSH v. LEMON.

APPEAL from the Court of Appeal for Ontario.

Entered, but never prosecuted.

(31st July, 1894.)

1895 [S. C. File No. 1384.]

MURRAY v. JONES.

APPEAL from the Court of Appeal for Ontario.

Dismissed with costs, by consent, upon a settlement effected during the hearing.

(2nd April, 1895.)

1894

[S. C. File No. 1386.]

DAVIS v. THE PONTIAC AND PACIFIC RAILWAY CO.

APPLICATION for approval of security on appeal from the Court of Queen's Bench, Province of Quebec, appeal side.

Never prosecuted.

(23rd August, 1894.)

[S. C. File No. 1393.]

THE HALIFAX STREET CARETTE CO. v. DOWNIE ET AL.

APPEAL from the Supreme Court of Nova Scotia.

Never prosecuted.

(1st September, 1894.)

[S. C. File No. 1393*a*.]

THE HALIFAX STREET CARETTE CO. v. KELLEY AND GLASSY.

APPEAL from the Supreme Court of Nova Scotia.

Never prosecuted.

(1st September, 1894.)

1894

[S. C. File No. 1393*b*.]

THE HALIFAX STREET CARETTE CO. v. LANE.

APPEAL from the Supreme Court of Nova Scotia.

Never prosecuted.

(1st September, 1894.)

1895

[S. C. File No. 1393*c*.]

THE HALIFAX STREET CARETTE CO. v. McMANUS.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed with costs for want of prosecution.

(8th March, 1895.)

1894

[S. C. File No. 1398.]

WILLIAMS v. BARTLING.

APPEAL from the Supreme Court of Nova Scotia.

Appeal allowed with costs and a new trial ordered.

(6th November, 1894.)

See 29 Can. S. C. R. 548.

[S. C. File No. 1399.] 1895

PHILLIPS v. McGRATH.

APPEAL from the Supreme Court of Nova Scotia.

Inscribed, but never brought to hearing.

(4th February, 1895.)

[S. C. File No. 1401.] 1894

SUTTON v. THE COMMISSIONERS OF THE HARBOUR OF TORONTO.

APPEAL from the Court of Appeal for Ontario.

Entered, but never prosecuted.

(15th September, 1894.)

[S. C. File No. 1410.] 1898

THE QUEEN v. MacLEAN AND ROGER.

APPEAL from the Exchequer Court of Canada (4 Ex. C. R. 257).

Discontinued.

(13th June, 1898.)

(See 8 Can. S. C. R. 210.)

1894 (S. C. File No. 1411.)

HAYES v. BERRY.

APPEAL from the Court of Appeal for Ontario.

Entered, but never prosecuted.

(21st September, 1894.)

1895 [S. C. File No. 1413.]

THE LONDON STREET RAILWAY CO. v. THE CITY OF LONDON.

APPEAL from the Court of Appeal for Ontario.

Withdrawn.

(27th April, 1895.)

1894 [S. C. File No. 1420.]

IN RE LARTER.

APPLICATION for writ of habeas corpus on commitment for two years' confinement in Dorchester penitentiary, upon conviction at the Court of Assize, at Charlottetown, P.E.I., for procuring a noxious drug to be used to obtain a miscarriage.

The proceedings were not further prosecuted.

(6th October, 1894.)

[S. C. File No. 1425.] 1907

WRIGHT ET AL. v. THE QUEEN.

Rideau Canal Lands—Forfeiture—Mis-user—Condition Subsequent—Jurisdiction of Exchequer Court of Canada—Costs.

APPEAL from the judgment of the Exchequer Court of Canada rendered on 20th March, 1893.

The appeal was argued on 12th, 13th, 14th and 15th of March, 1895, and judgment was reserved.

On the appellants' petition of right, the Exchequer Court found and declared that the Crown held certain lands in question for the purposes of the Rideau Canal, and that to a tract thereof sixty feet in width surrounding the Canal Basin, in the City of Ottawa, and the by-wash therefrom, there was attached the condition that no buildings should be thereon erected; but that the proviso that no buildings should be erected thereon did not create a condition subsequent, the breach of which would work a forfeiture and let in the heirs of the late Nicholas Sparks, by whom the same had been surrendered to the Crown for the purposes of said canal, and that the use by the Crown of a portion of the lands in question for uses other than the purposes of the canal would not work such a forfeiture. On the question of the relief which the suppliants might obtain for breach of the condition, or for the non-user of any portion of the lands or for mis-user thereof, and also as to the question of costs, the said court was of opinion that it had no jurisdiction to grant the same, and declared that the suppliants were not entitled to the relief so sought, and ordered that there should be no costs to either party.

On 9th December, 1895, an order was made for re-argument, Mr. Justice Fournier having become disqualified by resignation, and the remaining judges who heard the arguments being equally divided in opinion; proceedings were suspended on proposals for an amicable arrangement between the parties, which finally resulted in a settlement out of court.

(25th January, 1907.)

1895

[S. C. File No. 1426.]

WARD ET AL. v. THE SHIP "YOSEMITE."

APPEAL from the Exchequer Court of Canada, British Columbia Admiralty Division.

Withdrawn.

(23rd January, 1895.)

1894

*Dec. 19.

[S. C. File No. 1430.]

STEWART v. SCULTHORPE.

Appeal per saltum—Expiration of time for appealing—Supreme Court Act, s. 40.

Leave to appeal *per saltum* cannot be granted after the expiration of the time limited by sec. 40 of the Supreme and Exchequer Courts Act.

APPLICATION, on 19th December, 1894, for leave to appeal *per saltum* from the judgment of the Queen's Bench Division of the High Court of Justice for Ontario (25 O. R. 544).

It appeared from the affidavit filed that the judgment sought to be appealed from was rendered on the 21st June, 1894; that a motion for leave to appeal to the Court of Appeal for Ontario was refused on 13th November, 1894, an oral judgment being delivered by Osler, J., to the effect that the legislature had fixed a limit, and the Court of Appeal did not feel justified in granting leave to appeal in cases below that limit, except in extreme cases, and that this was not such a case, the judgment being for only $400 and costs of suit.

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* PRESENT: THE REGISTRAR, in Chambers.

1894

THE REGISTRAR refused leave on the ground that the application, not having been made within the time limited by section 40 of the Supreme and Exchequer Courts Act, was too late.

STEWART v. SCULTHORPE.

Application dismissed with costs.

[S. C. File No. 1431.] 1894

TENNANT v. BALL ET AL.

APPEAL from the Court of Appeal for Ontario (21 Ont. App. R. 602).

Entered, but never prosecuted.

(14th December, 1894.)

[S. C. File No. 1432.] 1895

THE S. S. "MANDALAY" v. THE MONCTON SUGAR REFINING COMPANY.

APPEAL from Nova Scotia Admiralty Division of the Exchequer Court of Canada.

Abandoned, without costs, by consent.

(7th December, 1895.)

1895

[S. C. File No. 1441.]

THE QUEEN v. ROCHE.

APPEAL from the Exchequer Court of Canada awarding the respondent $77,772.05 for properties expropriated for the Water street extension of the Intercolonial Railway in the City of Halifax, and for damages resulting from such expropriation.

By the judgment of the court the judgment appealed from was varied by an order that the respondent should recover $55,744.79 instead of the sum awarded by the Exchequer Court, and the court did not award any costs on the appeal, to either party.

(7th May, 1895.)

[S. C. File No. 1463.]

BURNS v. CHISHOLM ET AL.

APPEAL from the Supreme Court of New Brunswick (32 N. B. Rep. 588).

Settled out of court.

(20th November, 1895.)

[S. C. File No. 1479.]

TORONTO RAILWAY CO. v. EWING.

APPEAL from the Court of Appeal for Ontario (24 O. R. 694).

Settled out of court.

(17th September, 1895.)

[S. C. File No. 1483.] 1895

DUBE v. LES CURE ET MARGUEILLIERS DE L'ISLE VERTE.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side (Q. R. 6 Q. B. 424).

Application to approve security for costs refused.

(29th May, 1895.)

[S. C. File No. 1490.]

DONOVAN v. ROBERTS.

APPLICATION for leave to appeal *per saltum* from the judgment of MEREDITH, C.J. (16 Ont. P. R. 456), committing the appellant for contempt.

The application was refused by the Registrar, and an appeal from his decision was dismissed with costs by TASCHEREAU, J., in chambers.

(11th July, 1895.)

(See 21 O. R. 535.)

[S. C. File No. 1502.]

KINGSTON & MONTREAL FORWARDING CO. v. UNION BANK OF CANADA.

APPEAL from the Court of Review, Province of Quebec.

Dismissed, with costs.

(9th December, 1895.)

(See Cout. Dig. 203, 541, 1054, 1481.)

1895

[S. C. File No. 1505.]

MUNICIPALITY OF SMITH'S FALLS v. SWEENEY ET AL.

APPEAL from the Court of Appeal for Ontario (22 Ont. App. R. 429).

Settled out of court.

(24th September, 1895.)

[S. C. File No. 1513.]

DOMINION SAFETY FUND LIFE ASSOCIATION v. FREEZE.

APPEAL from the Supreme Court of New Brunswick (33 N. B. Rep. 238).

Settled out of court.

(2nd November, 1895.)

1896

[S. C. File No. 1514.]

KEACHIE ET AL v. THE CITY OF TORONTO.

APPEAL from the Court of Appeal for Ontario (22 Ont. App. R. 371).

Settled out of court.

(14th February, 1896.)

[S. C. File No. 1521.] 1899

PENNY v. THE QUEEN.

APPEAL from the Exchequer Court of Canada (4 Ex. C. R. 428).

Withdrawn.

(26th December, 1899.)

[S. C. File No. 1525.] 1896

CITY OF OTTAWA v. BRUCE.

APPEAL from the Court of Appeal for Ontario.

Withdrawn.

(16th January, 1896.)

[S. C. File No. 1527.]

TAYLOR v. FOY.

APPEAL from the Court of Appeal for Ontario.

Dismissed with costs.

(4th March, 1896.)

1896 [S. C. File No. 1530.]

*May 18, 19.
*Oct. 13.

WILLIAM I. SHEETS ET AL. (DEFENDANTS), APPELLANTS,

AND

PETER N. TAIT (DEFENDANT) AND HER MAJESTY THE QUEEN (PLAINTIFF), RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Title to land—Lease for years—Possession by sub-tenant—Purchase at sheriff's sale—Adverse occupation—Evidence—Conveyance of rights acquired—Compromise—Waiver—Estoppel.

The court held that the acceptance of a deed of compromise in respect to the tenure of real property, which excluded certain lands, estopped the appellant from any claim for compensation for the expropriation of lands forming part of the excluded area.

APPEAL from the Exchequer Court of Canada, in a suit wherein Her Majesty, the Queen, was plaintiff, and the present appellants and the respondent, Tait, were defendants, and in which the judge of the Exchequer Court declared that the respondent, Tait, was entitled to be paid the amount of the compensation awarded upon the expropriation of certain lands taken for canal purposes.

The questions at issue on the appeal are stated in the judgment now reported.

Moss, Q.C., and *Cline*, for the appellants.
Ferguson, Q.C., for the respondent, Tait.
Hogg, Q.C., for the Superintendent of Indian Affairs.

The judgment of the court was delivered by

KING, J.—Upon information filed under the Expropriation Act, 52 Vict. chap. 13, relative to the expropriation of certain land on Sheik's Island, in the township of Cornwall and county of Stormont, for the purpose of enlargement of

* PRESENT: SIR HENRY STRONG, C.J., and TASCHEREAU, SEDGEWICK, KING and GIROUARD, JJ.

the Cornwall Canal, the chief contestation was as to whether the present appellant, Sheets, or the respondent, Tait, is entitled to compensation, which was assessed by the court at $1,400.

The land in question consists of fifteen acres at the westerly end of Sheik's Island and is a portion of lands which, in 1796, were leased by the British Indians of St. Regis to one David Sheik and Jeremiah French for a term of 999 years. This lease was recognized by the Crown and is the foundation of the claim of the respective parties, each of whom claims to be entitled to the part in question for the unexpired term.

It appears that, in the year 1800, French assigned his interest in the lease to David Sheik. Subsequently, Sheik let a number of persons into possession of certain parts of the island as sub-tenants, and, amongst these was Jacob Sheets, the father of the appellant, William Sheets. The part so occupied by Jacob Sheets was known as lot No. 7 and consisted of one hundred acres to the westward of lot No. 6, occupied by one William Raymond. To the westward of Raymond's occupation there were one hundred and forty acres, and a material question is whether the whole of this, or only about one hundred acres, was within the lot No. 7, occupied by Jacob Sheets; or, in other words, whether Sheet's occupation extended to the fifteen acres of expropriated land which were at the westernmost end of the island.

The learned judge was of opinion that the evidence as to whether or not Jacob Sheets actually occupied and used this forty acres was not, perhaps, altogether satisfactory. I agree in this conclusion, which is further strengthened (as pointed out by the learned judge) by the terms of the conveyance which Jacob Sheets, while in possession of lot 7, was satisfied to take from Solomon V. Chesley, who then was claiming title to the whole.

Chesley had, in 1837, recovered judgment against Isaac B. Sheik, the eldest son of David Sheik, who was then de-

1896

SHEETS ET AL v. TAIT AND THE QUEEN.

ceased, and, under execution thereon, Isaac B. Sheik's right and interest in the estate of his late father was sold at sheriff's sale and was purchased by Chesley.

In March, 1850, Chesley sold and conveyed to one John Tait all his estate and interest in the following portions of the island, *i.e.*, the lot one, and also in

that portion of the said island situate at its head and adjoining the premises of Jacob Sheets on the west containing forty acres,

which latter portion was subsequently (August, 1888), conveyed by John Tait to the respondent.

In April, 1856, Chesley made a conveyance to Jacob Sheets (then in possession of lot seven), of all his interest in the one hundred acres adjoining the farm owned by the heirs or successors of William Raymond, deceased. In this deed it was (*inter alia*) recited that David Sheiks had, in his life-time, and in contravention of the terms of his lease with the Indians, placed upon the island sundry sub-tenants, and amongst the number, Jacob Sheets; that upon the demise of David Sheik, his eldest son and heir, Isaac B. Sheik, had entered into possession, occupation and usufruct of the said island, and exercised undisturbed ownership therein for a series of years; that, during this term, he compromised with several of the sub-tenants referred to, and received valuable considerations from Solomon Raymond and others of them, but nothing from the said Jacob Sheets; that Jacob Sheets had settled upon the uppermost end of the island, and made large improvements upon the hundred acres adjoining the farm and premises of William Raymond, then deceased;

and having as he stated made large payments to the late David Sheik therefor, but of which he produced no documentary or other proof, a mutual compromise was entered into between the said Solomon V. Chesley and the said Jacob Sheets, to the effect that for the consideration and payment of twenty-five pounds, the said Solomon V. Chesley undertook to convey to the said Jacob Sheets, his heirs and assigns, all the right, title, interest, claim, etc., which he possessed or acquired by the aforesaid purchase at sheriff's sale of all and singular the land and premises situated west of William Raymond's farm, save and except forty acres of woodland on the extreme south-westerly end of said island.

A memorial of this deed was registered by Jacob Sheets. 1896

There would seem to be, in the acceptance of this deed, an admission of Isaac B. Sheik's and of Chesley's possession and title, and that the hundred acres at the uppermost end of the island, adjoining the farm and premises of Raymond, upon which it is recited that Jacob Sheets had settled, did not include the forty acres of woodland on the extreme south-westerly end of the island. SHEETS ET AL. v. TAIT AND THE QUEEN.

Upon the whole, therefore, I agree with the learned judge that no sufficient title is shewn in the appellant either by possession or otherwise to the fifteen acres that have been expropriated, and that, consequently, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Maclennan, Liddell & Cline.*
Solicitor for the respondent, Tait: *A. Ferguson.*
Solicitors for the Superintendent-General of Indian Affairs: *O'Connor & Hogg.*

[S. C. File No. 1532.] 1896

THE TOWN OF PETERBORO v. MASON.

APPEAL from the Court of Appeal for Ontario.

Dismissed with costs.

(5th March, 1896.)

(See 20 Ont. App. R. 683.)

1896

*Jan. 13.

[S. C. File No. 1533.]

THE CITY OF LONDON (DEFENDANT), APPELLANT,

AND

LEVI LEWIS ET AL. (PLAINTIFFS), RESPONDENTS.

ON APPEAL FROM THE COMMON PLEAS DIVISION OF THE HIGH COURT OF JUSTICE FOR ONTARIO.

Municipal corporation—Drainage—Construction of sewers—Nuisance—Injunction—Damages—Right of action—Practice.

APPLICATION for special leave to appeal *per saltum* from the judgment of His Lordship Mr. JUSTICE MACMAHON, at the trial, by which the action of the plaintiffs was maintained with costs.

The circumstances of the case are stated, as follows, in the judgment appealed from, as delivered by,

"MACMAHON, J.—The action is to recover against the City of London the damages which the plaintiffs sought but failed to recover against the defendant in *Lewis* v. *Alexander* (1). The history of the by-laws under which the drains or sewers were constructed, causing the nuisance of which the plaintiffs complain, need not be repeated here, as it is set out with all necessary particularity in the above-mentioned reports.

"The question as to what was the effect of by-law No. 391 finally passed by the Township of Westminster on the 7th of August, 1883, was decided by the Supreme Court (2). Mr. Justice Sedgewick, in delivering the judgment of the majority of the court, says, at page 555:

> There is no authority, it seems to me, for limiting the purposes of the drain. Who is to determine the character of the matter that may be carried off, the degree of its offensiveness or inoffensiveness?

* PRESENT: THE REGISTRAR, in Chambers.

(1) 21 Ont. App. R. 613; 24 Can. S. C. R. 551.
(2) 24 Can. S. C. R. 551.

The drainage of an area covered by human habitations must, in my judgment, necessarily include the drainage or carrying off from those habitations of all matter that is usually carried off by means of drains or sewers in areas of that description. Some evidence was adduced at the trial to shew that it was never intended by the petitioners that their water-closets should be connected with this drain, and this evidence not only impressed the trial judge, but seems to have affected the learned judges of the Court of Appeal.

Neither the petition for the drain nor the by-law itself affords any evidence that such was the object of the drain. If it were to be so limited, either the by-law itself or the plans and specifications of the work which formed part of the by-law, should have made apparent that limited purpose, and no reliance, in my view, can be placed upon oral testimony, even if admissible, as to its purposes many years after the work was constructed. It appears to me, however, that the evidence is conclusive that the drain was intended to be a drain for all purposes. The petition and the bill refer to it as a sewer.

"The plan prepared by an engineer for the proposed work called for an outlet on the lands of the plaintiff. But from the completion of the work, in 1884, until the year 1888, the use of the drain had been confined to carrying off the surface water from the lands and to the drainage of the cellars of the houses on Bruce Avenue, so no damage was, during that period, caused to the plaintiff.

"As pointed out in the dissenting judgment delivered by Mr. Justice Gwynne, at page 565, this drain or sewer was the property of the Township of Westminster, and at the time of the passing of the by-law, in 1883, the township council had not vested in them the jurisdiction which was, by 46 Vict. ch. 18, sec. 496, s.-s. 39 and 40, vested in the councils of cities, towns and incorporated villages, for regulating sinks, water-closets, privies and privy vaults, and the manner of draining the same, that jurisdiction being first vested in township municipalities in 1887, by R. S. O. ch. 184, sec. 489, s.-s. 47.

"This want of authority in the township municipality appears to have been overlooked when the judgment of the majority of the court was written.

1896

CITY OF LONDON v. LEWIS.

"As a fact, however, the plaintiff's consent to the outlet to the drain or sewer being on his property was on the understanding and agreement that the sewer was to be used exclusively for the purposes above stated—for draining the lands and cellars—and that the water-closets were not to have connection with the sewer. In order to prevent any misunderstanding as to the object of the petitioners, on the day of the final passing of the by-law, and prior to its being passed, the township clerk of Westminster, at the request of those signing the petition, and in order to prevent any question arising as to the object of the petition, made the following memorandum thereon:—

The opinion of the petitioners, as expressed at a meeting of those interested, is that no water-closets should be drained into the sewer.

"That the property owners on Bruce Avenue regarded the drain or sewer by-law as being passed solely to enable their lands and cellars to be drained, cannot be doubted, as none of them connected their water-closets with the sewer until the increased power was conferred to township municipalities, in 1887, by R. S. O. ch. 184, sec. 489, s.-s. 47. After the passing of the Act, and in 1888, Mr. Alexander made a connection between the water-closet in his house and the sewer.

"On the 4th July, 1892, the corporation, upon the petition of two-thirds of the City of London, under the provisions of sec. 612, relating to local improvements, passed by-law No. 659, for a sewer on Henry street, which connects with the Bruce street drain. In September, 1892, R. W. Puddicane, by agreement with and under authority of the City of London, connected the water-closet in his house with the Henry street sewer, and so passing into the Bruce street drain contributed to create the nuisance on the plaintiff's property. Mr. Puddicane was the first to obtain the sanction of the city to make water-closet connection with the sewer. Since then, a number of the owners and occupiers of houses on Bruce and Henry streets have made connections between the water-closets in their houses and the sewers on those streets. A serious nuisance has been created, rendering it impossible, at certain

times, for the plaintiffs to leave their windows or doors of their residences open by reason of the noxious smells caused by the deposits of filth on their premises. I have found there was no consent given by the plaintiffs to the deposit of such filth on their lands, causing this unbearable nuisance. And I have then to consider whether the plaintiffs are entitled to a reference as to the damages in this section or whether their remedy is confined to proceeding by arbitration under the statute.

"The cases referred to by Mr. Justice Gwynne, in 24 Can. S. C. R. at pages 566-7, of *Charles* v. *Finchley Local Board* (3), *Lewis* v. *City of Toronto* (4), and *Van Egmond* v *Seaforth* (5), all shew that where a person or a corporation

entitled to a limited right, exercises it in excess so as to produce a nuisance, and the nuisance cannot be abated without obstructing the enjoyment of the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it within its proper limits.

"Assuming, as I must, that the corporation was obliged, for sanitary reasons, to carry off the water-closet excreta through the sewers, it cannot create a nuisance and cause an unsanitary condition in another locality by the deposit of such excreta there. There are methods of deodorizing sewage and rendering it innoxious, and the corporation should have adopted some one of the numerous methods to prevent a nuisance being created of which the plaintiffs justly complain.

"Counsel for the defendant relied on the judgment in *Township of Raleigh* v. *Williams* (6) as authority for the contention that the plaintiffs' only remedy was by arbitration under the Municipal Act. I expressed the opinion at the trial that the case decided under the clauses of the "Drainage Act" could have no application to a case like the present. In that view I am confirmed by the judgment of the learned Chief Justice of the Common Pleas Division, in his judgment in

(3) 23 Ch. D. 775. (4) 39 U. C. Q. B. 352. (5) 6 O. R. 599.
(6) (1893), A. C. 540; 21 Can. S. C. R. 103.

1896

CITY OF LONDON v. LEWIS.

Holt v. *The City of Hamilton* (not yet reported), to which reference can be had.

"There will be judgment for the plaintiffs with a reference to the local master at London as to the damages. And the defendant is hereby enjoined from permitting filth from water-closets or other noxious or foul matter from being carried on to the premises of the plaintiffs through the sewers or drains.

"The injunction will be suspended for five months from this date to enable the defendant to abate the nuisance, with liberty to apply to extend the time.

"The plaintiffs are entitled to their costs, including the costs of the reference."

The application for leave to appeal *per saltum* was based principally upon the grounds that the case was distinguishable from the case of *Lewis* v. *Alexander* (7); that the evidence shewed that the sewer in question had been constructed as a general sewer, and that the statute referred to by the learned judge in his reasons above quoted (R. S. O. 1887, ch. 184, sec. 489, s.-s. 47), had been cited and commented upon in the case before the Supreme Court of Canada above referred to.

After hearing counsel on behalf of the parties, the learned Registrar dismissed the application with costs, fixed at $12.

Application refused with costs.

[S. C. File No. 1542.]

THE CITY OF MONTREAL v. CAMPEAU.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed, for want of prosecution.

(26th February, 1896.)

(7) 24 Can. S. C. R. 551.

[S. C. File No. 1543.] 1896

CONNOLLY ET AL. v. THE QUEEN.

APPEAL from the Exchequer Court of Canada.

Withdrawn.

(1st April, 1896.)

NOTE.—See *The Queen* v. *Connolly* (5 Ex. C. R. 397).

[S. C. File No. 1544.]

CONNOLLY ET AL. v. THE QUEEN.

APPEAL from the Exchequer Court of Canada.

Withdrawn.

(1st April, 1896.)

NOTE.—See *The Queen* v. *Connolly* (5 Ex. C. R. 397).

[S. C. File No. 1545.]

CONNOLLY ET AL. v. THE QUEEN.

APPEAL from the Exchequer Court of Canada

Withdrawn.

(1st April, 1896.)

NOTE.—See *The Queen* v. *Connolly* (5 Ex. C. R. 397).

1896

[S. C. File No. 1546.]

CONNOLLY ET AL. v. THE QUEEN.

APPEAL from the Exchequer Court of Canada.

Withdrawn.

(1st April, 1896.)

NOTE.—See *The Queen* v. *Connolly* (5 Ex. C. R. 397).

[S. C. File No. 1547.]

CONNOLLY ET AL. v. THE QUEEN.

APPEAL from the Exchequer Court of Canada.

Withdrawn.

(1st April, 1896.)

NOTE.—See *The Queen* v. *Connolly* (5 Ex. C. R. 397).

[S. C. File No. 1551.]

BURNHAM v. HANES.

APPEAL from the Court of Appeal for Ontario (23 Ont. App. R. 90).

Settled out of court.

(13th May, 1896.)

1896

[S. C. File No. 1554.]

THE QUEEN v. LAINE ET AL.

APPEAL from the Exchequer Court of Canada.

Discontinued.

(25th April, 1896.)

[S. C. File No. 1565.]

THE MERIDEN BRITANNIA COMPANY v. McMAHON ET AL.

APPEAL from the Court of Appeal for Ontario.

Discontinued.

(10th April, 1896.)

[S. C. File No. 1569.]

ARCHIBALD v. SLAUGHENWHITE.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed, with costs, for want of prosecution.

(15th May, 1896.)

[S. C. File No. 1574.]

THE UNIVERSAL MARINE INSURANCE CO. v. McLEOD.

APPEAL from the Supreme Court of New Brunswick (33 N. B. Rep. 447).

Entered, but never prosecuted.

(1st August, 1896.)

1897 [S. C. File No. 1579.]

SHEETS v. THE QUEEN.

APPEAL from the Exchequer Court of Canada.

Settled out of court.

(21st July, 1897.)

1896 [S. C. File No. 1580.]

FARRELL v. HOGG.

APPEAL from the Supreme Court of British Columbia.

Discontinued with costs.

(24th June, 1896.)

1897 [S. C. File No. 1582.]

THE BAIE DES CHALEURS RAILWAY CO. v. NANTEL.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Attorney-General for Province of Quebec was a party intervening, and, on special application, the Attorney-General of Canada was made a party by order, by His Lordship Mr. Justice King, in chambers.

Inscribed on roll, but never brought to hearing.

(13th May, 1897.)

(See Q. R. 9 S. C. 47; 5 Q. B. 64.)

[S. C. File No. 1583.] 1897

THE ATLANTIC AND LAKE SUPERIOR RAILWAY CO. v. NANTEL.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Attorney-General for Province of Quebec made a party by order.

Inscribed, but never brought to hearing.

(13th May, 1897.)

[S. C. File No. 1585.] 1896

PAGE v. THE ATTORNEY-GENERAL FOR ONTARIO.

APPEAL from the Court of Appeal for Ontario.

At the hearing, upon suggestion of the court, the parties agreed to a settlement, and a consent order was made modifying the terms of the judgment appealed from.

(26th October, 1896.)

[S. C. File No. 1586.] 1897

THE CITY OF OTTAWA v. CLARK ET AL.

APPEAL from the Court of Appeal for Ontario (23 Ont. App. R. 386).

Withdrawn.

(18th March, 1897.)

1897 [S. C. File No. 1587.]

THE CITY OF OTTAWA v. KEEFER.

APPEAL from the Court of Appeal for Ontario (23 Ont. App. R. 386).

Withdrawn.

(18th March, 1897.)

[S. C. File No. 1588.]

THE QUEEN v. O'NEILL & CAMPBELL.

APPEAL from the Exchequer Court of Canada.

Allowed in part without costs, the judgment appealed from being reduced from $37,827.37 to $36,954.83, and the cross-appeal being dismissed with costs. Special terms as to costs apportioned were settled in the minutes of judgment.

(15th June, 1897.)

1896 [S. C. File No. 1591.]

THE QUEEN v. GOODWIN.

APPEAL from the Exchequer Court of Canada.

Not prosecuted.

(20th July, 1896.)

(See *Goodwin* v. *The Queen*, 28 Can. S. C. R. 273.)

[S. C. File No. 1592.] 1896

THE WESTERN ASSURANCE COMPANY v. THE SINGER MANUFACTURING CO.

APPEAL from the Superior Court, sitting in review, at Montreal.

Discontinued.

(8th September, 1896.)

(See Q. R. 10 S. C. 379.)

[S. C. File No. 1594.]

THE CONFEDERATION LIFE ASSOCIATION v. KINNEAR.

APPEAL from the Court of Appeal for Ontario (23 Ont App. R. 497).

Order made reversing judgment appealed from.

(18th August, 1896.)

(See note at p. 516 of report in court below stating that the case was settled out of court.)

[S. C. File No. 1611.] 1897

VOISARD v. LEGRIS; MASKINONGE ELECTION CASE.

APPEAL from the Controverted Elections Court.

Discontinued.

(16th February, 1897.)

1897

[S. C. File No. 1616.]

THE ANDERSON TIRE CO. v. THE AMERICAN DUNLOP TIRE CO.

APPEAL from the Exchequer Court for Canada (5 Ex. C. R. 194).

Dismissed with costs, by consent, for want of prosecution.

(3rd Feb., 1897.)

[S. C. File No. 1619.]

THE "PRINCE ARTHUR" v. THE "FLORENCE."

APPEAL from the Exchequer Court of Canada (5 Ex. C. R. 151, 218).

Withdrawn.

(21st April, 1897.)

[S. C. File No. 1620.]

RODDICK v. GRIFFITH; ST. ANTOINE ELECTION CASE.

APPEAL from the Controverted Elections Court.

Struck off the list.

(16th February, 1897.)

[S. C. File No. 1622.] 1897

THE RICHMOND INDUSTRIAL CO. v. TOWN OF RICHMOND.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed for want of prosecution.

(30th March, 1897.)

(See Q. R. 12 S. C. 81.)

[S. C. File No. 1627.]

WINN v. TOWN OF MILTON.

APPEAL from the Court of Appeal for Ontario.

Discontinued.

(12th February, 1897.)

[S. C. File No. 1631.]

McKENZIE v. McKENZIE.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed with costs.

(19th February, 1897.)

(See 29 N. S. Rep. 231.)

1897 [S. C. File No. 1637.]

VAILLANCOURT v. ROULEAU.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Settled out of court.

(5th October, 1897.)

1896 [S. C. File No. 1647.]

MACDONELL v. HOLMES; SELKIRK ELECTION CASE.

APPEAL from the Controverted Elections Court.

Discontinued.

(17th April, 1896.)

1897 [S. C. File No. 1649.]

ALEXANDER v. McALISTER; RESTIGOUCHE ELECTION CASE.

APPEAL from the Controverted Elections Court.

Never brought to hearing.

(8th June, 1897.)

1897

[S. C. File No. 1654.]

BEATTIE v. WENGER.

APPEAL from the Court of Appeal for Ontario (24 Ont. App. R. 72.)

Discontinued.

(6th April, 1897.)

[S. C. File No. 1673.]

THE CANADA PERMANENT LOAN AND SAVINGS CO. v. ALDRICH.

APPEAL from the Court of Appeal for Ontario.

Discontinued with costs.

(15th May, 1897.)

[S. C. File No. 1680.]

THE SCOTTISH UNION AND NATIONAL INSURANCE CO. v. THE PACIFIC CASKET AND FURNITURE CO.

APPEAL from the Supreme Court of British Columbia.

Discontinued.

(6th July, 1897.)

1897

[S. C. File No. 1681.]

MATTON v. THE QUEEN.

PETITION for leave to appeal from the Exchequer Court of Canada (5 Ex. C. R. 401).

Petition for leave to appeal filed, but never prosecuted.

(4th June, 1897.)

(S. C. File No. 1685.)

ROBINSON v. DUN & CO.

APPEAL from the Court of Appeal for Ontario.

Settled out of court.

(See 24 Ont. App. R. 287.)

(21st July, 1897.)

[S. C. File No. 1687.]

ELLIS v. CLARKSON.

APPEAL from the Court of Appeal for Ontario.

Settled out of court.

(25th October, 1897.)

[S. C. File No. 1688.] 1901

DUNN v. THE QUEEN.

APPEAL from the Exchequer Court of Canada (See 4 Ex. C. R. 8).

Appeal not prosecuted effectively up to 1st June, 1900. No order appears to have been made, but see (File 1955) *Dunn* v. *The King* (Cout. Dig. 728), for note of case decided between same parties by the dismissal of the appeal with costs, on 11th Nov., 1901.

[S. C. File No. 1690.] 1897

MAINWARING v. BOON.

APPEAL from the Court of Review, at Montreal.

Dismissed with costs, by consent, for want of prosecution.

(July, 1897.)

[S. C. File No. 1702.] 1898

GUEST v. DIACK.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed with costs.

(14th June, 1898.)

(See 29 N. S. Rep. 504, 558.)

1897

[S. C. File No. 1709.]

WHITE v. ROTHSCHILD.

APPEAL from the Court of Appeal for Ontario.

Dismissed for want of prosecution.

(5th November, 1897.)

1898

[S. C. File No. 1714.]

REID v. McCURRY.

APPEAL from the Court of Appeal for Ontario.

Dismissed, with costs.

(6th May, 1898.)

[S. C. File No. 1720.]

THE NATIONAL FIRE INSURANCE CO. OF IRELAND v. BERNARD.

APPEAL from the Court of Review, at Montreal.

Dismissed with costs for the reasons given in the court appealed from.

(6th May, 1898.)

[S. C. File No. 1727.] 1898

THE QUEBEC HARBOUR COMMISSIONERS v. McGREEVY.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Discontinued.

(See Q. B. 11 S. C. 455; Q. R. 7 Q. B. 17.)

(16th February, 1898.)

[S. C. File No. 1729.]

RAPHAEL v. MACLAREN.

APPEAL from the Court of Queen's Bench, appeal side, Province of Quebec.

Allowed in part, declaring that interest should run upon the sum of $1,555.93 from the date of the action, and that all the costs of both parties should be paid by the respondents out of the trust fund of $70,000 in their hands as executors and trustees of the estate of the late James McLaren.

(6th May, 1898.)

[S. C. File No. 1735.]

GILBERT v. DANDURAND.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Settled out of court.

(9th May, 1898.)

1898

[S. C. File No. 1745.]

WARMINGTON v. TOWN OF WESTMOUNT.

APPEAL from the Court of Queen's Bench, appeal side, Province of Quebec.

Dismissed with costs.

(14th June, 1898.)

(See Q. R. 8 S. C. 44; Q. R. 9 S. C. 161, and cf. *Bulmer* v. *Warmington and The Town of Westmount*, No. 1747, *infra*.

[S. C. File No. 1747.]

BULMER v. WARMINGTON AND THE TOWN OF WESTMOUNT.

APPEALS from the Court of Queen's Bench, appeal side, Province of Quebec.

Dismissed without costs.

(14th June, 1898.)

See Q. R. 5 Q. B. 120. Cf. *Warmington* v. *Town of Westmount*, No. 1745, *ante*.

[S. C. File No. 1755.]

MARCOTTE v. LA BANQUE NATIONALE.

APPEAL from the Court of Queen's Bench, appeal side, Province of Quebec.

Dismissed with costs.

(15th May, 1898.)

[S. C. File No. 1766.] 1898

FOURNIER v. BARSALOU.

APPEAL from the Court of Review, at Montreal.

Dismissed, with costs, for want of prosecution.

(11th May, 1898.)

[S. C. File No. 1767.] 1899

MACPHERSON v. GLASIER.

APPEAL from the Supreme Court of New Brunswick.

Discontinued with costs.

(3rd May, 1899.)

(See 34 N. B. Rep. 206; 1 N. B. Eq. 649.)

[S. C. File No. 1770.] 1898

THE TORONTO, HAMILTON & BUFFALO RAILWAY CO. v. BIRELY; IN RE ARBITRATION UNDER "THE RAILWAY ACT" OF 1888.

MOTION for special leave to appeal from the judgment of the Court of Appeal for Ontario, which dismissed an appeal from the order of ARMOUR, C.J., dismissing an appeal from the award of the arbitrators.

After hearing counsel for the parties, the court dismissed the motion with costs fixed at $25.

(13th and 20th May, 1898.)

NOTE.—See next case.

1898

[S. C. File No. 1770a.]

BIRELY v. THE TORONTO, HAMILTON & BUFFALO RAILWAY CO.

On motion for dismissal of an application for special leave to appeal from the Court of Appeal for Ontario (25 Ont. App. R. 88), in the matter of an arbitration between the parties, no one appeared to support the motion, on the day for which notice had been given, and the motion was dismissed with costs.

(13th May, 1898.)

Subsequently, on motion before the Registrar, in chambers, the application for special leave to appeal was dismissed with costs.

(20th May, 1898.)

NOTE.—See last case.

[S. C. File No. 1774.]

McCASKILL v. COMMON.

APPEAL from the Court of King's Bench, Province of Quebec, appeal side.

Application for leave to appeal dismissed with costs.

(18th June, 1898.)

(See Q. B. 13 S. C. 282.)

[S. C. File No. 1779.] 1899

TOWN OF PETROLIA v. JOHNSTON.

APPEAL from the Court of Appeal for Ontario, affirming the judgment of MEREDITH, J., which awarded the plaintiff $50 damages, and enjoined the town from discharging noxious or deleterious water or substances through their drains and sewers into Bear Creek or its natural tributaries, so as to cause appreciable damages to the plaintiff as riparian owner of lands on said creek.

The appeal was dismissed with costs. GWYNNE, J., dissenting.

The only notes of reasons for judgment delivered in the Supreme Court were by Gwynne, J., who dissented.

(See No. 1801, at page 186, *post*.)

(22nd Feb., 1899.)

NOTE.—Cf. *Town of Petrolia* v. *Johnston* (30 Can. Gaz. 585), and *Johnston* v. *Town of Petrolia* (17 Ont. P. R. 332).

[S. C. File No. 1780.] 1898

MONTREAL GAS CO. v. GAFFNEY.

APPEAL from the Court of Queen's Bench, appeal side, Province of Quebec.

Dismissed with costs.

(5th October, 1898.)

1899

[S. C. File No. 1782.]

DROLET v. CHALIFOUR.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Allowed with costs. Judgment to be entered for appellants for $1,125, with interest from January, 1897, and costs in all the courts. TASCHEREAU, J., dissenting.

(30th May, 1899.)

[S. C. File No. 1801.]

JOHNSTON v. THE IMPERIAL OIL CO.

APPEAL from the Court of Appeal for Ontario.

Allowed with costs, judgment to be entered for the appellant in the same terms as the judgment affirmed by the Supreme Court of Canada in the *Town of Petrolia* v. *Johnston* (No. 1779, at page 185, *ante*), TASCHEREAU and GWYNNE, JJ., dissenting.

The only notes of reasons for judgment delivered were by the dissenting judges:

Mr. JUSTICE TASCHEREAU was of opinion that the appeal should be dismissed, and considered that, for the reasons given by MEREDITH, J., at the trial, the appellant had no case against the company.

Mr. JUSTICE GWYNNE, for reasons stated in voluminous notes, thought that a new trial should be granted.

(22nd Feb., 1899.)

[S. C. File No. 1802.] 1899

MACPHERSON v. FRASER.

APPEAL from the Supreme Court of New Brunswick.

Dismissed with costs.

(5th June, 1899.)

(See 34 N. B. Rep. 417.)

[S. C. File No. 1805.] 1898

THE MONTREAL STREET RAILWAY CO. v. THE MONTREAL PARK AND ISLAND RAILWAY CO.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

The appeal was dismissed with costs for want of prosecution, and afterwards a notice of discontinuance was filed by the appellants.

(19th October; 2nd November, 1898.)

[S. C. File No. 1806.] 1899

THE TRENTON ELECTRIC CO. v. CORPORATION OF TRENTON.

APPEAL from the Court of Appeal for Ontario.

Discontinued.

(29th March, 1899.)

1898

*Oct. 27.

[S. C. File No. 1807.]

KILNER v. WERDEN.

Appeal per saltum—Special leave—Discretion—Review of whole case on application for leave—Vexatious proceedings—Want of merits—Expiration of time for appealing.

Where it appeared that an appeal was utterly without merits, leave to appeal *per saltum* was refused, and it was declared that, in such a case, the circumstances could not justify an order extending the time for appealing.

APPEAL from the decision of the Registrar, in chambers, refusing special leave to appeal *per saltum* from the judgment of the Chancellor of Ontario at the trial, dismissing the plaintiff's action with costs.

The circumstances urged upon the application are set out in the judgment by the Registrar, in chambers, refusing the application, as follows:—

THE REGISTRAR—This is an application under section 26, sub-section 3, of the Supreme and Exchequer Courts Act, for leave to appeal *per saltum* to the Supreme Court of Canada from a judgment of the trial judge, the Chancellor of Ontario, delivered on the 24th October last.

In support of the application the plaintiff's solicitor files an affidavit in which he alleges that the principal question in controversy in the action is as to whether the paper writing set up by the defendant as the will of one William Pigeon is a valid will or is void for uncertainty, as the plaintiff contends. He also alleges that the same question was in issue in *May* v. *Logie* (1), tried before Meredith, J., who upheld the sufficiency of the will, and whose judgment was subsequently affirmed by the Court of Appeal for Ontario. He also alleges that the plaintiff appealed from the judgment of the Court of Appeal for Ontario in *May* v. *Logie* (1), to the Supreme Court

* PRESENT: KING, J., in Chambers.

(1) 27 O. R. 501; 23 Ont. App. R. 785; 27 Can. S. C. R. 443.

1898

KILNER v. WERDEN.

of Canada, and that the appeal was dismissed, not on the ground of the sufficiency of the will, but for insufficiency of the proof, shewing that the persons who conveyed the land in question to one Kilner, the plaintiff herein, were all the heirs at law of the said Pigeon.

Mr. George E. Henderson, for the plaintiff, contends that it is impossible for him to recover in the Court of Appeal, inasmuch as that court is bound by its previous judgment in *May* v. *Logie* (1), and an appeal, therefore, to that court would be fruitless so far as he is concerned, and he claims that, under the practice of this court upon similar applications, he is entitled to have the discretion of the court exercised in his favour, and to have leave to appeal *per saltum* granted.

Mr. Christie, for the defendant, contends that the validity of the will is only one of the grounds of defence to the action; that, in addition to this defence, he has pleaded a number of other substantial defences anyone of which, if established, would entitle him to defeat the plaintiff's claim; and that, therefore, the decision of the Court of Appeal might be in the defendant's favour irrespectively altogether of the question as to the validity or invalidity of the will, and that, this being so, it cannot be said that an appeal to the Court of Appeal would be useless. I understand his contention to be, in short, that if he can shew that the plaintiff's claim may be defeated in the Court of Appeal upon grounds wholly aside from and independent of the point determined in *May* v. *Logie* (1), that is a sufficient reason why the Supreme Court should not grant leave to appeal *per saltum*.

The contention of Mr. Christie, I think, is opposed to the decision of this court in *Moffatt* v. *The Merchants Bank of Canada* (2), in which leave to appeal was granted from the judgment of Ferguson, J. (3).

The facts were substantially as follows:—

The defendant, Moffatt, at the request of Moffatt & Co., executed a bond and agreement as accommodation for them

(1) 27 O. R. 501; 23 Ont. App. R. 785; 27 Can. S. C. R 443.
(2) 11 Can. S. C. R. 46. (3) 5 O. R. 122.

1898

KILNER v. WERDEN.

to the Merchants Bank. Upon an action brought by the bank, two defences were set up, the first being that the documents were executed by him under a misapprehension as to their effect, through the representations of one of the members of the firm of Moffatt & Co.; that the documents did not contain the true agreement between the parties, and should be rectified to express the true agreement, and that they should not be held binding upon him. The second ground of defence was that, if it should be held that the bond and agreement were binding upon him, that, nevertheless, according to their proper construction, his liability thereunder was limited to the amount of Moffatt & Co.'s indebtedness to the bank at the time of the execution of the documents, and that he was entitled to credit for all subsequent payments made by Moffatt & Co. to the bank, the effect of which would be to wipe out his entire liability. The bank, on the contrary, claimed that his liability was not in any way limited, but was a continuing liability, only determined in the event of Moffatt & Co. paying their entire indebtedness to the bank. It was held by the trial judge that the case of *Cameron* v. *Kerr* (1), was conclusive as to the effect of the documents under the second ground of defence. Upon this state of facts, an application was made to Gwynne, J., for leave to appeal *per saltum*, under the same section in question on this motion, and this leave was granted on the ground that the Court of Appeal would be bound by the case of *Cameron* v. *Kerr* (1), whereas the appellant sought to avoid the effect of that decision. *Moffatt* v. *The Merchants Bank* (2), was more fully considered in the case of *Kyle* v. *The Canada Co.* (3), where the judgment of the court, delivered by the present Chief Justice, affirms the decision in *Moffatt* v. *The Merchants Bank* (2), for the reason that the legal question which the appellant sought to raise had been decided in the Court of Appeal on the same state of facts, and, virtually, upon the same evidence, oral and documentary, upon which the decision upon which it was proposed to appeal from had proceeded, and that, under these circumstances, it was manifestly a proper case for giving leave to appeal, since the Court of Appeal could not

(1) 3 Ont. App. R. 30. (2) 11 Can. S. C. R. 46.
(3) 15 Can. S. C. R. 188.

be expected to take a different view of the legal consequences flowing from the identical state of facts upon which they had lately pronounced.

It will be seen, therefore, that in the case of *Moffatt* v. *The Merchants Bank* (1), it was open to the respondent to object to leave being granted on the ground that the Court of Appeal might determine the case in favour of the appellant, without dealing with the second ground of defence, which alone was covered by the decision in *Cameron* v. *Kerr* (2). In other words, if the Court of Appeal should hold that the defendant was entitled to escape liability by reason of the representations under which he was induced to execute the documents in question, it would not be necessary for that court to deal with the second ground of defence in any way.

The only conclusion, therefore, which I can come to is that *Moffatt* v. *The Merchants Bank* (1), is an authority for granting leave to appeal *per saltum* to this court, where the appellant can shew, as in this case he clearly does shew, that under no circumstances can he succeed in the Court of Appeal, as he would be met there by the decision of the same court on the same state of facts, and proceeding upon the same evidence.

If this were not the only element to be considered upon the application, I think the plaintiff would have made out a case for granting the order asked, but in dealing with an application such as this, in which the applicant does not come to the court as of right, but claiming to have a discretion exercised in his favour, I think I am entitled to look at the facts of the case as disclosed in the uncontradicted evidence in the court below. The case of *Dumoulin* v. *Langtry* (3), and *Lewin* v. *Howe* (4), in my opinion, are authority for my so doing.

I have, therefore, to consider whether, on the whole case, without actually adjudicating upon the merits, the plaintiff's claim is not an unmeritorious one.

(1) 11 Can. S. C. R. 46.
(2) 3 Ont. App. R. 30.
(3) 13 Can. S. C. R. 258.
(4) 14 Can. S. C. R. 722.

1898

KILNER v. WERDEN.

The evidence given in the case of *May* v. *Logie* (1), and contained in the appeal case, was put in at the trial by consent as the evidence of both parties, and, in that evidence, the following facts appear:—

Mr. Joseph A. Donovan, a solicitor, practising in the City of Toronto, in or about the Spring of 1894, discovered that the title to a valuable part of the Village of Mimico, near Toronto, rested upon the will of one William Pigeon, which will read as follows:—

> I, William Pigeon, of the Township of Etobicoke, in the County of York, yeoman, do declare this to be my last will and testament, revoking all others by me heretofore made. It is my will that as to all my estate, both real and personal, whether in possession, expectancy or otherwise, which I may die possessed of, my wife Elizabeth, and I hereby appoint my said wife Elizabeth to be sole executrix of this my will.

It will be perceived that in this will, through mistake or ignorance, the testator left out the words *give, devise, bequeath*, or any word importing a gift. It would appear that the property had been very much improved since it was first owned by Pigeon, by the erection of buildings, etc., and was now of the value of $40,000 or $50,000, and had been sold in parcels so that there were a large number of persons deeply interested in the title. Mr. Donovan, being about to proceed to England, where the heirs-at-law of William Pigeon, if the will were invalid, resided, comes to an understanding with Kilner, the present plaintiff, by which the latter agrees to accept a conveyance from the heirs-at-law in trust, but, through all the evidence, the plaintiff's solicitor and his witnesses carefully resist all efforts of counsel to extract the name of the *cestui que trust*. Donovan proceeds to England, and traces up through Cornwall, Surrey, Bristol, etc., the various heirs of William Pigeon, and obtains their execution of an absolute conveyance of all the lands of William Pigeon in Mimico to said Kilner. Apparently, upon his return, Kilner had some objections to having his name used as the plaintiff in the extensive litigation which, no doubt, was contemplated as the out-

(1) 27 O. R. 501; 23 Ont. App. R. 785; 27 Can. S. C. R. 443.

come of the antecedent proceedings, and suggested that the lands should be conveyed to some third person, and, after some inquiry, lights upon Albert E. May, the plaintiff in *May* v. *Logie* (1); obtains an interview between Donovan and May, the final result being that the property is to be conveyed by Kilner to May upon the receipt of $50. Why Kilner should have refused to be a party to the action does not appear, although he admits that nothing could be made out of him, and it is apparent that May was labouring under a similar condition of affairs.

One Brown now appears on the scene as May's solicitor, and upon examination he admits that May had not $50 with which to pay Kilner, and that it was expected he would get the money from his wife, who was supposed to be earning some money; and that finally he introduces May to another Brown, who is induced to loan the $50, which subsequently reaches Kilner's hands, and the conveyances are delivered over. It is also provided between the parties that the deed from Kilner to May shall be absolute in form, and without any trust, and that the consideration therefor should be $11,000, and that a mortgage should be given back to Kilner for $9,950. He professes to have had a very hazy recollection as to the transaction, but apparently the $1,000 difference was to be balanced by a conveyance of some mineral land, but the information as to its location was, for some reason which we can only suspect, very strenuously and sucessfully refused by Donovan. The transaction having been, in this way, carried out, matters are in shape to set in motion actions of ejectment against the numerous persons who now were the owners of the original lot of land, and accordingly, writs were issued and proceedings taken. Kilner, in his evidence, admits that the only hope the parties to the transaction had of getting anything out of the mortgage to May was to succeed in the action of *May* v. *Logie*, (1); and it further appears that the spoils to result from the proposed litigation were to be divided by a

(1) 27 O. R. 501; 23 Ont. App. R. 785; 27 Can. S. C. R. 443.

1898

KILNER v. WERDEN.

payment, first to Kilner of the $11,000 mortgage; secondly, Mr. Donovan's costs, and the balance to go to Mr. May. Subsequently, and after the decision in *May* v. *Logie* (1), an order was obtained requiring May to give security for costs, and all the actions were dismissed except the present one, in which, through some oversight apparently, an order for dismissal was not taken out.

As before stated, Donovan and Kilner refused to give the name of the *cestui que trust*, and it is not alleged that he furnished the funds to buy out the interests of the heirs in England, or the expenses of Mr. Donovan's trip, and Mr. Donovan refuses to tell how much he paid the heirs for executing the deeds, and he further says that Kilner simply did what he was told. Apparently nobody else gave him instructions except Donovan. In fact, reading the evidence as a whole brings one to the conclusion that Donovan was the moving and guiding spirit from the inception of the transaction to the end; that the other parties concerned were simply automatons, moving only as directed and controlled by him. I do not believe the heirs of Pigeon ever thought they had, or in fact ever had, any other interest to sell than a right to litigate, and this they were, no doubt, willing to dispose of for a trifling amount. The case, in my opinion, falls expressly within the judgment of Lord Abinger in *Prosser* v. *Edmunds* (2), where he says:—

> The remaining cause of demurrer, namely, that the plaintiffs have no right to equitable relief, raises an important and curious question, which is this:—Whether or not parties who either become purchasers for a valuable consideration, or who take an assignment in trust of a mere naked right to file a bill in equity, shall be entitled to become plaintiffs in equity in respect of the title so acquired. * * * Where an equitable interest is assigned, it appears to me that in order to give the assignee a *locus standi* in a court of equity, the party assigning that right must have some substantial possession, some capability of personal enjoyment, and not a mere naked right to overset a legal instrument. * * * In the present case it is impossible that the assignee can obtain any benefit from his security, except through the

(1) 27 Can. S. C. R. 443. (2) 1 Y. & C. 481.

medium of the court. He purchases nothing but a hostile right to bring parties into a court of equity as defendants to a bill filed for the purpose of obtaining the fruits of his purchase. * * * All our cases of maintenance and champerty are founded upon the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. There are many cases where the acts charged may not amount precisely to maintenance or champerty, yet of which, upon general principles and by analogy to such cases, a court of equity will discourage the practice.

The whole litigation seems to me to have been an abuse of the process of the court, and utterly without merit; and, as the plaintiff comes claiming, not as of right, but appealing to the discretion of the court, I think, for the reasons above set out, ample grounds are afforded for refusing to exercise such discretion in his favour, and for relegating him to the redress which the usual and ordinary practice and procedure of the courts afford to all litigants.

I have given the reasons for my conclusions in this full manner that, in the event of it being held I am wrong in looking at all at the evidence, the plaintiff will be in a position to obtain relief upon an appeal from my decision, if he desires to have it revised.

Application refused with costs.

An appeal from the foregoing decision was taken before Mr. Justice King, in chambers, and application also made, as alternative relief, for an order extending the time limited by the statute for appealing from the Chancellor's judgment *de bene esse*. The appeal was dismissed with costs. His Lordship delivering the following note of reasons for his decision:—

KING, J.—The appeal is dismissed with costs, the appeal not having been taken and prosecuted within the time fixed by the rules, and the circumstances not calling for an extension of time.

Appeal dismissed with costs.

1899

[S. C. File No. 1809.]

THOMPSON v. CITY OF SAINT JOHN.

APPEAL from the Supreme Court of New Brunswick.

Dismissed with costs for the reasons stated by TUCK, C.J., in the court below.

(30th May, 1899.)

[S. C. File No. 1813.]

BANK OF MONTREAL v. DEMERS.

Varying order for judgment—Settling terms more definitely.

APPEAL from the Court of Review, at Quebec, affirming the judgment of the Superior Court (which condemned the defendant to pay plaintiff the sum of $5,689.24 with costs), and dismissing an appeal by the bank seeking to have the condemnation increased.

On 7th March, 1899, a stay of proceedings was ordered (see 29 Can. S. C. R. 435), pending the decision of an appeal by the respondent to the Privy Council.

After the dismissal of the appeal by the Privy Council, the case was again inscribed and heard upon the merits (6th, 10th Oct., 1899), and the appeal was allowed with costs, the majority of the court being of opinion that a sum of $5,000 paid to the respondent on 10th June, 1895, should be included in the judgment entered against him, with costs before all the courts.

Subsequently the parties again applied to the court (29th Nov., 1899), for a more definitive order, and by consent, judgment was ordered to be entered against the respondent, defendant, for $8,739.24, with interest as given by the judgment of the Superior Court and costs.

(Cf. *The Queen* v. *Demers* ([1900] A. C. 103.)

[S. C. File No. 1814.] 1899

WATSON v. HILL.

APPEAL from the Court of Appeal for Ontario.

Discontinued with costs.

(7th February, 1899.)

[S. C. File No. 1820.]

McQUEEN v. GALLAGHER.

APPEAL from the Supreme Court of New Brunswick.

Settled out of court.

(6th February, 1899.)

(See 35 N. B. Rep. 193.)

[S. C. File No. 1821.]

CRERAR v. HOLBERT.

APPEAL from the Court of Appeal for Ontario.

Allowed, and judgment of FALCONBRIDGE, J., restored, for reasons given by him at the trial. Appellants to have costs in all the courts.

(5th June, 1899.)

(See 17 Ont. P. R. 283.)

1899

[S. C. File No. 1826.]

AMERICAN DUNLOP TIRE CO. v. GOOLD BICYCLE CO.

APPEAL from the Exchequer Court of Canada (6 Ex. C. R. 223).

Withdrawn.

(26th Sept., 1899.)

[S. C. File No. 1830.]

GUARDIAN FIRE AND LIFE ASSURANCE CO. v. MARGESON.

APPEAL from the Supreme Court of Nova Scotia.

Settled out of court.

(17th April, 1899.)

(See 31 N. S. Rep. 359.)

[S. C. File No. 1835.]

MALCOLM ET AL. v. MAXWELL.

APPEAL from the Supreme Court of New Brunswick.

Discontinued, after hearing, and settled out of court.

(5th March, 1899.)

1899

[S. C. File No. 1837.]

POIRIER v. LALONDE.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed with costs for the reasons given in the court below.

(5th June, 1899.)

[S. C. File No. 1838.]

GEMMILL & MAY v. O'CONNOR.

APPEAL from the Court of Appeal for Ontario (26 Ont. App. R. 27).

Settled out of court.

(24th Oct., 1899.)

[S. C. File No. 1839.]

FORD v. McNAMEE.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed with costs for the reasons given in the court below.

(5th June, 1899.)

1899

[S. C. File No. 1841.]

REID v. MACKENZIE.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed with costs, GWYNNE, J., dissenting.

(5th June, 1899.)

[S. C. File No. 1855.]

TRUSTEES OF SCHOOL DISTRICT No. 6, CITY OF CARLETON v. SHARP.

APPEAL from the Supreme Court of New Brunswick.

Entered, but never prosecuted.

(15th April, 1899.)

1901

[S. C. File No. 1861.]

WALLACE v. THE QUEEN.

APPEAL from the Exchequer Court of Canada (6 Ex. C. R. 264).

Withdrawn, with costs.

(26th June, 1901.)

[S. C. File No. 1865.] 1899

ERDMAN v. TOWN OF WALKERTON.

Motion, in chambers, to tax costs under settlement made in the High Court of Justice for Ontario.

Refused.

(12th June, 1899.)

(See 14 Ont. P. R. 467; 15 Ont. P. R. 12; 20 Ont. App. R. 444; 23 Can. S. C. R. 352.)

[S. C. File 1877.]

McCARTNEY v. PROCTOR.

APPEAL from the Court of Appeal for Ontario.

Settled out of court.

(18th September, 1899.)

[S. C. File No. 1881.]

DOYON v. MARTINETTE.

APPEAL from the Court of Queen's Bench, appeal side, Province of Quebec, reversing the judgment of the Superior Court, which made absolute a writ of prohibition against the execution of a judgment convicting the appellant for the sale of intoxicating liquors without a license.

The appeal was dismissed with costs.

(5th Oct., 1899.)

1900

*Jan. 22.

[S. C. File No. 1904.]

LES SYNDICS DE LA PAROISSE DE ST. VALIER v. CATELLIER.

Appeal—Jurisdiction—Final judgment—Mandamus.

Motion by way of appeal from the order of the Registrar, in chambers (11th January, 1900), approving of the deposit of $500 as security for the costs of an appeal from the Court of Queen's Bench, appeal side, Province of Quebec.

The respondent Catellier, applied for a peremptory writ of mandamus ("un bref péremptoire de la nature d'un bref de mandamus") against the appellants to compel them to proceed with the purchase of lands selected for the site of a parish church, and obtained an order, as follows:—

Vu la requête ci-dessus, il est ordonné d'emaner un bref de mandamus tel que demandé.

Upon this order an ordinary writ of summons was issued under art. 993 of the Code of Civil Procedure, indorsed as a writ of mandamus, but the copy served on the Syndics did not contain any indorsement of the nature of the claim as provided by art. 124 C. P. Q. An exception to the form was dismissed, whereupon the Syndics inscribed an appeal *de plano*, before the Court of Queen's Bench, on the ground that the order was a final judgment, and directed the issue of a peremptory writ of mandamus.

The Court of Queen's Bench quashed the appeal for the following reasons:—

Parceque (1) Les appelants ont inscrit en appeal de l'ordonnance du juge permettant l'émission du bref de mandamus en cette cause, sans au préalable obtenir la permission; (2) Parceque la dite ordonnance n'est pas un jugement final, mais une interlocutoire.

Upon the motion before the Registrar, in chambers, the respondent contended that the judgment was not appealable, that the case was governed by *Langevin* v. *Les Commissaires*

* PRESENT: MR. JUSTICE GIROUARD, in Chambers.

1900

SYNDICS DE ST. VALIER v. CATELLIER.

d'Ecole de St Marc (1), and that section 24 (*g*) of the Supreme and Exchequer Courts Act did not permit of an appeal in such a case unless the order was final in its nature.

The learned Registrar, considering that the order was not simply for the issue of a summons under art. 993 C. P. Q., but a peremptory order for the issue of a writ of mandamus, under art. 996 C. P. Q., held that the judgment was final in its nature and, therefore, appealable.

On the motion, by way of appeal:—

This decision was reversed, on the appeal, by Mr. JUSTICE GIROUARD, in chambers, and the application for approval of the security for costs was dismissed with costs.

Motion dismissed with costs.

J. A. Ritchie, for the motion.
Murphy, contra, for the appellants.

[S. C. File No. 1907.]

BAIE DES CHALEURS RAILWAY CO. v. MACFARLANE ET AL.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Motion for leave to appeal dismissed.

Subsequently a motion to reinstate the application was dismissed with costs.

(8th March, 1900.)

(1) 18 Can. S. C. R. 599.

1900

[S. C. File No. 1911.]

THE GREAT NORTHERN RAILWAY CO. v. CAMPBELL.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed with costs for the reasons given in the court below.

(12th June, 1900.)

[S. C. File No. 1913.]

BICKNELL v. THE GRAND TRUNK RAILWAY CO.

APPEAL from the Court of Appeal for Ontario (26 Ont. App. R. 431).

Entered, but never prosecuted.

(5th February, 1900.)

1907

[S. C. File No. 1915.]

IN RE CANADA TEMPERANCE ACT.

REFERENCE by the Governor-General in Council, on 1st February, 1900, for the opinions of the judges of the Supreme Court of Canada on the following questions:—

"(1) Had the Parliament of Canada authority to enact section 6 of the Act 51 Victoria, chapter 34, intituled "An Act to amend the Canada Temperance Act?"

"(2) If the said section be *ultra vires* in part only, or if its operations be in any wise confined as to any one or more of the provinces of Canada, then

"(*a*) What portions of the said section are *ultra vires* and as to which, if any, of the judicial officers therein named is it *ultra vires?* and—

"(*b*) as to which of the provinces of Canada is the said section operative, and upon what depends the question as to its operative effect in any province?

"(3) Is the said section operative as to the judicial officers therein named, or as to any, and which of them in provinces where no jurisdiction to convict for violation of the Canada Temperance Act has been otherwise given or otherwise exists?

"(4) Is the said section operative as to the said judicial officers, or any, and which of them, in provinces where no jurisdiction to convict for any violation of the Canada Temperance Act has been otherwise given or otherwise exists, and where no jurisdiction to convict summarily for crimes or offences analogous to violations of the Canada Temperance Act has been given to such officers or exists otherwise than by legislation of the Parliament of Canada?

"(5) Is the said section operative as to the said officers, or any and which of them, in provinces where no jurisdiction to convict for violations of the Canada Temperance Act has been otherwise given or otherwise exists, and where no jurisdiction to convict summarily for crimes or offences analogous to violations of the Canada Temperance Act has been given to such officers, or exists otherwise than by legislation of the Parliament of Canada, and where no general jurisdiction to convict offenders for all crimes and offences made punishable on summary conviction before such officers has been given or exists otherwise than by legislation of the Parliament of Canada?

"(6) Is the said section operative in the Province of Nova Scotia as authorizing prosecution before two justices of the peace as therein mentioned?"

The order-in-council referring the subject for hearing and consideration, and a factum on behalf of the Attorney-General of Canada, were filed. On 24th of April, 1900, the hearing was postponed and no further proceeding has been taken since then.

(1st April, 1907.)

1901

[S. C. File No. 1919.]

SMART v. ANGUS ET AL.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Settled out of court.

(23rd April, 1901.)

1900

[S. C. File No. 1921.]

GRIDLEY ET AL. v. BRITTON.

APPEAL from the Court of Appeal for Ontario.

Entered, but never prosecuted.

(12th March, 1900.)

[S. C. File No. 1935.]

ELLIOTT v. THE QUEBEC BANK.

APPEAL from the Superior Court, Province of Quebec, sitting in review.

Settled out of court.

(9th April, 1900.)

[S. C. File No. 1940.] 1900

THE TRUSTS AND GUARANTEE CO. v. CITY OF ROSSLAND.

APPEAL from the Court of Appeal for Ontario.

Dismissed with costs for reasons given in the court below, the CHIEF JUSTICE taking no part in the judgment.

(8th October, 1900.)

[S. C. File No. 1947.]

MOLSONS BANK v. BEAUCAGE.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Entered, but never prosecuted.

(19th April, 1900.)

[S. C. File No. 1954.] 1901

GREEN v. JENKINS.

APPEAL from the Supreme Court of New Brunswick.

Entered, but not prosecuted.

(4th February, 1901.)

1900 [S. C. File No. 1958.]

COLEMAN PLANING MILL AND LUMBER COMPANY OF BURLINGTON v. HOOD.

APPEAL from the Court of Appeal from Ontario.

Entered, but never prosecuted.

(30th June, 1900.)

1901 [S. C. File No. 1960.]

GORDON & IRONSIDE v. BICKNELL.

APPEAL from the Court of Appeal for Ontario.

Dismissed with costs.

(21st March, 1901.)

1900 [S. C. File No. 1961.]

BONSACK MACHINE CO. v. FALK.

APPEALS from the Court of Queen's Bench, appeal side, Province of Quebec, affirming the judgment of the Superior Court, District of Montreal, dismissing the action by the company to recover $25,000, for the use of a patent for manufacturing cigarettes, from S. Davis & Sons of Montreal, on their principal demand, and awarding them $1,193 upon their incidental demand filed after the institution of the action.

The appeals were dismissed with costs for the reasons given in the court below.

(12th November, 1900.)

(See note of decision as to security for appeal in Cout. Dig. 46; Q. R. 9 Q. B. 355.)

[S. C. File No. 1964.] 1900

THE QUEEN v. GIBBON.

APPEAL from the Exchequer Court of Canada (6 Ex. C. R. 430).

Discontinued with costs.

(26th Sept., 1900.)

[S. C. File No. 1973.]

GALBRAITH v. THE HUDSON BAY COMPANY.

APPEAL from the Supreme Court of British Columbia.

Allowed with costs, including the costs of the Supreme Court of British Columbia on appeal, and judgment of the trial judge restored.

(7th December, 1900.)

[S. C. File No. 1976.]

THE NOVA SCOTIA MINING AND PROSPECTING CO. v. STUART.

APPEAL from the Supreme Court of Nova Scotia.

Settled out of court.

(12th November, 1900.)

1901

*March 14.
*March 18.

[S. C. File No. 1983.]

TOWNSHIP OF ARUNDEL v. WILSON.

Municipal corporation—Reservation for highway — Opening by-road —Damages.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, Province of Quebec, reversing the judgment of the Superior Court for the District of Terrebonne.

The respondent, Wilson, brought the action to recover a strip of land taken by the municipal corporation along the side of his property, for the purpose of opening a by-road, and for damages occasioned by the removal of his fences. On the issues joined, questions were raised as to the right of the corporation, without paying any indemnity, to take possession of the strip of land in question as part of the reservation for road allowance established by law between the land of the plaintiff and adjoining lands.

Lafleur, K.C., and *Delaronde*, K.C., for appellant.
Fitzpatrick, K.C., and *Demers*, K.C., for respondent.

The judgment appealed from, in reversing the judgment of the Superior Court, maintained the plaintiff's action against the municipality, granted him $20 damages, and ordered that he should be reinstated in his possession of a strip of land sought to be appropriated for a by-road. Costs were given against the corporation in the courts below.

The judgment appealed from was reformed by striking out the condemnation for damages, and adding thereto, after the direction that the plaintiff should be reinstated in his possession of the strip of land in question, "par un des officiers de la cour supérieure dans le District de Terrebonne," the words "si mieux n'aime la dite corporation de payer au dit démandeur la somme de $200, comme prix du dit terrain, le tout avec dépens, dans l'une ou l'autre alternative, contre la dite corporation dans toutes les cours."

Appeal allowed in part.

* PRESENT: TASCHEREAU, GWYNNE, SEDGEWICK, KING and GIROUARD, JJ.

1901

[S. C. File No. 1984.]

LAKE ERIE AND DETROIT RIVER RAILWAY CO. v. SCOTT.

Railways—Negligence—Non-suit.

APPEAL from the Court of Appeal for Ontario.

The action was by a brakesman employed by the company for damages in respect of injuries incurred by him while in discharge of his duty through the negligence of servants of the company in checking the speed of the train on which he was working too suddenly, so that a part of the train became detached. The jury found for the plaintiff, and the trial judge granted a non-suit, although he was inclined to the view that the plaintiff had made out a case. The non-suit was set aside by the Divisional Court.

The Supreme Court of Canada dismissed the appeal with costs for the reasons given in the Divisional Court, Gwynne, J., dissenting.

(1st April, 1901.)

[S. C. File No. 1989.]

BANK OF HAMILTON v. GOLDIE & McCULLOUGH.

APPEAL from the Court of Appeal for Ontario (27 Ont. App. R. 619).

Withdrawn.

(5th Feb., 1901.)

1901

[S. C. File No. 1990.]

CITY OF MONTREAL v. CASSIDY.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed, with costs.

(18th March, 1901.)

[S. C. File No. 1996.]

THE GURNEY FOUNDRY CO. v. MORRIS.

APPEAL from the Court of Appeal for Ontario.

Dismissed with costs, GWYNNE, J., dissenting.

(3rd June, 1901.)

[S. C. File No. 1998.]

SCHELL v. FINKLE.

APPEAL from the Court of Appeal for Ontario.

Allowed in part.

(13th March, 1901.)

[S. C. File No. 2004.] 1902

HOPKINS v. UPTHEGROVE.

APPEAL from the Court of Appeal for Ontario.

Settled out of court after a first argument.

(22nd May, 1902.)

[S. C. File No. 2016.] 1901

THE MONTREAL STREET RAILWAY CO. v. GAREAU.

APPEAL from the Court of King's Bench, Province of Quebec, appeal side.

Settled out of court.

(20th April, 1901.)

[S. C. File No. 2017.]

MORASH v. ZWICKER.

APPEAL from the Supreme Court of Nova Scotia.

Discontinued with costs.

See 34 N. S. Rep. 555.

(23rd May, 1901.)

1901

[S. C. File No. 2025.]

THE CANADIAN ACETYLENE CO. v. SAVOIE ET AL.

APPEAL from the Court of Queen's Bench, Province of Quebec, appeal side.

Dismissed with costs for the reasons given in the Superior Court.

(5th June, 1901.)

[S. C. File No. 2027.]

THE INSURANCE COMPANY OF NORTH AMERICA v. BORDEN ET AL.

APPEAL from the Supreme Court of Nova Scotia.

Settled out of court.

(13th May, 1901.)

1901

[S. C. File No. 2029.]

*May 14, 15.

THE INSURANCE COMPANY OF NORTH AMERICA v. McLEOD; THE WESTERN ASSURANCE COMPANY v. McLEOD; THE NOVA SCOTIA MARINE INSURANCE COMPANY v. McLEOD.

Marine insurance—Abandonment—Repairs—Boston clause—Findings of jury—New trial—Practice—Evidence taken by commission—Judicial discretion.

APPEALS from the judgments of Supreme Court of Nova Scotia dismissing the appeals of the present appellants

* PRESENT: SIR HENRY STRONG, C.J., and TASCHEREAU, GWYNNE, SEDGEWICK, and GIROUARD, JJ.

1901

INSURANCE CO. OF NORTH AMERICA v. McLEOD.

WESTERN ASSURANCE CO. v. McLEOD.

NOVA SCOTIA MARINE INS. CO. v. McLEOD.

from the judgments entered against them on the third trial, and refusing an order on their motion for another new trial.

The former appeals by the same appellants were allowed by the Supreme Court of Canada (29 Can. S. C. R. 449), and new trials ordered, upon terms as to payment of costs, for the purpose of allowing the defendants, appellants, to adduce further evidence. Upon these trials the three cases were heard together, and, upon the findings of the jury, judgment was entered for the plaintiff in each case. On appeal to the full court in Nova Scotia, the defendants again moved for leave to amend, and for new trials on additional grounds stated, and the plaintiff filed cross-appeals. The appeals and cross-appeals were dismissed, as well as the defendants' motions to amend by adding the new grounds, and for new trials. The present appeals were by the defendants against the judgments dismissing the appeals and refusing the amendment and new trials.

Newcombe, K.C., and *Harris*, K.C., for the appellants.
Borden, K.C., and *Russell*, K.C., for the respondent.

The appeals were dismissed with costs on 15th May, 1901, the following reasons for judgment being delivered:

TASCHEREAU, J.—(Oral)—We were of opinion that the appeals should have been dismissed with costs on the cases as presented to us at the former hearing, in 1898 (29 Can. S. C. R. 449; 30 N. S. Rep. 480); but, in order that the insurance companies might have the full opportunity of adducing further evidence, which had not been received at the former trial, we indulged them by granting new trials to enable them to produce letters in respect to the transactions which took place at St. Thomas, W. I., and then said to be in the possession of witnesses residing there.

This indulgence was granted at their own expense, and they were given thirty days in which to make settlement of these costs, otherwise the appeals were ordered to stand dismissed.

1901

INSURANCE CO. OF NORTH AMERICA v. MCLEOD.

WESTERN ASSURANCE CO. v. MCLEOD.

NOVA SCOTIA MARINE INS. CO. v. MCLEOD.

The new trials so ordered have now taken place, and the missing evidence has been produced, the three cases being united and tried together, and the companies appeal from the judgment of the Supreme Court of Nova Scotia, in banc, affirming the decisions of the trial court then rendered against them.

By the new evidence so produced at the new trial, the companies have shewn nothing which can justify this court in any interference with the judgment of the court below.

The present appeals are therefore dismissed with costs.

Appeals dismissed with costs.

(Cf. 32 N. S. Rep. 481.)

[S. C. File No. 2031.]

LARIVIÈRE v. PHANEUF; PROVENCHER ELECTION CASE.

APPEAL from the Controverted Elections Court.

Dismissed without costs.

(7th May, 1901.)

[S. C. File No. 2035.]

MEIGS v. MORIN; MISSISQUOI ELECTION CASE.

APPEAL from the Controverted Elections Court.

Struck off the roll of cases inscribed for hearing.

The record was subsequently returned to the court below, and no further proceedings were taken on the appeal.

(1st October, 1901.)

[S. C. File No. 2036.] 1901

WEIL v. RATTRAY.

APPEAL from the Court of King's Bench, Province of Quebec, appeal side.

Never prosecuted.

(30th April, 1901.)

[S. C. File No. 2038.]

MOREL v. LACHANCE.

MOTION for approval of security for an appeal from the Court of King's Bench, Province of Quebec, appeal side.

Refused by the Registrar.

Motion by way of appeal from the decision of the Registrar dismissed with costs by GIROUARD, J.

(5th June, 1901.)

[S. C. File No. 2039.] 1902

ALEXANDER STEPHEN (DEFENDANT) . . . . APPELLANT, *May 6, 7.
AND *May 20.
WILLIAM A. BLACK ET AL. (PLAINTIFFS) . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract—Guarantee—Conditional sale—Rescission — Mortgagor and mortgagee — Power of sale—Creditor retaking possession —Continuing liability—Appropriation of money realized by creditor—Release of debtor—Discharge of surety.

S. leased a hotel for three years and agreed to purchase the furniture therein from plaintiffs (respondents) at $11,000, payable by instal-

* PRESENT: TASCHEREAU, SEDGEWICK, GIROUARD, DAVIES AND MILLS, JJ.

1902

STEPHEN v. BLACK ET AL.

ments, $3,000 during the first year, $3,000 during the second year, and $5,000 during the third year of the term, power to retake and sell the goods, on default, being reserved. The whole debt was secured by chattel mortgage upon the furniture, and, as further security, by an agreement entered into with several other persons, the defendant (appellant), guaranteed the payment of one-sixth of the instalment payable during the second year of the term. It was a condition of the guarantee that it should remain in force notwithstanding that S. might forfeit her right to the furniture under the conditions of any agreement or mortgage. The chattel mortgage, on breach of covenants, provided for forfeiture of all claim of S. to the furniture, and that the plaintiffs might, thereupon, retake possession thereof, and, also, that all payments she should have made would then be forfeited. During the second year of the term, on default by S. to pay part of the first year's instalment, the plaintiffs resumed possession of the hotel and furniture, leased the hotel to another person and sold the furniture for $6,500; they also notified the guarantors of the default of S. to perform "the conditions of the purchase," that they had, in consequence, repossessed themselves of the furniture, and that they intended holding the guarantors liable for the payment guaranteed. The money received on the re-sale was appropriated by the plaintiffs, first, in payment of a balance of the first year's instalment; 2ndly, in payment of the third instalment; and lastly, towards part payment of the second instalment, thus reducing this last amount by $105.14. After the expiration of the three years' term of the lease to S., the plaintiffs sued upon the guarantee, and recovered judgment against the defendant.

Held, per TASCHEREAU, GIROUARD and DAVIES, JJ. (SEDGEWICK and MILLS, JJ., contra), that the contract represented by the agreement, guarantee and chattel mortgage constituted a relationship of mortgagor and mortgagee between S. and the plaintiffs, and, consequently, that the guarantors continued to be liable under the guarantee, notwithstanding the forfeiture of the rights of S., and the exercise of the powers of resuming possession and re-sale of the furniture.

Held, per SEDGEWICK and MILLS, JJ., dissenting, that the transaction amounted to a conditional sale of the furniture, that the liability of S. upon her personal covenant ceased upon the exercise of the powers by the plaintiffs, and, consequently, that the sureties were discharged, notwithstanding the special provision that the guarantee should remain in force.

Held, also, *per* SEDGEWICK and MILLS, JJ. (DAVIES, J., contra), that, in either view of the nature of the contract, the receipt of the money on re-sale of the furniture cancelled the debt *pro tanto*, and,

upon the second instalment falling due, the plaintiffs were bound forthwith to appropriate the amount of that instalment out of the $6,500 then in their hands, in satisfaction and discharge of the guaranteed payment, thereby releasing both S. and her sureties from further liability.

APPEAL from the judgment of the Supreme Court of Nova Scotia, affirming the judgment at the trial, which maintained the plaintiffs' action with costs.

The circumstances of the case and the questions in issue upon the appeal are stated in the judgments now reported.

Borden, K.C., and *Mellish*, for the appellant.
Newcombe, K.C., and *Drysdale*, K.C., for the respondents.

TASCHEREAU, J.—I would dismiss this appeal for the reasons given by Mr. Justice Meagher in the court appealed from.

If that guarantee, worded as it is, does not mean that the guarantors guarantee the payment in question, never mind what would happen which might, otherwise, relieve them in law from liability, I cannot see what it could mean, and we cannot read the clause out of the contract. It has been inserted therein for the very purpose of meeting this case. There is no reason for consideration of the law on appropriation of payments. The guarantors have contracted themselves out of it.

SEDGEWICK, J. (dissenting):—Prior to the 31st of March, 1896, the plaintiffs, some or one of them, were the owners of the "Queen Hotel" in the City of Halifax, and of the furniture therein contained. On that day an agreement was entered into between such owners and one Mary I. Sheraton,

(1) that the latter should lease the hotel for a term of three years, at an annual rental of $4,316, payable weekly in advance;

(2) that she should purchase the furniture in the hotel for the sum of $11,000, payable $3,000 the first year of the

1902

STEPHEN
v.
BLACK ET AL.

SEDGEWICK, J

term, $3,000 the second year, and the balance, $5,000, in the third year;

(3) that, in order to secure payment of these sums at the times specified, she would give the plaintiffs a chattel mortgage upon the goods sold; and

(4) that, as further and special security for the second instalments, she would give the plaintiffs the guarantee of six gentlemen, of whom the defendant was one, for that sum.

The agreement, chattel mortgage, and guarantee are as follows (the lease does not give rise to any question requiring its being here set out):

AGREEMENT.

"MEMORANDUM OF AGREEMENT made this first day of April, in the year of our Lord one thousand eight hundred and ninety-six, between Mary I. Sheraton, of the City of Halifax, in the County of Halifax, the wife of Alfred B. Sheraton, of the same place, hotel keeper, of the one part; and Samuel M. Brookfield of the said City and County of Halifax, contractor, William M. Black, Henry G. Bauld, C. Willoughby Anderson and Donald Keith, all of Halifax aforesaid, merchants, and John Dunn, executor of the last will and testament of Charles Annand, deceased, of the second part.

"Whereas, the parties of the second part have this day agreed to sell, and have sold to the party of the first part, all the hotel and other furniture, hotel equipments, appliances, and personal property of every nature and kind, held by the parties of the second part, or over which they have any control or interest in, upon and about the property in the City of Halifax, on the east side of Hollis Street, known as the Queen Hotel property, and in the building on the west side of Hollis Street aforesaid, known as the Annex.

"Now, these presents witness that the parties of the second part agree to sell and transfer to the party of the first part all and singular the furniture and other personal property hereinbefore referred to, and the party of the first part in considera-

tion of the premises and of the transfer and delivery to her of all the said property, hereby agrees to pay to the parties of the second part the sum of eleven thousand dollars, lawful money of Canada, in the manner and under the terms and conditions herein mentioned and set forth.

"1. The parties of the second part agree to give and grant to the party of the first part a lease of the Queen Hotel for three years, from the first day of April, A.D. 1896, with an option in the party of the first part to renew the same for two years longer beyond the said period of three years, at a rental of four thousand three hundred and sixteen dollars per year, payable weekly in advance, in sums of eighty-three dollars per week, together with the water rates payable in respect of the period of said lease.

"2. Upon the party of the first part being put into possession of the said personalty, she will give her promissory note to the parties of the second part for the sum of $3,000 at 30 days, and will pay the said notes with interest in monthly instalments as follows:—

"1896—

May 1st	$100
June 1st	150
July 1st	400
August 1st	500
September 1st	500
October 1st	300
November 1st	250
December 1st	200

"1897—

January 1st	200
February 1st	200
March 1st	200

"3. The party of the second part will give a chattel mortgage upon all the personal property so transferred, together with all the furniture and hotel equipments belonging to her in the said hotel and annex, except such as are enumerated

1902

STEPHEN v. BLACK ET AL.

SEDGEWICK, J.

and excluded from said mortgage. And also upon all such other furniture or hotel equipments as may during the continuance of the said chattel mortgage be brought in or upon said hotel or annex, in substitution for or in addition to that already there.

"4. The party of the first part will, during the second year of the said lease, pay a further sum of three thousand dollars on said purchase price of furniture, and will give a guarantee signed by Wm. Y. Kennedy, Andrew E. McMannus (the defendant), Alexander Stephen, John Peters, Harry L. Chipman, and Benjamin F. Pearson, all of Halifax, for the payment of said three thousand dollars, said sum to be payable at the said times and in the same amounts as the $3,000 mentioned in paragraph 2 of this agreement. She also hereby promises and agrees to carry out and complete said purchase by the payment of the balance of five thousand dollars remaining due after the payment of the second sum of three thousand dollars within one year after the termination of the second year of the tenancy, such sum to be paid in equal quarterly instalments, beginning on the 30th of June, and to pay 6 per cent. per annum on the balances from time to time due upon the said purchase money, such interest to be payable quarterly; to insure and keep insured the said furniture for the sum from time to time due and unpaid to the grantors upon the said purchase price, such insurance to be payable in the event of loss to the parties of the second part to the extent of the sum which may be due them at the time of the said loss. To pay all premiums of insurance, taxes and water rates upon the same, and to deposit the policies with the parties of the second part.

"In the event of the said party of the first part failing to pay or satisfy the premiums on such policies on the days they respectively become due, or upon her failing to make the payments particularly set out in this agreement, the lease of the realty shall be forfeited without further notice, the said lease to contain a clause to that effect. Also, she shall forfeit all claim to the personalty, and the parties of the second part shall be at liberty, and such right and liberty shall be given

them in the chattel mortgage to enter into possession of said personalty, and to possess or sell the same, all payments made being forfeited. And the guarantee for the $3,000 to remain in force.

"In the event of a non-payment of rental for twenty-one days after the same is due, the parties of the second part shall have the right to enter under the chattel mortgage, and all previous payments on account of the same shall be forfeited.

"5. The following articles are not to be considered or included as appliances or equipments: All furnaces and fittings, radiators, and all steam fittings, electric fittings, gasoliers, globes, all gas fittings, mantles, fancy glass doors and windows, telephone office annunciators, counters, shutters, and all present fixtures.

"Should the tenancy be extended as mentioned in paragraph 1 hereof, then if the parties of the second part receive a *bonâ fide* offer to buy the land and premises, the party of the first part shall buy the same on the same terms as those so offered, or shall surrender the balance of said extended term.

"In witness whereof, etc."

CHATTEL MORTGAGE.

"THIS INDENTURE, made the thirty-first day of March, in the year of our Lord one thousand eight hundred and ninety-six, between Mary I. Sheraton, of the city of Halifax, married woman, wife of Alfred B. Sheraton of the same place, of the first part, and Samuel M. Brookfield, William A. Black, Henry G. Bauld, C. Willoughby Anderson, and Donald Keith, all of Halifax, merchants, and John Dunn, executor of the last will and testament of Charles Annand, deceased, of the second part, hereinafter called the parties of the second part.

"Witnesseth, that the said party of the first part, for and in consideration of the sum of eleven thousand dollars of lawful money of Canada, to her in hand well and truly paid by

1902

STEPHEN v. BLACK ET AL.

SEDGEWICK, J.

the said parties of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over unto the said parties of the second part and their executors, administrators and assigns, all and singular the furniture, hotel equipments, and personal property of every kind and nature now contained and being in and upon that certain building and premises on the east side of Hollis street, in the city of Halifax, known as the Queen Hotel, and in the building on the west side of said street, known as the Queen Hotel Annex, consisting of parlor, bedroom and office furniture, chairs, tables, pictures, carpets, crockery and glassware, kitchen furniture, furnishings and utensils, and generally all and singular such furniture, personal property and effects as are now in and upon the said premises respectively, or which may hereafter be brought in or thereupon to replenish the same or in lieu or substitution therefor.

"Provided, however, that this security shall not apply to the goods, chattels, furniture and personal property now situate in the Queen Hotel Annex, and of which a schedule is hereto annexed, and marked with the letter "A," all of which, and the goods, chattels and effects brought into or upon the Queen Hotel Annex in lieu or in substitution therefor of the like kind, or to replenish the same, shall be excluded from the security;

"To have and to hold the same and every part thereof unto and to the use of the said parties of the second part, their executors, administrators and assigns, on breach of the covenants, provisoes and agreements hereinafter mentioned and expressed, or any or either of them.

"Provided always, and these presents are upon the express condition that if the said party of the first part, her executors, administrators or assigns, shall well and truly pay or cause to be paid unto the said parties of the second part, their executors, administrators and assigns, the said full sum of eleven

thousand dollars, with interest thereon, at and after the rate of six per centum per annum in the manner following, then these presents shall be void, otherwise to be and remain in full force, virtue and effect.

"The party of the first part will give to the parties of the second part her promissory note for $3,000 at thirty days, and will pay the said note with interest in monthly instalments as follows:—

"1896. On

1st May	$160
1st July	400
1st September	500
1st November	250

"1897. On

1st January	200
1st March	200
1st June	150
1st August	500
1st October	300
1st December	200

"1898. On

1st February	200

"The party of the first part will pay to the parties of the second part during the year which will elapse between the 31st day of March A.D. 1897, and the 30th day of March, A.D. 1898, a further sum of $3,000 on acount of said purchase money at the same times and in the same amounts as in the year preceding, and the balance of $5,000 in and during the year which will elapse between the 30th day of March, A.D. 1898, and the 30th day of March, A.D. 1899, in four equal quarterly payments, and will pay interest at six per centum per annum on the balances from time to time due upon the said purchase money, interest to be payable quarterly.

1902

STEPHEN v. BLACK ET AL.

SEDGEWICK, J.

"If any proceedings shall be taken to remove any of the property hereby assigned without the consent of the parties of the second part, or if the party of the first part shall without such consent assign or attempt to assign the same, or if the same shall be at any time seized or taken in execution or attachment, or by any legal process by any creditor, in either of said cases, it shall be lawful for the said parties of the second part, their executors, administrators or assigns, to take immediate possession of and sell the said property as hereinbefore provided before the expiration of the period hereinbefore mentioned.

"And the said party of the first part, for herself, her executors and administrators, hereby covenants, promises and agrees to, and with the said parties of the second part, their executors, administrators and assigns, that she, the said party of the first part, her executors or administrators, will pay, or cause to be paid to the said parties of the second part, their executors, administrators or assigns, the said sum of eleven thousand dollars and interest at the times and in the manner hereinbefore specified and provided.

"And also will insure and keep insured against fire in such good and sufficient fire insurance office or offices as shall be approved of by the said parties of the second part, their executors, administrators or assigns, on all the property hereby mortgaged and conveyed, in the sum from time to time due upon the said purchase money in the name and for the benefit of the said parties of the second part, their executors, administrators and assigns, and will deposit with the said parties of the second part all policies and receipts for renewal premiums of such insurance, and in default thereof, or if the said premiums of insurance shall not be paid or satisfied when due, or the rent reserved in the lease of the Queen Hotel of even date herewith, shall remain unpaid for the space of 21 days after the same are payable, or if the payments mentioned in the agreement of even date herewith are not made at the times therein specified, the party of the first part shall forfeit all claim to the property herein conveyed, and the party of the

second part to enter into possession thereof, and all payments made shall be forfeited.

"In witness whereof, etc."

GUARANTEE.

"MEMORANDUM OF AGREEMENT made this thirty-first day of March, A.D. 1896, between William Y. Kennedy, Andrew E. McManus, Alexander Stephen, John Peters and Harry L. Chipman, all of the City of Halifax, Merchants, and Benjamin F. Pearson, of said City of Halifax, Barrister-at-law, of the first part, and Donald Keith, Samuel M. Brookfield, William M. Black, Henry G. Bauld, and C. Willoughy Anderson, and Donald Keith, all of Halifax aforesaid, merchants, of the second part.

"Whereas, the parties of the second part have this day sold and transferred to Mary I. Sheraton, of Halifax, married woman, all the personal property situated in the building on the east side of Hollis street, known as the 'Queen Hotel.'

"And whereas the parties of the first part have agreed to guarantee to the parties of the second part the payment by the said Mary I. Sheraton to the parties of the second part of the sum of $3,000, part of the sum of $11,000, the purchase price of the said property, during the year which shall elapse between the 30th day of March, A.D. 1897, and the 30th day of March, 1898, as and for a portion of the purchase money of the said property, in the manner following:—

"Now these presents witness that each of the said parties of the first part, each for himself, his heirs, executors and administrators, doth hereby guarantee the payment by the said Mary I. Sheraton to the said Donald Keith, Samuel M. Brookfield, William M. Black, Henry G. Bauld, C. Willoughby Anderson, of the sum of $500, to be paid by the said Mary I. Sheraton on or before the 30th day of March, 1898, as and for a part of the purchase money for the said personal

1902

STEPHEN
v.
BLACK ET AL.

SEDGEWICK, J.

property, and failing such payment by said Mary I. Sheraton of the said $3,000, or any part thereof within the period mentioned, each one of us, our heirs, executors and administrators, will pay one-sixth part of the sum so unpaid at said last mentioned date.

"This guarantee is to remain in force notwithstanding Mary I. Sheraton may have forfeited her right to the said personal property under the conditions of any agreement or mortgage entered into between the said Mary I. Sheraton and the parties of the second part.

"In witness whereof, etc."

Mrs. Sheraton, having been placed in occupation and possession of the hotel and furniture under the foregoing instruments, about eight months afterwards, during the first year of the term, became in default, owing three months' interest on the furniture, the insurance thereon, and the city taxes thereon, and thereupon, on the 13th of January, 1897, the plaintiffs sent the following letter to the guarantors:—

DEAR SIRS,—We desire to notify you that Mary I. Sheraton has failed to perform and carry out the conditions of purchase contained in the agreement whereby we sold or agreed to sell the personalty of ours in connection with the "Queen Hotel." Under this agreement you are sureties for the sum of $3,000 unpaid purchase money, and we have to notify you that, on account of breach of conditions of agreement and default made by the said Mary I. Sheraton, thereunder, we have taken and re-possessed ourselves of said personalty, and Mary I. Sheraton has forfeited her rights and payments made under said agreement. And we have to call upon you for the payment of said sum of $3,000.

Yours truly,

DONALD KEITH,
&c., &c., &c.

To

WILLIAM Y. KENNEDY,
&c., &c., &c.

The plaintiffs had, in the meantime (the 13th of January, 1897), resumed possession of the hotel with the furniture. They operated it until the 14th of April following, when they leased the hotel to another party, selling him the furniture for $6,500. During the first year, Mrs. Sheraton had paid the

1902

STEPHEN v. BLACK ET AL

SEDGEWICK, J.

whole of the year's instalment, without interest, as the final account shewed, but, according to the plaintiffs' contention, there was still due from her to them at the time of the trial, $2,894.86, the money received from the re-sale being appropriated, first, in payment of the first instalment with interest; secondly, in payment of the third instalment; and lastly, in part payment of the second instalment, reducing the original alleged liability of $3,000 by the sum of $105.14. After three years, the original term of the lease and the period during which the furniture was to be wholly paid for, this action was brought upon the guarantee above set out, and resulted in a judgment for the plaintiffs which, upon appeal to the full court, was sustained. The defendant appealed.

The questions arising upon this appeal are mainly these: First,—Under the facts stated, was Mary I. Sheraton liable to the plaintiffs for the whole purchase money, less what they received directly from her and from the re-sale of the goods? Or was the original contract rescinded and her liability upon her personal covenant determined upon the exercise by the plaintiffs of their option of re-taking and re-sale? Secondly,—In the event of this question being determined in her favour, what effect had the extinguishment of her liability upon the defendant's liability, irrespective of any contract extending it? And, Thirdly,—Upon the proper interpretation of the special provision in the guarantee, relating to acts of forfeiture, is the surety still liable to the plaintiffs for the extinguished debt of his principal?

As to the first question, I am of opinion that upon the taking, probably, and certainly, upon the re-selling of the property, the plaintiffs' right to sue upon the debtor's personal covenant was gone. Whether one regards the old doctrine of equity that a creditor cannot pursue his personal action on the covenant after foreclosure and sale (not judicial), because he, by his own act, has prevented the debtor, upon payment of his debt, from getting back his property—the possibility of redemption being gone, or the common law principle that the taking and selling of the property conditionally sold operates

1902

STEPHEN
v.
BLACK ET AL.

SEDGEWICK, J.

as a rescission of the contract, and the consequent destruction of the creditor's original right to sue upon it, the result is the same, there is a discharge of the debtor.

In *Sawyer* v. *Pringle* (1), in 1891, Mr. Justice Burton stated the law as follows:—

> When there has been a sale, the authorities seem very clearly to establish that when there is no express reservation of a right to re-sell, such a sale by the vendor is a mere tortious act, for which the purchaser has his remedy, but it has no effect as a rescission of the contract. Where, however, there is such a reservation to re-sell on default, and the vendor exercises that right, it operates as a rescission of the original sale, and this rule applies whether the goods are from the first in the possession of the vendor or are re-taken from the purchaser after their delivery to him. * * * If the plaintiffs desired to hold the defendant to his contract, they were bound to hold the machine for delivery to him on payment.

That case is very instructive upon the issues here so far as the principal debtor's liability here is concerned. It will be noticed that the agreement between the plaintiffs and Mrs. Sheraton expressly gave to the former the right of resumption of possession and of re-sale, but it failed to make any provision as to the consequences following therefrom. *Modus et conventio vincunt legem.* And the contracting parties might have proceeded to vary or limit the operation of ordinary legal principles.

Sir John Hagarty, Chief Justice of Ontario, in the case just cited, indicates how the contract might be enlarged so as to preserve the debtor's liability. He says:—

> Where the contract contains this term as to resuming possession, we generally find this followed by a power given to the vendors to sell the chattel either with or without notice, and to credit the proposed purchaser with the proceeds realized from the sale, leaving him expressly liable for any difference between that and the contract price. In such a case the contract would undoubtedly not be rescinded.

In the present case, the plaintiffs have signally failed to make such a stipulation or thus expressly to preserve the right of action.

(1) 18 Ont. App. R. 218.

1902

STEPHEN v. BLACK ET AL.

SEDGEWICK, J.

In Arnold v. *Playter* (1), in 1892, which differed from *Sawyer* v. *Pringle* (2), in this, that before re-sale, the owners of the property had obtained judgment against the defendants, the Chancellor (now) Sir John Boyd, followed the decision in that case. He says:—

> 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* (2), 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 re-sold the machinery,

and he held that, under the circumstances, the debtor could go behind the judgment, and that the transaction of sale subsequent to the judgment shewed that the consideration for the judgment had disappeared by the intentional act of the vendors, by reason whereof the original liability was extinguished.

The case of *Hewison* v. *Ricketts* (3), in 1894, is a case of an extraordinary likeness to this. The plaintiffs, by an instrument in writing, had let to one Guerin, certain chattels. £125 were paid in advance. The balance, £243, was to be paid by monthly instalments. There was a power to seize in case of default. If all instalments were met the chattels were to belong to Guerin. Default was made, and the plaintiffs seized. The defendant, in consideration of the return of the chattels to Guerin, guaranteed the remaining instalments. Further default was made as to two instalments. The plaintiffs again seized, and afterwards sued the defendant for the amount of the two instalments. Upon appeal from the County Court, Charles, J., said:—

> Now, in the first place, it must be considered whether, having seized the goods, they could have sued Guerin for these instalments in arrear. Clearly, they could not. Guerin cannot get his £125 back, because of the express provision of the agreement, that the owners are to keep it *coûte qui coûte*, otherwise he might have got it back, as a total failure of consideration. Can it be said that, under the

(1) 22 O. R. 608. (2) 18 Ont. App. R. 218.
(3) 63 L. J. Q. B. 711.

1902

STEPHEN v. BLACK ET AL

SEDGEWICK, J.

terms of this guarantee, the defendant is liable? I think not. I cannot adopt Mr. Taylor's view of the contract. Seizure by the plaintiff extinguished liability so far as Guerin was concerned with regard to these two instalments and, in my opinion, relieves the surety. The practical result of holding otherwise would be that vendors, or, as they term themselves, owners, in cases of this kind, on default being made, might seize the property and keep it—keeping at the same time the £125 and all instalments paid, and thus get paid twice. Upon the true construction of the agreement, the general right to sue Guerin having been put an end to by the seizure, the right to sue the defendant falls to the ground.

And Collins, J., is equally emphatic:—

Here, after the guarantee had been given the plaintiffs had two rights. They could, under their original agreement, resume possession or they could sue the surety, the present defendant, on his guarantee. By resuming possession they would determine the agreement. This they did and, by doing so, lost the right they had to sue Guerin. Consequently, any proceedings taken by them against the defendant to enforce the guarantee against him as surety must fail. The agreement does not give the plaintiffs, who are the vendors, the right to resume possession of the goods and at the same time recover unpaid instalments from the defendant, the surety, upon his guarantee.

The case of *Taylor* v. *The Bank of New South Wales* (1), in 1886, may be shortly referred to. There the mortgagors in possession before default, but with the knowledge and without the disapproval of the bank, had sold certain sheep, the increase or portion of a much larger herd. This was done because the right of management of the stock was, by the terms of the instrument, in him, and the sale was made in the interests of good husbandry, and because he "thought it best in due management." The guarantors of the debt claimed a discharge, either in whole or *pro tanto*, but the Judicial Committee held otherwise, upon the ground that this subordinate right of sale by the manager was within the contemplation of the parties as evidenced by the instruments themselves, and that there was, therefore, no discharge. Just as, in the present case, where the documents disclose a right on the part of the mortgagor to substitute new furniture for old, the defendant would not have been discharged had the debtor, even

(1) 11 App. Cas. 596.

with the consent of the plaintiffs, exercised that right in the interests of good management. I do not think that the law, as determined in the cases cited, is in any way affected by that decision.

Reference may also be made to Mr. Benjamin's work on Sales (4th ed.), p. 803, where a summary of the law on this subject is stated, and to Campbell on Sales (2 ed.), p. 452.

I think, therefore, I have demonstrated that, under the circumstances of the present case, the plaintiff's right of action against Mrs. Sheraton upon her personal covenants was wholly gone, the debt being extinguished by the voluntary act of the plaintiffs, not by contract, but by operation of law.

The second question may be summarily disposed of. It is elementary and fundamental law, taken for granted by all the learned judges whose opinions I have already referred to, that, in ordinary cases, and in the absence of a special contract to the contrary, the discharge of the principal debtor, whether by payment of the primary debt, or by its extinguishment, in other ways, or by the rescission of the original contract, discharges the surety, the destruction of the principal debt necessary involving the destruction of the secondary or subordinate one. Once remove the foundation and the structure based upon it falls. *Primâ facie*, therefore, in the present case, Mrs. Sheraton having been released from her liability, the defendant's liability is gone with it.

The third question, therefore, has to be answered. Is the instrument of guarantee alive though the debt guaranteed is dead? Does the tree still bear fruit though uprooted and gone?

The right answer wholly depends upon the proper construction to be given to the special clause of the guarantee:—

This guarantee is to remain in force notwithstanding Mary I. Sheraton may have forfeited her right to the said personal property under the conditions of any agreement or mortgage entered into between the said Mary I. Sheraton and the parties of the second part.

1902

STEPHEN v. BLACK ET AL.

SEDGEWICK, J

If the principal debt has been discharged, it is solely by virtue of this provision (reading into it, of course, those parts of the documents specified, as are in it by reference), that the plaintiffs can succeed. Clause 4 of the agreement must be particularly considered, as that agreement is the original contract of sale, the lease, chattel mortgage and guarantee being given in pursuance of it. It provides that Mrs. Sheraton shall *during the second year of the lease* pay $3,000 on the price of the furniture, and will give the guarantee of the person named for its payment *at the dates and in the amounts* agreed upon in reference to the first instalment.

The agreement and chattel mortgage, taken together, provided that the following acts or omissions on the part of Mrs. Sheraton shall work a forfeiture:—

(1) Failure to pay premiums of insurance;

(2) Failure to make payment of the stipulated price at the times stated;

(3) Removal of the property without consent;

(4) Assignment or attempted assignment; and

(5) Seizure under legal process;

and that upon the happening of any of these events, the lease of the hotel should be forfeited;

and

she shall forfeit all claims to the personalty, and the parties of the second part shall be at liberty, and such right and liberty shall be given them on the chattel mortgage, to enter into possession of said personalty, and to possess or sell the same, all payments made being forfeited, *and the guarantee for the $3,000 to remain in force.*

(I assume, in the plaintiffs' favour, that this last word "and" is equivalent to "notwithstanding which," or "nevertheless.")

Turn now to the guarantee actually given, and it will be found that it differs in most important points from the guarantee agreed to be given. The agreement contemplated a joint guarantee of the six named parties for the payment of

$3,000. The guarantee given was a several liability for $500 only. The agreement specified the manner as to time and amounts in which the $3,000 were to be paid; the guarantee varied this by allowing Mrs. Sheraton to pay at any time before the end of the year. But, most important of all, the agreement provided that the guarantee was to remain in force notwithstanding, in the event of default, that the plaintiffs should be at liberty to enter into a possession of the goods and to possess and sell the same, all payments made being forfeited. The guarantee is absolutely silent as to this proviso of re-possession and re-sale, including their resulting legal consequences, but referring to an act of default on Mrs. Sheraton's part only which might effect a forfeiture upon which the plaintiffs might or might not elect to act upon or fully enforce.

Now, we must bear in mind that this guarantee was not intended to be and is not an obligation guaranteeing Mrs. Sheraton's obligations under the agreement, as a whole, but only a particular and partial one. The guarantors are parties to it in so far only as they have by their contract agreed to be bound by it, so that there is to be read into it or with it, not the whole agreement and chattel mortgage, but only those conditions which indicate the default on her part that forfeits her right to the property. The guarantors are bound by their promise to the plaintiffs as contained in their contract, whether in express terms or by reference or necessary implication, but they are not bound by her promise to the plaintiffs. So that the provisions of the agreement relating to the rights of the plaintiffs, after forfeiture has taken place, do not bind or affect them, no matter whether they knew or did not know of them. If relevant, they may, of course, be read as admissions or in aid of construction, but not as extending or in any way changing the obligation created by the guarantee itself. I say all this because it has been suggested that the guarantors are bound because, in the agreement, Mrs. Sheraton has stipulated that the guarantee was to remain in force notwithstanding the re-taking and re-sale of the goods, and the forfeiture of the purchase money paid. But that is

1902

STEPHEN v. BLACK ET AL.

SEDGEWICK, J.

not in the guarantee itself. They did not guarantee that the guarantee they gave should continue a guarantee or be converted into a primary debt in the event of the plaintiffs' resumption of possession, or their re-sale of the goods, or their forfeiture of all moneys previously paid by Mrs. Sheraton. Besides that is not the obligation sued on.

How, then, are these particular words in the guarantee to be construed?

In the first place, I am of opinion that, giving them their natural and proper meaning, they are simply a statement of what the law is, nothing more, nothing less. Except for the action taken by the plaintiffs, upon the default of Mrs. Sheraton, the guarantee would still remain in force. Had they permitted her to remain in possession until the second year of the lease had expired, the principal debt subsisting, the guarantee would continue to subsist. In a certain sense the law imposed no duty upon the plaintiffs to act immediately when a forfeiture accrued. They might have remained passive, thus keeping their security alive. The contention here is, however, that the sureties are relieved because of the subsequent positive acts of the plaintiffs, not tortious acts, but acts authorized by the agreement, but unauthorized by them; that the position is the same as if there had been a change in the agreement without the guarantors' consent, or the plaintiffs had given time to the debtor (not reserving their rights against the sureties), or had been paid the debt secured, or had rescinded the agreement altogether. And in this I agree.

Secondly, it is admitted that the words state the actual law, but it is urged that they must have some additional meaning because they are there, and they would not be there except to give expression and effect to that additional meaning. We must, in the interpretation of a written instrument, assume that every word and clause in it have a meaning, and we must give it such meaning as its language will permit, but, having so ascertained its meaning, we are not obliged to give it a further or additional meaning simply

1902

STEPHEN v. BLACK ET AL. SEDGEWICK, J.

because we find it to be nothing more than the statement of a legal principle, or an exposition of the legal consequences of some other provision in the instrument itself. Strike out the clause we are discussing and insert in its place a chapter of DeColyar on Guarantees. Would that alter the construction of the guarantee? It is no use to talk of the *intention* of the parties. To be available that contention must be an *expressed* intention. And where here is that expression? Why then was it inserted? I do not know, but, were I permitted to conjecture or guess, I might suppose that the plaintiffs were under some sort of idea that, in the interest of the sureties, they would be bound to enforce a forfeiture when once incurred.

It is a rule that the surety will be discharged if the creditor omit to do anything which he is bound to do for the protection of the surety.

See *Watts* v. *Shuttleworth* (1), where it was laid down that, upon a contract of suretyship, if the person guaranteed does any act injurious to the surety or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged. And it may have been to get rid of that obligation that the clause was inserted.

Or, I might hazard the suggestion of another possibility. The original agreement contemplated and provided for the delivery of a guarantee of a specified character. Clause 4, already fully referred to (p. 222), shews its character. Upon the draft being prepared and submitted to the proposed guarantors, it was in the exact shape agreed upon by the plaintiffs and Mrs. Sheraton, and, the guarantors being advised that in its then form it must impose upon them the onerous burdens in the present action claimed, struck out the offensive words and delivered it as it is.

Thirdly, I am of opinion that, whatever the meaning of the guarantee is, it is not what the paintiffs claim, and this

(1) 7 H. & N. 353; 5 H. & N. 235.

1902

STEPHEN
v.
BLACK ET AL.

SEDGEWICK, J.

for several reasons. The respondents contend that the clause in question must be construed as if the following or similar words taken from the 4th clause of the agreement had been added:—"And, notwithstanding that the parties of the second part may have exercised their right and liberty to take possession of the said personal property, and have re-sold the same, and have forfeited all payments at any time theretofore made to them by the said Mary I. Sheraton." And Mr. Justice Meagher, in his judgment, adopts this view. He says:—

> I am unable to read the guarantee as being other than an absolute one to the effect that the defendant became bound to pay the plaintiffs the sum guaranteed in any event short of actual payment by Mrs. Sheraton; and, particularly, that it was to continue in force against him, even if Mrs. Sheraton, through her own act or default, or through the exercise of any right, or the performance of any act by plaintiffs which they were authorized to do or perform under the special conditions of any of the documents evidencing the transaction between them and her, or under any right or power which the law applicable to such instruments gave them, forfeited her right to redeem the goods and the payments she had made as well.

Now, under the terms of the agreement, if default had occurred in the first week of the tenancy, the plaintiffs would have the right of taking and selling. If they exercised that right, as between them and Mrs. Sheraton, the contract, as I have shewn, would be deemed to be rescinded and she discharged, no provision having been made in the event of a sale at a sum less than $11,000 for her continuing liability. In that event, in the absence of a special agreement by the guarantors to the contrary, they too would be discharged. If we add to the guarantee the words I have indicated then, while she is discharged, they are not. Again, under the agreement, upon default being made, say on the last day before the $3,000 guarantee had become due, but after she had paid $2,999, the effect of such default would be that, although only one dollar remained due, all the money paid would become forfeited—treated as if no payment had been made at all—and the whole $3,000 would become due. If, however, we change the guarantee as supposed, and the power of sale, in that event, were exercised, while the debtor is discharged the guar-

antors remain liable for the whole $3,000, the plaintiffs being paid twice. 1902

STEPHEN v. BLACK ET AL.

I cannot believe that the guarantors entered into any such compact, or that the guarantee is capable of being so read. There is not a word in it referring to any power vested in the plaintiffs, or to their right of re-taking or re-sale, or to the consequences that were to follow upon the exercise of their rights. SEDGEWICK, J.

But what I think demonstrates that the words suggested are not to be read into the guarantee, is that, while they are in the agreement, they have been left out of the guarantee. Why left out? If the obligations of the debtor were to be stated in the agreement it was equally, if not more, important that those of the proposed guarantors should be stated in the guarantee. You need not resort to implication to interpret the major obligation in terms of the proposed minor obligation as set out in detail there.

But they have been expressly left out of the minor obligation. Can we by implication put them in? Can any one imagine a stronger case to which the maxim "*expressio unius*" may be applied? There is a conflict between the agreement and the guarantee; which governs? The question answers itself. The respondents' argument here is substantially the same as that addressed to the courts to fix liability upon the debtor in the cases cited, shewing there was no such liability. In most of those cases it is evident that the draughtsman, unread in law and ignorant of the mysteries of redemption and rescission, *intended* to keep the personal liability alive. But his good intentions were of no avail, either in England, the United States or in Canada. The "essential provision" — a definite expression of that intention — was absent.

As this, I think, ends the case, it is not necessary to enter upon the question of appropriation of payments. I express no opinion as to whether or not the $3,000 in question should be deemed to have been paid by the $6,500 realized from the sale of the goods.

1902

STEPHEN v. BLACK ET AL.

SEDGEWICK, J.

Neither do I express the opinion that the sureties would be liable, even if the special clause of the guarantee were to be read as claimed. I have assumed that. But the phrase "this guarantee is to remain in force," it may be argued, may have to be interpreted—"this guarantee, *so long as it is a guarantee, etc.,*" and the words "remain in force," may not be equivalent to an unambiguous expression of personal and primary liability, where the guaranteed deed is done. The point was not taken, and is, therefore, in all probability untenable.

The appeal should be allowed with costs and judgment entered for the defendant with costs, including his costs of appeal in the court below.

* * * * * *

Since the foregoing was written a re-argument became necessary owing to the death of our late lamented brother Gwynne. My brother Davies has allowed me to peruse his opinion, and would have agreed with me in the opinion I have expressed had he not thought that the transaction in question was more in the nature of a mortgage transaction than a conditional sale.

Had the transaction been in essence a mortgage of Mrs. Sheraton's goods for the purpose of raising money, I agree that different principles of law would apply. But inasmuch as no absolute property ever passed from the plaintiffs to her, she never having at any time an absolute interest in the goods, nor able to give a title to them, except subject to the terms of the instrument of sale, the law governing the transaction must be that relating to conditional sales, not that relating to mortgages.

It also becomes necessary that I should now deal with the question of appropriation of payments. It is, of course, elementary that if a debtor makes no appropriation of a payment made by him, the creditor can appropriate it, as a general rule, to such debts as he thinks fit. But, in my view,

this is not a case in which the creditor has a right to that privilege. In Broom's Legal Maxims (7 ed.), at page 619, it is stated:

A creditor, however, has no right to appropriate a payment to a debt which arises after, or the amount of which is not ascertained until after the time of the payment; and it has been laid down generally that "there must be two debts: the doctrine never has been held to authorize a creditor, receiving money on account, to apply it towards satisfaction of what does not, nor ever did, constitute any legal or equitable demand against the party making the payments." The law will not appropriate a payment to a demand which it prohibits as illegal. Moreover the creditor's right of appropriation does not extend to all moneys of the debtor which come to the creditor's hands; if he receive money to his debtor's use without the debtor's knowledge, he cannot at once appropriate it to a statute-barred debt; the debtor must be given an opporunity of electing how the money should be applied.

The learned Chief Justice of this Court in *Cooper* v. *Molsons Bank* (1), states as follows, at page 623:—

Another rule, which at first sight would seem to furnish an argument for the respondents here, was that the creditor is not bound to accept a partial payment; it is his right to say to the debtor, "I will not be paid in driblets; pay me in full and redeem my security or leave me to do the best I can with it."

To apply these principles to the present case, I quite agree that so long and so far as the collateral notes remained unpaid in the respondents' hands there was no obligation to give any credit in respect of them, and the bank was entitled to sue for and recover judgments for the full amount of the direct notes constituting the principal debt due to them by the appellants. So soon, however, as money came into their hands by the payment of the collaterals, which they were bound to use due diligence in enforcing payment of, they were in the position of a creditor who had agreed to receive, and who had received a partial payment, and were bound to appropriate those moneys in the payment, in the first place of interest, and then to the reduction *pro tanto* of so much of the principal debt as had fallen due.

The American law on the subject is stated in Munger on the Application of Payments, p. 48, as follows:—

The claims upon which the creditor makes application must at the time be due and payable.

(1) 26 Can. S. C. R. 611.

1902

STEPHEN v. BLACK ET AL

SEDGEWICK, J.

He cannot apply it to a debt not then payable and demandable, if there be another debt then due; nor partly on debts then due and partly on debts not then due; nor retain it in his hands to apply upon a future indebtedness, leaving a prior demand unpaid; nor, where he has an existing claim against the debtor, apply the payment to extinguish his contingent liability on a note which he has indorsed for him.

These extracts and authorities convince me that it was the duty of the plaintiffs upon the second instalment becoming due to appropriate, out of the $6,500 then in their hands, $3,000 to the payment of the second instalment and thereby absolve Mrs. Sheraton, and her sureties as well, from their liability to that extent, and that too whether the transaction is to be regarded as a conditional sale or a mortgage. In such circumstances it is the law which makes the appropriation. The receipt by the plaintiffs of the money was a cancellation of the debt *pro tanto* as soon as they received it, and it was beyond their power to devote it to the payment of any debt then unmatured.

I am still of opinion that the appeal should be allowed.

GIROUARD, J.—I am also to dismiss the appeal. I agree with the courts below that the guarantee is still in force. It contains a clause which was intended to provide for this very case, and, without expressing any opinion on the other legal questions raised by the appellant, I have come to the conclusion that the appellant is liable under that clause, which is as clear as short:—

> The guarantee is to remain in force notwithstanding Mary I. Sheraton may have forfeited her right to the said personal property under the conditions of any agreement or mortgage entered into between the said Mary I. Sheraton and the parties of the second part.

DAVIES, J.—On the 31st March, 1896, the appellant gave to the respondents a guarantee for the payment to them by Mary I. Sheraton on or before the 30th March, 1898, of the sum of $3,000. The recitals and body of the guarantee read as follows (see page 227, *ante*).

The guarantee was part of a transaction entered into at the time for the lease of the "Queen Hotel," Halifax, by the

respondents to the said Mary Sheraton and for the sale to her of the furniture of that hotel. This furniture was sold to her for the sum of $11,000, payable in instalments extending over a period of three years, $3,000 to be paid during the first year, $3,000 during the second year, and the balance $5,000 at the expiration of the third year. The guarantee in question was given to secure the payment of the $3,000 payable in the second year. An agreement was at the same time entered into between the respondents and Mary Sheraton, which recited the facts, and provided for the granting of the lease of the hotel to Mrs. Sheraton, and embodied the terms of the sale of the personalty to her. This agreement specially provided for the giving of a chattel mortgage to the respondents, of the personal property sold by them to Mrs. Sheraton, and other property of hers, to secure the payment of the purchase money, and also for the giving of the guarantee which I have above set out, further securing the payment of the second year's instalment of that purchase money. It also contained the following clause, which is important.

(Here the second paragraph of clause 4 of the agreement is cited, see page 222, *ante*.)

The lease and the chattel mortgage were both executed simultaneously with the agreement. In fact, all of the documents, lease, agreement, chattel mortgage and guarantee, really formed part of one transaction and were executed on the same day. The guarantee refers expressly to the agreement and the chattel mortgage, and the agreement refers expressly to the lease, the chattel mortgage and the guarantee. To determine the true nature of the transaction they must all be read together.

The chattel mortgage was in the usual form and contained the customary proviso for redemption on payment of the $11,000 and interest secured thereby. It set out the dates when the various instalments were to be paid, and contained the *usual covenant from Mary Sheraton to pay the $11,000 at the several times specified.* It also provided that, if the premiums of insurance or the rents reserved in the

1902

STEPHEN v. BLACK ET AL.

DAVIES, J.

lease, or the payments mentioned in the agreement, were not made at the times specified, Mary Sheraton should forfeit all claim to the property therein mortgaged, and the respondents, the mortgagees, might enter into possession thereof, and that all payments made should be forfeited. Although the contemporaneous agreement executed by the parties provided expressly that, in any case where the mortgagees properly entered into possession of the personal property, upon default made by Mary Sheraton, *they should have power to sell*, and also provided that this right and liberty should be given them in the chattel mortgage, it was, as a fact, not so given. The right and power to sell after re-taking possession were given expressly in the agreement only, but, as the right is given there in clear and unmistakable terms, its omission in the chattel mortgage is not, to my mind, material.

In January, 1897, Mary Sheraton, after making a number of payments under the agreement and chattel mortgage, made default, whereupon respondents, the mortgagees, entered into and took possession of the personal property mortgaged to them, and subsequently, under the power of sale contained in the agreement, sold the same to the best advantage, the proceeds not being sufficient to pay the balance of the $11,000 purchase money and interest. After the expiration of the time for the payment of the last instalment of the purchase money of the furniture, the respondents applied the proceeds of the sale towards payment of the instalments of the purchase money for which they had no other security than Mary Sheraton's covenant and the chattel mortgage, and then brought this action against the appellant for his portion of the balance of the guaranteed $3,000.

In appropriating, as they claimed the right to do, the proceeds arising from the sale of the furniture to that part of their debt which was otherwise unsecured, a small balance was left which the mortgagees credited to the instalment guaranteed. No claim was made by the respondents at any time that any payments made by Mary Sheraton were forfeited as provided in the agreement and chattel mortgage,

but, in the accounting between Mary Sheraton and the respondents, mortgagees, full credit was properly given for all these payments.

At the trial, before Mr. Justice Ritchie, that learned judge gave judgment for the plaintiffs, the now respondents, for the full amount claimed, and his decision was, afterwards, affirmed by the Supreme Court of Nova Scotia, on the ground, mainly, that the clause in the guarantee was intended to protect, and did protect, the respondents from loss in case of a forfeiture and a sale following thereon, and that, notwithstanding such sale, the guarantee remained operative and binding.

On the appeal to this court, two grounds only were submitted by the appellant for reversing the judgment of the court below. First, that the forfeiture and subsequent sale of the furniture determined the agreement for the sale, and Mary Sheraton ceased to have any further liability thereon, and the debt guaranteed never became payable by her; and, Secondly, that the respondents, having sold the property, were bound to apply the proceeds in payment of the instalments as they fell due, in which case the amount guaranteed was paid, or that, in any event, the guarantors were entitled to share *pro ratâ* in the proceeds of the security.

I am of opinion that neither contention is correct, and that the appeal should be dismissed.

Much confusion has, in my opinion, arisen from ignoring the true character of the transaction, and from attempting to apply principles of law to this case, which, however applicable to an ordinary case of the conditional sale of goods, where the vendor has reserved to himself a right to re-take in case of default in payment of purchase money, have no application to a transaction such as this, which is, beyond any doubt, a case of a mortgage, and must be controlled and governed by the principles regulating the duties, rights and liabilities of parties standing in the relation of mortgagor and mortgagee to each other.

1902

STEPHEN v. BLACK ET AL.

DAVIES, J.

The case of *Hewison* v. *Ricketts* (1), was pressed upon us as an authority, but, in my opinion, it has no application to such an action as this. That was a hire-and-purchase agreement, where plaintiffs, in consideration partly of a sum paid down, had let W. G. certain chattels. £125 were paid in advance, and the balance was to be paid in monthly instalments. There was a power to seize in case of default. If all the instalments were met, the chattels were to belong to G. Default was made, and the plaintiffs seized. The defendant, in consideration of the return of the chattels to G., guaranteed the remaining instalments. Plaintiffs again seized, and afterwards sued the defendant for the amount of the two unpaid instalments. The court there held that the plaintiffs, by resuming possession, had determined the agreement *and extinguished liability as far as G.* was concerned, and, consequently, discharged the guarantors. But it was purely upon the character of that transaction and the construction of that particular agreement that this conclusion was reached. No relation of mortgagor and mortgagee existed between the parties. The principal debtor had no right to redeem, nor right, in case of sale of the property by the vendor, after possession resumed, to have an account taken and be credited with proceeds of sale. The vendors, there, had two rights; they could under their original agreement resume possession; or they could sue the surety on his guarantee. But, if they resumed possession, they determined the agreement, and there was no stipulation that, in such an event, the purchaser or his guarantor would remain liable.

The practical result of holding otherwise (says Charles, J., at p. 714), would be that vendors, or as they term themselves, owners, in cases of this kind, on default being made, might seize the property and keep it, keeping, at the same time, the £125 and all instalments paid, and thus getting paid twice.

But, if there had been such a stipulation for a continuing liability, or if the relation of mortgagor and mortgagee, with its attendant rights and liabilities, had existed, the result would have been entirely different.

(1) 63 L. J. Q. B. 711.

So, in the cases of *Sawyer* v. *Pringle* (1), and *Arnold* v. *Playter* (2), which were executory contracts for sale of personalty, the property remaining in the vendor, who stipulated for the right to re-take possession on default being made, and *nothing being said as to re-sale*, it was held that the exercise of this right of re-taking possession put an end to the original agreement and that subsequent instalments of the original price were not recoverable afterwards. Mr. Justice Maclennan, who dissented in the former case, did so on the ground that the facts created the relationship of mortgagor and mortgagee, and that, in such case, the vendor, on default, was entitled forthwith to sell and sue for the balance, and Mr. Justice Burton, who concurred in the judgment of the court, agreed with Mr. Justice Maclennan that, if any such relationship could be established, such a result would legally follow. But he did not agree that, under the facts there proved, such a relationship existed.

But, as I have already said, those cases can have no bearing upon the present case, where the relationship of mortgagor and mortgagee clearly existed. If the furniture seized and sold under the power of sale had realized a larger sum than was due the vendors, can it be doubted that they would be liable to account for the surplus to Mary Sheraton? If, after they had taken possession and before sale, she had tendered them the full amount they were entitled to, would she not have been entitled to redeem? I certainly think she would, and that the clause declaring the goods forfeited on default would not have been allowed to prevail, or construed by the court as taking away her right to redeem, all such clauses being inconsistent with the rights of mortgagor and mortgagee, and looked upon as so many devices to evade the well established rules of the court.

The equitable doctrine on this point is perfectly clear, and has been long established. It is that a mortgage creditor shall not be permitted to obtain, by or through any agreement made contemporaneously with the mortgage, any advantage by his

(1) 18 Ont. App. R. 218. (2) 22 O. R. 608.

1902

STEPHEN v. BLACK ET AL.

DAVIES, J.

security beyond his principal, interest and costs, and that, in such cases, equity will let a man loose from his agreement, or even against his agreement, admit him to redeem a mortgage. Whatever his security may be, whether land, chattels, bond, note or covenant, the moment it appears that it is a security, the party cannot recover any more in equity than his debt, interest and costs, unless, of course, under some *subsequent* arrangement made between the parties. As said by Kay, J., in *James* v. *Kerr* (1):

> The rule is that a mortgagee shall not be allowed to stipulate for any collateral advantage beyond his principal and interest.

And again:—

> It was a bold but necessary decision of equity that the debtor could not, even by the most solemn engagements entered into at the time of the loan, preclude himself from his right to redeem, for in every other instance, probably, the rule of law "*modus et conventio vincunt*" is allowed to prevail.

See Coote on Mortgages (5 ed.), pp. 16-17; *Croft* v. *Graham* (2); *Gossip* v. *Wright*, per Kindesley, V.C., at page 653 (3); and *Lisle* v. *Reeve* (4).

Now, in this case, the relation of mortgagor and mortgagee being established, I ask—How did the re-taking of possession of the furniture operate to discharge the mortgagor, Mary Sheraton? She was clearly liable on her covenant to pay the money. The mortgagees had an undoubted right, on default, to re-take possession, and, under the power of sale contained in the agreement made contemporaneously with the mortgage, to sell the goods, and, if any balance of their money remained unpaid, to sue the mortgagor on her covenant for that balance. The case of *Rudge* v. *Richens* (5), is an express authority, if any was needed for this proposition.

In *Kinnaird* v. *Trollope* (6), Sterling, J., shews the general rule to be this:—that a mortgagee who, *unauthorized*

(1) 40 Ch. D. 449, 460.
(2) 2 DeG. J. & S. 155.
(3) 32 L. J. Ch. 648.
(4) (1902) 1 Ch. 53.
(5) L. R. 8 C. P. 358.
(6) 39 Ch. D. 636, 646.

1902

STEPHEN v. BLACK ET AL.

DAVIES, J.

by the mortgagor, has deprived himself of the power to reconvey the premises to the mortgagor, on payment of principal and interest, will be restrained by a court of equity from suing on a covenant. But it is not so *if the mortgagor has authorized the sale*, and, as the learned judge says, in the case now being cited:—

> The necessary authority might be derived either, as in the case of *Rudge* v. *Richens* (1), from the powers conferred by the mortgage deed, or from the direct concurrence of the mortgagor or otherwise.

In the case at bar, it is derived from the agreement executed concurrently with the mortgage.

If then Mary Sheraton remained liable on her covenant, how are her sureties discharged? Was anything done against the faith of the contract guaranteed? Was it not, I ask, within the contract contained in the agreement and chattel mortgage and contemplated by the sureties, not only as expressed in their guarantee that they should remain liable in case of a forfeiture of the goods, but that, after seizure and sale as expressed in the agreement, the guarantee should still remain in force and available to enable the mortgagees to recover any balance which the sale of the goods might leave unpaid?

But it is said, to determine what the contract of the sureties was, you must not look beyond the literal terms of their guarantee. I do not agree with this contention. I think you must look beyond them, and that the guarantee can only be correctly construed by reference to the transaction to which it refers, and that transaction will be found correctly described in the agreement and mortgage. The guarantee, itself, refers expressly to this very agreement and mortgage, and declares:—

> This guarantee is to remain in force notwithstanding Mary I. Sheraton may have forfeited her right to the said personal property under the conditions of any agreement or mortgage entered into between the said Mary I. Sheraton and the parties of the second part (respondents).

The learned judges of the court below held that this clause, of itself, was quite sufficient, and was intended, by itself, to retain the liability of the guarantors, after the

(1) L. R. 8 C. P. 358.

1902

STEPHEN
v.
BLACK ET AL

DAVIES, J.

forfeiture took place, notwithstanding the subsequent entry and sale by the vendors. Whether that be so or not, I do not feel called upon to decide, because I am clearly of opinion that the guarantee must be read in the light of the agreement and mortgage to which it refers, and as that agreement and mortgage clearly contemplated the retention of the liability of the mortgagor, Mary Sheraton, for any unpaid balance of the amount secured, even after sale of the furniture, and expressly declared that in such latter case "the guarantee should still remain in force," the seizure and sale of the furniture in no wise operated as a discharge of the guarantors. The re-taking of possession and the re-sale are not "things done against the faith of the contract," but in pursuance of it. They were not "inequitable acts which interfered with the sureties' rights," but conditions expressly provided for, and not only so, but the very clause in the agreement which gives the power, on default, to enter into possession and sell the furniture, expressly goes on to provide that, in such case, "*the guarantee for the $3,000 (sic) to remain in force.*" This does not, of course, mean that if the sale realized enough to pay the whole amount due on the security of the mortgage, the guarantee should still remain in force, but only that it should be in force and capable of being enforced so as to realize any balance which the sale of the goods and the payments made by Mary Sheraton left due. Under these circumstances, the transaction being in the nature of a mortgage, giving mortgagee power to seize and sell on default, there can be no doubt, under the authorities, of the liability of Mrs. Sheraton to be sued upon her covenant for the unpaid balance and, she being so liable, her sureties are also liable, there not having been anything inequitable done to discharge them or against the faith of the contract.

As to the claim made by the appellant to have the moneys arising from the sale of the furniture applied in payment, whether in whole or in part of the $3,000 guaranteed, I do not think there is any ground for such contention.

In the first place, I think the words I have just quoted from the contract, of themselves, shew that the parties intended the

guarantee to remain in force, even after seizure and sale, as to any balance, up to the $3,000, which might remain due. The only construction I can put upon those words is that which I think all parties deliberately contemplated, namely, that this guarantee should be an additional security to the vendors, the respondents, over and above the chattel mortgage and available to the respondents to the extent expressed, namely, $3,000, in case the proceeds of any sale under that mortgage, and the contemporaneous agreement, failed to realize for them, and the principal debtor failed to pay the price and interest for which they had agreed to sell the furniture. But, if I am wrong in the meaning I attribute to those words, I still think it clear, under the authorities, that the right of appropriating the proceeds of the sale, first, to the payment of the otherwise unsecured instalment of the debt payable in the third year lay with the mortgagees, and that upon the plain principle that they held the money as security to pay their full debt, or two different instalments of one debt, and they could appropriate the moneys to such debt or instalment as was to their greatest advantage. This right lay with the creditors. The proceeds of the sale remained with them until after all of their debt fell due. They were not bound, in dealing with the proceeds arising from the security held by them, to exercise their right until the last instalment fell due. They did then so exercise it, and applied the proceeds of the sale in payment, first, of the unsecured instalment. As a matter of fact, no claim was made by Mary Sheraton, the principal debtor, or by the sureties after the sale, to have the proceeds of the sale, or any part of them, applied towards payment of the instalment guaranteed, nor, as a matter of law, do I think they had the right, even if they attempted to exercise it.

The right of a debtor to appropriate the payment made by him to a particular debt, or instalment of a debt, is a limited one and must be made at the time of payment. The right of the creditor is more general and may, in the absence of express appropriation by the debtor at time of payment, be made at any time up to action

1902

STEPHEN
v.
BLACK ET AL.

DAVIES, J.

brought. But I cannot see upon what principle the debtor or the guarantor, in the special circumstances of this case, had or should have any right of appropriation after the sale, none having been stipulated for in the contract, as regards the proceeds realized from the sale. That furniture was held by the creditors as part of their security for payment of all the instalments due them. In addition, they held the other and further security of the appellant's guarantee for one of these instalments. Surely they had the right to apply the proceeds of their general security towards payment of such part of their debt or such instalment of their debt as would be to their greatest advantage—in other words—to pay off that otherwise unsecured instalment of their debt and look to the guarantors for the payment of the guaranteed instalment. No authority was referred to which denied them this right, nor was any equitable principle cited which gave the debtor or her sureties a right to have the proceeds of a security held for the entire debt applied, in the absence of a special stipulation to that effect, in whole or in part, towards payment of an instalment of that debt which they had specially guaranteed. The rights of the sureties, in this regard, are not greater than those of the primary debtor. If a direct payment had been made by the debtor, her right to appropriate it *at the time of payment* to any overdue instalment could not be questioned. But if she failed to make her appropriation *then* she could not do so afterwards, the right then being with the creditor.

As, in this case, the contract did not provide for any right on the part of the debtor to make an appropriation of the proceeds of the sale after seizure and sale of the goods, so there could be no such right in the debtor's sureties. But the absence of this right on the part of the debtor did not take away, as was contended at the bar, the legal right of the creditor to appropriate. The appropriation which the law makes is only made in the absence of an appropriation by both debtor and creditor. Here the creditor had made an appropriation, and the rule appealed to has no application: De Colyar on Guarantees (3 ed.), 453. And see *Ex parte*

Johnsen (1); *City Discount Co.* v. *McLean* (2); *Wilcox* v. *Fairhaven Bank* (3).

In reviewing the authorities in the case of *The "Mecca"* (4), in the House of Lords, Lord Macnaughton says at page 293:—

> There can be no doubt what the law of England is on this subject. When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment, the right of application devolves upon the creditor. In 1816, when *Clayton's Case* (5) was decided, there seems to have been authority for saying that the creditor was bound to make his election at once, according to the rule of the civil law, or at any rate within a reasonable time, whatever that expression in such a connection may be taken to mean. But it has long been held, and is now quite settled, that the creditor has the right of election "up to the very last moment," and he is not bound to declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain. Where the election is with the creditor it is always his intention, expressed or implied or presumed, and not any rigid rule of law, that governs the application of the money. * * * So long as the election rests with the creditor and he has not determined his choice, there is no room, as it seems to me, for the application of rules of law such as the rule of the civil law, reasonable as it is, that if the debts are equal, the payment received is to be attributed to the debt first contracted.

Nor, *a fortiori*, is there any such room after the creditor, as in this case, has made his election.

The appeal should be dismissed with costs.

MILLS, J. (*dissenting*)—(His Lordship, in opening, referred shortly to the terms of the guarantee, already quoted. See page 227.)

The guarantee further provides that it shall remain in force notwithstanding Mary I. Sheraton may have forfeited her right to said personal property, under the conditions of

(1) 3 DeG. M. & G. 218.
(2) L. R. 9 C. P. 693.
(3) 7 Allen (Mass.) 270.
(4) (1897) A. C. 286.
(5) 1 Mer. 585, 608.

1902

STEPHEN v. BLACK ET AL.

MILLS, J.

any agreement or mortgage, etc. A good deal of discussion has taken place with reference to this paragraph of the agreement, but I do not understand it to be other than this—that, although Mrs. Sheraton may have forfeited her right to claim the property under the said agreement, yet, if it is left with her, this guarantee will remain in force. But she was out of possession before the period within she and her sureties were to become liable for the second sum of $3,000 began to run. The guarantee was a part of an agreement to sell, which was entered into at the time that the lease of the "Queen Hotel" was made by the respondents to Mary Sheraton, and the agreement to sell the personal property to use in the hotel was made upon this condition, that the property should vest in her as soon as the whole of the purchase money was paid.

(The agreement with Mrs. Sheraton is here in part recited.)

The lease, and the so-called chattel mortgage, were executed simultaneously with the agreement. The guarantee refers to the other instruments, and the agreement expressly refers to the lease, and the intention of the parties will be best understood by reading all these instruments together. The chattel mortgage contained a proviso for redemption on the payment of $11,000 and the interest thereby secured. It is difficult to understand what purpose this mortgage was intended to serve. Mary Sheraton did not own the property, nor would she become owner until the whole sum of $11,000 was paid. She had no present interest in the property, and no prospective interest, which the respondents could not forfeit, if she defaulted, and the making of the so-called chattel mortgage did not, in any way, add to their security. It gives the dates at which the various instalments became due. It provides that the insurance, the rents reserved, and the payments mentioned, if not made at the times specified, should cause Mrs. Sheraton to forfeit all her claim to the property, and that the respondents should be at liberty to enter into possession. The agreement expressly provides that, in any case where the mortgagees enter into possession, upon default made by Mrs. Sheraton, they should have power to sell, and this power should be given them, or to speak more accurately, preserved

to them in the chattel mortgage. The respondents were to have the right and power to sell after re-taking possession. But the fact is, this power is not given in the mortgage, but is given in the agreement; and, in the absence of such power in the mortgage, the respondents must derive such right to enter into possession and to confiscate all payments which had been made upon the furniture, and to enforce the guarantee for the payment of the second $3,000 against the sureties, if it survives, from the agreement, and not from the mortgage. It is the agreement that discloses what Mary I. Sheraton's interest is or may become, and it shews that the respondents made to her a conditional sale of property, of which they gave her possession, but the title to which remained in them, and was to continue in them until the whole of the price agreed upon was paid. This being so, there was no present interest in Mrs. Sheraton that could be mortgaged; the title was in the respondents; there was no interest that a mortgage could secure that they did not have, and more; for a failure to pay led to the immediate possession as well as to the forfeiture of what had been paid.

In January, 1897, Mrs. Sheraton having made several payments under the agreement, made default, whereupon the mortgagees entered into and took possession of the hotel and of the personal property, which she had conditionally purchased, and sold the same for $6,500, being $4,500 less than they had agreed to sell the same for to Mrs. Sheraton. They appropriated the proceeds of this sale, not to that part of their debt which first became due, but to that portion of it not otherwise secured, which was not at the time due, and the small sum in excess of the payment of the unsecured portion was applied by them to the payment of the second instalment, for which they now claim payment from the guarantors. In the trial court Mr. Justice Ritchie gave judgment for the plaintiffs, now respondents, and his decision was affirmed by the judgment appealed from.

The grounds of the present appeal are that the forfeiture and subsequent sale of the furniture by the respondents put an end to the conditional sale, that the respondents, by taking

1902

STEPHEN v. BLACK ET AL.

MILLS, J.

back the property and confiscating the payments which Mrs. Sheraton had made, exhausted their rights under the conditional sale, and, there being no debt now guaranteed, they can have no valid claim against her sureties; and, having sold the property, the respondents were bound to apply the payments to the instalments as they fell due, in which case the guaranteed amount was paid, and, on this ground also, the guarantors were discharged from their obligation. (The letter addressed by the respondents to the sureties is here recited.) Here the respondents had reached the point where the ways part. They could leave Mrs. Sheraton in possession of the furniture and hold her guarantors to their guarantee, or they could give effect to the forfeiture and so put an end to the sale. They took the latter course and so informed the sureties.

This communication was addressed to the sureties on 30th January, 1897, and the respondents went into possession, at that time, of the hotel and furniture. Mrs. Sheraton had paid the whole of the first year's instalments. We have now to consider, first, whether Mrs. Sheraton was liable to the respondents for the whole purchase money, less what they received directly from her, and what they received from re-sale of the goods; or, was the original conditional sale terminated by the rescission of the contract, and was her covenant to purchase determined by the re-taking of the property and the rescission of the sale which had been made to her? Assuming this question to be answered in the affirmative, has the rescission of the sale or agreement to sell put an end to the liability of the sureties?

I think, under the law applicable to this case, the rescission of the contract and the forfeiture of the payments which had been made put an end to the respondents' claims against Mrs. Sheraton and against the guarantors. The right of the respondents to further payments was terminated by their own act; no right of redemption remaining in Mrs. Sheraton, no right to further payments could be claimed by the respondents. The original right of the respondents was terminated by the action they took. This I think

fully recognized in the case of *Hewison* v. *Ricketts* (1), in the judgments of Charles, J., and Collins, J. The same doctrine is fully recognized in *Sawyer* v. *Pringle* (2), by Hagarty C.J., and Burton, J.

His Lordship also referred to *Mersey Steel & Iron Co.* v. *Naylor, Benzon & Co.* (3), *per* Blackburn, L.J., at pp. 443-444, and Selborne, L.J., at pp. 438-439; *Harkness* v. *Russell* (4), *per* Bradley, J., at page 673; *Strong* v. *Taylor* (5), *per* Nelson, C.J.; *Herring* v. *Hoppock* (6); *Ballard* v. *Burgett* (7); *Ex parte Powell, in re Matthews* (8), *per* Bacon, C.J.; and in the Court of Appeal, *per* Mellish, L.J.; *Ex parte Watkins, in re Clouston* (9), *per* Selborne, L.J., at p. 528; *Ex parte Brooks, in re Fowler* (10), in the Court of Appeal, *per* Jessel, M.R.; *Crawcour* v. *Salter* (11).

The maxim "*nemo dat quod non habet*" applies to this case. It is impossible that Mrs. Sheraton could make either a valid bill of sale or a chattel mortgage for this furniture. The property in it had not passed to her, nor, would it, until the whole price was paid. The title to the furniture was vested in the respondents. They could not have their security improved so far as the right of property was concerned. Mrs. Sheraton could no more mortgage or pledge this property than she could pledge that which belonged to a stranger, and which was in the stranger's own house. She had possession which might be terminated at any moment by a failure to make payments according to the conditions of the purchase, and if she failed, the respondents could, at once, take possession and rescind the conditional sale which had been made. This would terminate the sale, and terminate any obligation connected with it. The respondents would be in possession of the furniture, and of all that would be paid upon it and, having put an end

(1) 63 L. T. Q. B. 711.
(2) 18 Ont. App. R. 218.
(3) 9 App. Cas. 434.
(4) 118 U. S. R. 663.
(5) 2 Hill, 326.
(6) 15 N. Y. 409, 411 and 414.
(7) 40 N. Y. 314.
(8) 1 Ch. D. 501.
(9) 8 Ch. App. 520.
(10) 23 Ch. D. 261.
(11) 18 Ch. D. 30.

1902

STEPHEN v. BLACK ET AL.

MILLS, J.

to the agreement itself, they could have no claim against Mrs. Sheraton, and there was, then, no transaction remaining between the respondents and Mrs. Sheraton to which the guarantee continued to apply.

It was by the act of the respondents that the contract was terminated and Mrs. Sheraton's payments forfeited, and, having discharged Mrs. Sheraton by the proceedings which they took, the guarantee given on her behalf could not remain in force.

Holding this opinion of the effect of the termination of the conditional sale, it is hardly necessary to discuss the question of appropriation. See remarks of Erskine, J., at page 75 in *Waller* v. *Lacy* (1).

The money came into the respondents' possession, not by a payment made by Mrs. Sheraton, but by the seizure and sale of the goods, which she had conditionally purchased, and there is no evidence that she was ever given an opportunity of saying how she wished the money to be applied. There was at the time nothing due either upon the second or third instalments. The second instalment first became payable, and it would hardly be contended, if the guarantors were under obligation to pay that, with this money in the hands of the respondents, that they (respondents) were entitled to sue the guarantors for the full amount of the indebtedness under the plea that they intended to hold the money which they had received for what would become due the following year, for which they held no security.

In *Coates* v. *Coates* (2), the court held that, where a sum is received from property held as collateral security for two debts, it ought to be set off ratably against the amount due on each. See also the remarks of Vice-Chancellor Wood in *Newton* v. *Charlton* (3), at page 651.

(1) 1 Man. & Gr. 54. (2) 33 L. J. Ch. 448; 12 W. R. 634.
(3) 10 Hare, 646.

1902

STEPHEN v. BLACK ET AL.

MILLS, J.

In the case of conditional sales, where there is a failure to make full payment, and the vendor puts an end to the sale and comes again into the possession of his property, and retains all the money which has been paid upon it, which may be very nearly the value of the article, or which may be much less, but whatever there is he retains, there is no longer any subsisting contract between the vendor and purchaser. There is nothing to enforce, and, if anyone has become security for the purchas r he is discharged, for there is no longer any subsisting contract between the principals to which the guarantee applies.

In my opinion, judgment should be for the appellant.

Appeal dismissed with costs.

Solicitor for the appellant: *H. Mellish.*
Solicitor for the respondents: *W. H. Fulton.*

[S. C. File No. 2043.]

1901

LAWRY v. LAWRY.

APPLICATION for leave to appeal *per saltum* from the judgment of FALCONBRIDGE, C.J., on the ground that the courts, in Ontario, to which an appeal might lie would be bound by the decision in *Lellis* v. *Lambert* (1).

The application was not proceeded with.

(30th May, 1901.)

(1) 24 Ont. App. R. 653.

1901

[S. C. File No. 2044.]

BIRKET v. POIRIER; CITY OF OTTAWA ELECTION CASE.

APPEAL from the Controverted Elections Court.

Discontinued.

(1st October, 1901.)

[S. C. File No. 2046.]

THE TORONTO STREET RAILWAY CO. v. ROBINSON.

Appeal—Special leave—Matter in controversy.

APPLICATION for special leave to appeal from the Court of Appeal for Ontario. The judgment recovered was for $600. An appeal to the Court of Appeal for Ontario stood dismissed on an equal division of opinion of the judges, and that court, on the same division, refused leave for an appeal to the Supreme Court of Canada.

No special grounds were stated in support of the application, and it was refused on the ground that no special circumstances had been shewn for granting special leave to appeal.

(29th October, 1901.)

[S. C. File No. 2047.]

CHICOUTIMI ELECTION CASE; GIRARD v. DE COURVAL.

APPEAL from the Controverted Elections Case.

Discontinued.

(14th November, 1901.)

[S. C. File No. 2057.] 1903

THE BRITISH AMERICAN BANK NOTE CO. v. THE KING.

APPEAL from the Exchequer Court of Canada.

Settled out of court.

(17th February, 1903.)

[S. C. File No. 2061.] 1901

VICTORIA B. C. ELECTION CASE; PRIOR v. FAIRFIELD.

APPEAL from the Controverted Elections Court.

Dismissed with costs.

(3rd October, 1901.)

[S. C. File No. 2069.]

BENNETT ET AL. v. PARKHOUSE.

APPEAL from the Court of Appeal for Ontario.

Dismissed with costs without calling upon the respondent for any argument.

(31st October, 1901.)

1901 [S. C. File No. 2072.]

JACK v. BONNELL.

APPEAL from the Supreme Court of New Brunswick.

Dismissed with costs for want of prosecution.

(5th December, 1901.)

1902 [S. C. File No. 2079.)]

LORD v. THE KING.

APPEAL from the Court of King's Bench for Lower Canada, appeal side.

Dismissed with costs, SEDGEWICK, J., dissenting.

(15th May, 1902.)

(See Q. R. 10 K. B. 97.)

[S. C. File No. 2088.]

CANTIN v. McDONELL.

APPEAL from the Court of King's Bench for Lower Canada, appeal side.

Dismissed with costs, the judgment appealed from being slightly varied.

(27th February, 1902.)

[S. C. File No. 2106.] 1902

TURCOTTE ET AL. v. DUMOULIN.

APPEAL from the Court of King's Bench, Province of Quebec, appeal side.

Discontinued.

(19th February, 1902.)

[S. C. File No. 2109.] 1902

THE GRAND TRUNK RAILWAY CO. v. THE NIAGARA FALLS INTERNATIONAL BRIDGE CO. *May 6.

Construction of contract—Railways—Free passes.

APPEAL and CROSS-APPEAL from the Court of Appeal for Ontario.

The questions at issue on the appeals involved merely the construction of a clause in an agreement respecting free passes over the respondents' bridge for the officers and servants of the railway company. After hearing counsel for the parties the court reserved judgment, and, on a subsequent day, dismissed the appeal and cross-appeal with costs. The only reasons for judgment delivered were as follows:—

TASCHEREAU, J.—We are all of opinion that this appeal and the cross-appeal should be dismissed with costs for the reasons given in the Court of Appeal.

DAVIES, J.—I concur in the judgment dismissing this appeal, and also the cross-appeal with costs, for the reasons given by Maclennan and Moss, JJ., in the Court of Appeal.

Appeal and cross-appeal dismissed with costs.

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* PRESENT: TASCHEREAU, SEDGEWICK, GIROUARD, DAVIES and MILLS, JJ

1902

May 26.

[S. C. File No. 2114.]

THE CITY OF HULL v. SCOTT ET AL.

Title to land—Injunction—Boundary—Riparian rights—Prescription.

APPEAL from the Court of Review, at Montreal, affirming the judgment of Archibald, J., in the Superior Court, District of Ottawa, dissolving an interim injunction against the construction of a factory on lands adjoining Brewery Creek, in the City of Hull (known as lot 95, on the west side of the creek, near its intersection by the Gatineau Macadamized Road), and ordering a boundary to be established between the lands of the respondents and lands on the east side of the creek, purchased by the city, by running a line through the eastern channel of the chasm below the road company's bridge. The city claimed ownership of the whole of the eastern channel, and a portion of the land, alleged to be an island, opposite the lots belonging to the city. The island was claimed by the respondents as forming a part of the western bank of the creek.

Foran, K.C., for the appellant.
Aylen, K.C., for the respondents.

The judgment of the court was delivered by

TASCHEREAU, J.—There is nothing in this appeal, and I would have dismissed it at the hearing without calling upon the respondent.

The appellant corporation, by its own title, shews that it never bought the lot No. 95 in question.

On the question of prescription, moreover, their claim to this lot entirely fails. Arts. 2199, 2242 C. C.

The appeal will be dismissed with costs, with an addition to the *motifs*, as well as to the *dispositif*, of the judgment of

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* PRESENT: TASCHEREAU, SEDGEWICK, GIROUARD, DAVIES and MILLS, JJ.

the Superior Court, of the 30th of November, 1901, that the defendants (respondents), have acquired the ownership of lot No. 95, by thirty years' prescription.

Appeal dismissed with costs.

NOTE.—Cf. reports of other cases affecting same title and controversy in 34 Can. S. C. R. pp. 282, 663, and 617.

[S. C. File No. 2115.]

THE CONFEDERATION LIFE ASSOCIATION v. WOOD.

APPEAL from the Supreme Court of New Brunswick (35 N. B. Rep. 512).

Upon the consent of parties filed, on a settlement out of court, the appeal was allowed, each party paying their own costs.

(9th May, 1902.)

[S. C. File No. 2121.]

CITY OF HALIFAX v. HART.

APPEAL from the Supreme Court of Nova Scotia (35 N. S. Rep. 1).

Entered, but not prosecuted.

(22nd March, 1902.)

1902

[S. C. File No. 2123.]

HAMBLY v. ALBRIGHT AND WILSON.

APPEAL from the Exchequer Court of Canada.

Settled out of court and discontinued.

(6th December, 1902.)

1902

*May 26.

[S. C. File No. 2125.]

MAGANN v. THE GRAND TRUNK RAILWAY CO.

Sale of railway ties—Delivery—Bank Act lien—Trade marks—Timber marks.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of Cimon, J., at the trial.

The action was for the price of 75,000 railway ties sold by Magann to the company and alleged to have been delivered at the Saugeen Peninsula, on Lake Huron and Georgian Bay. The question on the appeal was as to 20,000 of these ties claimed by R. Thomson & Co., as purchasers from the Union Bank, which claimed them under a Bank Act lien for advances to one Gillies, by whom they had been manufactured. The validity of the lien was contested for want of sufficient description as required in the Bank Act, and questions arose on the appeal as to whether timber brands are property marks or merely trade marks, and if they make *primâ facie* proof of ownership under the Timber Marks' Act passed in 1870.

Both courts below decided against the appellant on the ground of the insufficiency of the evidence.

The appeal was dismissed with costs for the reasons given by Mr. Justice Cimon in the Superior Court.

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* PRESENT: TASCHEREAU, SEDGEWICK, GIROUARD, DAVIES and MILLS, JJ.

[S. C. File No. 2128.] 1902

THE MONTREAL STREET RAILWAY CO. v. McLEOD.

APPEAL from the Court of King's Bench for Lower Canada, appeal side.

Settled out of court.

(19th May, 1902.)

[S. C. File No. 2134.] 1903

POWER v. GRIFFIN.

APPEAL from the judgment of the Exchequer Court of Canada (7 Ex. C. R. 411, *sub. nom. Griffin* v. *Toronto Ry. Co.*).

By judgment of the Supreme Court of Canada, on 15th December, 1902 (33 Can. S. C. R. 39), the respondents' letters patent were declared lapsed, but the entering of final judgment was stayed for a re-hearing on certain points in issue respecting the validity of the patent in question prior to 11th August, 1902.

(See report above referred to, at pages 44-45.)

The appeal was re-inscribed for hearing upon the points reserved, and was heard on the 27th of May, 1903, and judgment was reserved.

On 8th June, 1903, the appeal was dismissed without costs.

(8th June, 1903.)

1903

[S. C. File No. 2140.]

BELANGER v. CARBONNEAU; L'ISLET ELECTION CASE.

APPEAL from the Controverted Elections Court.

On the appeal being called for hearing, no one appearing for either party, the appeal was struck from the list.

(17th February, 1903.)

1903

*Feb. 26.

[S. C. File No. 2154.]

THE NOVA SCOTIA STEEL CO. v. BARTLETT.

Mines and minerals—Removal of ore—Boundary—Copy of plan—Evidence—False demonstratio.

APPEAL from the Supreme Court of Nova Scotia (35 N. S. Rep. 376), which set aside the findings and judgment of the trial court, with costs, and granted a new trial.

The action was for trespass, and the principal question discussed on the appeal to the Supreme Court of Canada was as to the identity of the lots claimed by the parties respectively, and depended upon the location of the boundary line, the plans in the Government office disagreeing as to the position of the line. The appeal was dismissed with costs, no written opinions being delivered.

Subsequently, on an appeal to the Supreme Court of Canada from the judgment of the Supreme Court of Nova Scotia, on the new trial, the following remarks were made with reference to the first appeal, on rendering the judgment of the court in the latter case (35 Can. S. C. R. 527, at page 530):—

* PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and SEDGEWICK, DAVIES, MILLS and ARMOUR, JJ.

1903

NOVA SCOTIA STEEL CO. v. BARTLETT.

"SEDGEWICK, J.— * * * When this case was on appeal before us, after the first decision of the Supreme Court of Nova Scotia (1), we held, affirming the judgment of that court, that the area described in the mining lease under which the plaintiff (Bartlett) claims was clearly defined and ascertained, and that all reference in the description therein to the southern line of Peter Grant's lot might be eliminated as *falsa demonstratio*."

Appeal dismissed with costs.

Harris, K.C., and *D. C. Fraser*, for the appellants.
W. B. A. Ritchie, K.C., for the respondent.

(ED. NOTE.—On a subsequent appeal an order for another new trial was affirmed. See 38 Can. S. C. R. 336.)

[S. C. File No. 2155.]

THE WAVERLY GOLD MINING CO. v. LONGLEY ET AL.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed by consent.

(4th May, 1903.)

[S. C. File No. 2158.] 1902

THE WELLINGTON COLLIERY CO. v. BOOKER.

APPEAL from the Supreme Court of British Columbia.

Dismissed with costs.

(6th November, 1902.)

(1) 35 N. S. Rep. 376.

1903

[S. C. File No. 2161.]

RENNIE v. THE QUEBEC BANK.

APPEAL from the Court of Appeal for Ontario.

Dismissed with costs for the reasons given in the court below.

(17th February, 1903.)

1904

[S. C. File No. 2168.]

DUNSMUIR v. LOWENBERG, HARRIS & CO.

Varying minutes of judgment—Costs of former trials—Issues on appeal—Practice.

APPEAL from the Supreme Court of British Columbia (9 B. C. Rep. 303, *sub nom. Harris* v. *Dunsmuir*).

MOTION to vary the minutes of judgment rendered on the appeal by the Supreme Court of Canada, on 30th November, 1903 (34 Can. S. C. R. 228), by adding a special direction in respect to two former trials of the action in the courts of British Columbia, prior to the third trial, upon which the appeal was taken to the Supreme Court of Canada and decided as above.

The Court refused the motion with costs on the ground that there had been no issue in question on the appeal touching the two previous trials.

Motion dismissed with costs.

(8th March, 1904.)

[S. C. File No. 2170.] 1902

FISHER v. FISHER.

APPEAL from the Court of Appeal for Ontario.

Settled out of court.

(13th November, 1902.)

[S. C. File No. 2173.]

WALLACE v. OUCHTERLONEY ET AL.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed with costs for want of prosecution.

(14th October, 1902.)

[S. C. File No. 2181.] 1903

*March 17.
*April 29

THE CALGARY AND EDMONTON RAILWAY COMPANY AND THE CALGARY AND EDMONTON LAND COMPANY (SUPPLIANTS).....APPELLANTS,

AND

HIS MAJESTY, THE KING.....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Title to land—Railway aid—Land grant—Crown patents—Dominion Lands Regulations—Reservation of minerals—53 Vict. c. 4—R. S. C. c. 54—Construction of statute—Free grants—Parliamentary contract.

The Act, 53 Vict. ch. 4 (D.), in 1890, granted, as a subsidy in aid of the construction of the railway, certain wild lands of the Crown

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* PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and GIROUARD, DAVIES and ARMOUR, JJ.

(NOTE.—This case was noted, without the reasons of the judges (33 Can. S. C. R. 673), and also in Cout. Dig. pp. 419, 1222.)

1903

CALGARY AND EDMONTON RY. CO. AND CALGARY AND EDMONTON LAND CO. v. THE KING.

in the North-West Territories of Canada. When the lands had been earned, by the construction of the railway, the Government of Canada refused to issue patents granting the lands to the railway company, or to the land company to which their rights had been assigned, except subject to the reservation of all mines and minerals and the right to work the same.

Held, per TASCHEREAU, C.J., and GIROUARD, J.—That the Dominion Lands Regulations of 1889, paragraph 8, providing for reservations in land grants, did not apply to the lands given as subsidy, but exclusively to grants of land made, in ordinary course, under the general laws governing the sale, use, occupation, and settlement of Crown lands, which, in regard to this subsidy, had been overriden by the Parliamentary grant made in virtue of a contract between the Crown and the railway company; that the railway company's title was perfect without the issue of a patent, which could avail only as evidence of the allotment of particular lands, and there could be no express or implied derogation from the free grant under the statute.

(This view of the case was affirmed, on appeal, by the Privy Council, (1904), A. C. 765.)

Held, per DAVIES and ARMOUR, JJ.—That it must be assumed that the lands to be given as subsidy were to be subject to the Dominion Lands Regulations of 1889, notwithstanding that the Act granting the subsidy declared that the lands to be earned by the railway company should be "free grants."

(Reversed by the Privy Council, *ubi sup.*).

The judges being thus equally divided in opinion, the appeal stood dismissed with costs, and the Exchequer Court judgment stood affirmed.

APPEAL from the judgment of the Exchequer Court of Canada dismissing the appellants' petition of right for a declaration that they were entitled to have free grants of the lands earned as subsidy under the Act, 53 Vict. ch. 4 (D.), without any reservation as to baser minerals therein, or the right of mining the same.

The circumstances of the case are fully stated in the judgments now reported.

Helmuth, K.C., and *Dyce W. Saunders*, for the appellants.

Newcombe, K.C., Deputy Minister of Justice, for the respondent.

THE CHIEF JUSTICE:—The appellant, the Calgary and Edmonton Railway Company, was incorporated under 53 Victoria, chapter 84 (D.), (24th April, 1890). By an Act passed in the same year, 53 Vict. ch. 4 (D.), (15th May, 1890), it was enacted that:—

> The Governor-General-in-Council may grant the subsidies in lands hereinafter mentioned to the railway companies, and towards the construction of the railways also hereinafter mentioned, that is to say (among others)—To the Calgary and Edmonton Railway Company, Dominion lands to an extent not exceeding 6,400 acres for each mile of the company's railway from Calgary to a point at or near Edmonton, on the North Saskatchewan River: a distance of about one hundred and ninety miles; and also a grant of 6,400 acres for each mile of the company's railway from Calgary to a point on the International boundary between Canada and the United States, a distance of about one hundred and fifty miles.

And by section 2 of the same Act it was provided that:

> The said grants and each of them may be made in aid of the construction of the said railways respectively in the proportion and upon the conditions fixed by the orders-in-council made in respect thereof, and except as to such conditions the said grants shall be free grants, subject only to the payment by the grantees respectively of the cost of survey of the lands and incidental expenses at the rate of ten cents per acre in cash on the issue of the patents therefor.

Under these provisions, orders-in-council fixing the terms and conditions were made in respect of this grant to the appellant, the Calgary and Edmonton Railway Company, on the fifth of May, 1890, and on the 22nd of May and 27th of June of the same year, but no mention of any reservation of mines and minerals is made in any of them.

Subsequent orders-in-council were passed from which it appears that the said railway company has earned and become entitled to its land grant, and by which certain lands, including the particular parcel mentioned in the petition of right, were allotted to and set apart for the said company, appellant. The other appellant, the Calgary and Edmonton Land Company, is and was, at the time of the commencement of the pro-

1903

CALGARY AND EDMONTON RY. CO. AND CALGARY AND EDMONTON LAND CO. v. THE KING.

THE CHIEF JUSTICE.

ceedings herein, beneficially interested in the said lands grant, and it is admitted that the proper parties are before the court.

Patents have been issued from time to time for some of the lands earned by the appellant, the Calgary and Edmonton Railway Company, and allotted to it by the several orders-in-council, but, for a considerable portion of the lands, including the particular parcel set out in the petition of right, no patents have as yet been issued.

In all the patents so far issued, there occurs the following reservation:

> Reserving unto Her Majesty, her heirs, successors and assigns, all mines and minerals, and the right to work the same.

The appellants claim by their petition of right that the patents for the lands to which they are entitled should be issued without any such reservation as to mines and minerals, and that, in those cases where patents have already been issued with such reservation, these should be rectified by striking out the reservation, or the former patents should be withdrawn and new patents issued without the reservation. In short, the appellants claim that they are entitled to the mines and minerals (other than gold and silver) in the lands to which they are entitled under the grant from Parliament and the orders-in-council made in respect thereof.

Their contention is that the Act of Parliament and the orders-in-council under it constitute the entire contract between them and the Crown, by which they agreed to build a railway through a portion of the unsettled lands of the Crown in the North-West Territories. The contention of the respondent, which prevailed in the Exchequer Court, is that the grant to the appellants was subject to the pre-existing conditions and reservations contained in the grants to the actual settlers or purchasers.

I would allow the appeal.

1903

CALGARY AND EDMONTON RY. CO. AND CALGARY AND EDMONTON LAND CO. v. THE KING. THE CHIEF JUSTICE.

The reservations as to grants to settlers contained in section eight of the regulations of September, 1889, have no application to the grant to the appellants. They are regulations made exclusively *for the sale, settlement, use and occupation* of the Crown lands under the laws generally governing such sales, settlements and occupations. These words do not include a special parliamentary grant such as this one is. It is begging the question to assume, as the judgment of the Exchequer Court does, that the grant to the appellants was subject to ordinary conditions and to existing regulations respecting such lands. Parliament has granted to them a subsidy in lands in aid of the construction of a railway needed in the public interest, without which it would not have been built, but the grant is not made subject to the pre-existing general orders-in-council, but exclusively to the special orders-in-council made in respect of such special grants.

There is no room that I can see for the contention that the contract between the Crown and the appellants was subject to both general and special conditions. Grants under special statutes are not ruled by the general conditions, if the special statute subjects them exclusively to special conditions.

The respondent would vainly say that if the company had purchased these lands they would have purchased them subject to the existing regulations. That is no argument.

Then section eight of the regulations of September, 1889, applies to patents to be issued in the ordinary course. The appellants' title is perfect without a patent. The patent is only evidence of the allotment. It is a parliamentary title under a contract. The subsequent allotment by the Department of the Interior and the Governor-in-Council of the particular lands so granted could not contain any derogation from that contract either expressly or impliedly.

I would allow the appeal with costs.

GIROUARD, J., concurred with the Chief Justice.

1903

CALGARY AND EDMONTON RY. CO. AND CALGARY AND EDMONTON LAND CO. v. THE KING.

ARMOUR, J.

DAVIES, J.—After much consideration, I am of opinion that the judgment appealed from is correct, and, for the reasons given by my learned brother Armour, I think that this appeal should be dismissed with costs.

ARMOUR, J.—The sections of the Dominion Lands Act, R. S. C. (1886) ch. 54, said to bear upon the question involved in this case are:—

Section 47. Lands containing coal or other minerals, whether in surveyed or unsurveyed territory, shall not be subject to the provisions of this Act respecting sale or homestead entry, but shall be disposed of in such manner and on such terms and conditions as are from time to time fixed by the Governor-in-Council by regulations made in that behalf.

Section 48. No grant from the Crown of lands in freehold, or for any less estate, shall be deemed to have conveyed, or to convey, the gold or silver mines therein, unless the same are expressly conveyed in such grant.

Section 90. The Governor-in-Council may * * (*h*) make such orders as are deemed necessary from time to time, to carry out the provisions of this Act according to their true intent, or to meet any cases which arise, and for which no provision is made in this Act, and further make and declare any regulations which are considered necessary to give the provisions in this clause contained full effect, and from time to time to alter or revoke any order or orders or any regulations made in respect of the said provisions, and make others in their stead.

And

Section 91. Every order or regulation made by the Governor-in-Council in virtue of the provisions of the next preceding clause, or of any other clause of this Act shall, unless otherwise specially provided in this Act, have force and effect only after the same has been published for four successive weeks in the Canada "Gazette," and all such orders or regulations shall be laid before both Houses of Parliament within the first fifteen days of the session next after the date thereof.

On the 17th of September, 1889, His Excellency, in virtue of the powers vested in him by the Dominion Lands Act, ch. 54 of the Revised Statutes of Canada, and by and with the advice of the Queen's Privy Council for Canada, was pleased to order that the following regulations for the sale, settle-

ment, use and occupation of Dominion Lands in the Province of Manitoba and the North-West Territories should be and the same were thereby established and adopted. These regulations from one to ten, inclusive, were under the heading "Sale of Dominion Lands;" from 11 to 20 inclusive, under the heading "Leases of Grazing Lands;" from 21 to 25, inclusive, under the heading "Permits to Cut Hay;" from 26 to 27, inclusive, under the heading "Leases to cut Hay;" from 28 to 33, inclusive, under the heading "Cutting Hay without Authority;" from 34 to 43, inclusive, under the heading "Disposal of Coal Lands, the property of the Dominion Government in Manitoba, the North-West Territories and British Columbia:" from 44 to 54, the end of the regulations, inclusive, under the heading "Lands Patented or entered on which the Mining Rights have been reserved." The provisions of section ninety-one were all complied with in respect to these regulations.

The regulations under the heading "Disposal of Coal Lands, the property of the Dominion Government in Manitoba, the North-West Territories and British Columbia," were obviously made under section forty-seven of the "Dominion Lands Act," and that section and the regulations made under it may be eliminated from this inquiry, as may also section forty-eight of that Act, for the plaintiffs do not claim the gold and silver, if any there be, in the lands to which they are entitled.

Regulation 8, under the heading "Sale of Dominion Lands," was obviously made under section 90 (*h*), and is as follows:—

All patents from the Crown for lands in Manitoba and the North-west Territories, shall reserve to Her Majesty, Her Heirs, and Successors and assigns, forever, all mines and minerals which may be found to exist within, upon or under such lands, together with full power to work the same, and for this purpose to enter upon and use and occupy the said lands, or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals or the mines, pits, seams and veins containing the same except in the case of patents for lands which have already been sold or disposed of

1903

CALGARY AND EDMONTON RY. CO. AND CALGARY AND EDMONTON LAND CO. v. THE KING.

ARMOUR, J.

for valuable consideration, or for lands which have been entered as homesteads before the date upon which these regulations come into force.

This regulation was evidently passed under the provisions of section 90 (*h*), that the Governor-in-Council may make such orders as are deemed necessary from time to time to meet any cases which may arise and for which no provision is made in this Act.

It was contended that this regulation was *ultra vires*, but it seems to me that the words quoted are sufficiently wide to support it. This regulation being then the general law, the Act, 53 Vict. ch. 84, was passed incorporating the plaintiff company, and the Act, 53 Vict. ch. 4, was passed which provided, section one, that

> The Governor-in-Council may grant the subsidies in land hereinafter mentioned to the railway companies, and towards the construction of the railways, also hereinafter mentioned, that is to say, * * * to The Calgary and Edmonton Railway Company, Dominion lands, to an extent not exceeding six thousand four hundred acres for each mile of the company's railway from Calgary to a point at or near Edmonton, on the North Saskatchewan River, a distance of about one hundred and ninety miles, and also a grant of six thousand four hundred acres for each mile of the company's railway from Calgary to a point on the international boundary between Canada and the United States, a distance of about one hundred and fifty miles.

Section two, that

> The said grants and each of them may be made in aid of the construction of the said railways respectively, in the proportion and upon the conditions fixed by the orders-in-council made in respect thereof, and, except as to such conditions, the said grants shall be free grants subject only to the payment by the grantees, respectively, of the cost of survey of the lands and incidental expenses, at the rate of ten cents per acre in cash, on the issue of the patents therefor.

It must be assumed, I think, that these grants were made subject to the general law in relation to lands in Manitoba and the North-West Territories, and subject, therefore, to the provisions of regulation 8, and there is nothing in the statute granting these lands, or in the orders-in-council made in

respect thereof, rightly understood, shewing that these lands were not subject to the reservation provided for in the regulation 8.

The grants were to be made

upon the conditions fixed by the orders-in-council made in respect thereof,

that is, upon the performance by the plaintiffs of such conditions, and "except as to such conditions, should be free grants," that is, that the performance by the plaintiffs of such conditions should be the sole consideration for such grants, and that they should be free from the performance of anything else and from any payment except only the payment

of the cost of survey of the lands and incidental expenses, at the rate of ten cents per acre in cash on the issue of the patents therefor.

To construe the words "free grants," in relation to the context in which they are found, as grants free from the reservation contained in regulation 8, would be a wholly unreasonable construction.

In my opinion, the judgment appealed from should be affirmed and the appeal dismissed with costs.

*Appeal dismissed with costs.**

Solicitors for the appellants: *Kingsmill, Hellmuth, Saunders & Torrance.*

Solicitor for the respondent: *E. L. Newcombe.*

* Reversed on appeal by the Privy Council ([1904] A. C. 765).

1902

[S. C. File No. 2185.]

THE KING v. GOLDRICK.

APPEAL from the Exchequer Court of Canada.

Abandoned.

(16th December, 1902.)

1903

[S. C. File No. 2188.]

HULL v. THE KING.

APPEAL from the Exchequer Court of Canada.

Dismissed with costs.

(30th November, 1903.)

1903

*Oct. 21.
*Nov. 30.

[S. C. File No. 2189.]

MILLER v. CAMPBELL.

Mines and Minerals — Placer mining regulations — Staking claims — Overlapping locations — Abandoned claims.

APPEAL from the judgment of the Territorial Court of Yukon Territory, affirming the decision of the Gold Commissioner.

The Gold Commissioner decided against the claim of the plaintiff, Miller, to a bench claim staked by him on Dominion Creek, Yukon, in August, 1899, and held that the ground had been properly taken up by the respondent, Campbell, while vacant and abandoned, and that it was his claim under a valid renewal. The full court affirmed the Gold Commissioner's decision and plaintiff appealed on grounds that the judgment was against the law governing staking and the weight of evidence, that boundaries of claims cannot be extended by mere renewal, and that no lapse of subsisting claims can enlarge another claim.

The appeal was dismissed with costs; the only notes of reasons delivered were the following:—

* PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and SEDGEWICK, DAVIES, NESBITT and KILLAM, JJ.

DAVIES, J.—I am unable to distinguish this case from the case of *St. Laurent* v. *Mercier* (1), decided less than a year ago by a majority of this court. By that decision I am bound, although I still retain the opinion I there expressed in a dissenting judgment concurred in by the late Mr. Justice Armour.

1903

MILLER v. CAMPBELL.

Appeal dismissed with costs.

Travers Lewis (Smellie with him), for the appellant.
J. A. Ritchie, for the respondent.

[S. C. File No. 2191.]

1903

TRABOLD v. MILLER.

*March 18, 19.
*April 29.

Mines and minerals—Trespass—Boundary—Hill-side claim—Jurisdiction—Appeal per saltum—Practice.

APPEAL direct from the judgment of DUGAS, J., in the Yukon Territorial Court, which maintained the plaintiff's action for trespass and the removal of gold-bearing gravel by the defendants, who tunnelled from an adjoining claim into a claim owned by the plaintiffs.

The principal dispute was as to the location of the defendant's hill-side claim under the mining regulations of 1898. During the hearing, on suggestion by the court, and consent of parties, leave to appeal *per saltum* was granted, *nunc pro tunc*, without costs, as there was some doubt as to the jurisdiction to hear the appeal direct from the decision of the trial court.

A cross-appeal by the plaintiffs was abandoned at the hearing.

The appeal was dismissed with costs, Armour, J., dissenting.

* PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and SEDGEWICK, GIROUARD, DAVIES and ARMOUR, JJ.

(1) 33 Can. S. C. R. 314.

1903

TRABOLD v. MILLER.

ARMOUR, J

The only notes delivered were for the reasons of dissent by

ARMOUR, J.—Where land is bounded by the summit of a hill such boundary is properly defined, not by a line drawn along the watershed, but by a line drawn along the crest of the hill, following the highest successive points of such crest.

A line drawn along the watershed may, sometimes, happen to coincide with a line so drawn along the summit, but it is a mistake to suppose that such lines will be always coincident, for this is not the case.

The plaintiffs were bound to shew, by a proper definition of the defendant's boundary, that the defendant has trespassed upon their location and to what extent, and this, in my opinion, they failed to do.

The appeal should, therefore, be allowed.

Appeal dismissed with costs

Russell, K.C., and *J. A. Ritchie*, for the appellants.
Sir C. H. Tupper, K.C., for the respondents.

1903

*Jan. 15.

[S. C. File No. 2194.]

LABELLE v. THE KING.

Criminal law—Refusal of reserved case—Appeal to Supreme Court of Canada—Conviction in Yukon Territory—Admission of evidence—Procedure at trial.

APPLICATION, at a special session called to consider the case (*Canada Gazette*, 14th Jan., 1903), for leave to appeal from the judgment of the judge of the Yukon Territorial Court (Craig, J.), refusing to reserve a case for the consideration and opinion of the full court upon the conviction of the appellant for the murder of Léon Bouthillett, in the Yukon Territory, whereon he was sentenced to death.

* PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and SEDGEWICK, GIROUARD, DAVIES, MILLS and ARMOUR, JJ.

1903

LABELLE v. THE K

The appellant was sentenced on 31st October, 1902, to be hanged on 20th January, 1903; the motion for a reserved case was made before Mr. Justice Craig, in the Territorial Court for Yukon Territory, on 5th January, 1903. Upon his refusal to reserve a case as prayed, application was made to the Minister of Justice, and a special session of the Supreme Court of Canada was called to hear the application for leave to appeal, based upon objections to the admisston of evidence at the trial, the procedure at the trial, and the charge of the learned judge to the jury.

Wilson and *Leonard*, for the application.

Newcombe, K.C., Deputy Minister of Justice, and *Congdon*, K.C., contra.

After hearing counsel for and against the application, the court retired for the purpose of considering their judgment, and, upon re-assembling, the decision was announced as follows:—

THE CHIEF JUSTICE:—The court being equally divided in opinion, there can be no judgment upon this application.

[S. C. File No. 2195.]

THE ATLANTIC AND LAKE SUPERIOR RAILWAY CO. v. VEILLEUX.

APPEAL from the Court of King's Bench, Province of Quebec, appeal side.

Dismissed with costs.

(2nd June, 1903.)

(See Q. R. 23 S. C. 217.)

1903

*March 2.
*April 22.

[S. C. File No. 2198.]

THE MONTREAL STREET RAILWAY CO. (DEFENDANTS).... APPELLANTS,

AND

GUSTAVE H. McDOUGALL (PLAINTIFF).. RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Negligence — Operation of tramway — Use of highway — Repair of streets — Dangerous way — Speed — Headlights — Exercise of ordinary and reasonable care.

The company's tramway line was laid upon a highway which it was not bound to keep in repair, and there was no provision by which head-lights were required to be used on its tram-cars during the night-time. The highway had become dangerous at a curve on the line on account of accumulations of ice and snow that inclined towards the tracks. After passing the front of a car, coming from the opposite direction, after dark, at the rate of about seven miles an hour and without a head-light, either through a sudden movement of the horse or on account of the inclination of the roadway, the vehicle in which the plaintiff was seated slid towards the side of the car, which struck it with great force and injured him.

Held, per Taschereau, C.J., and Sedgewick and Davies, JJ., that, under the circumstances, the rate of speed at which the car was driven and the absence of a head-light did not constitute actionable negligence on the part of the company.

Held, per Girouard and Mills, JJ., that, as the company was aware of the dangerous condition of the highway at the place where the accident occurred, during the night-time, it was liable for negligence in failing to slacken speed and provide sufficient lights.

Per Armour, J.—As the questions involved related merely to questions of fact, the appeal should be dismissed.

The judges being thus equally divided in opinion, the appeal stood dismissed with costs and the judgment appealed from stood affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior

* PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and SEDGEWICK, GIROUARD, DAVIES, MILLS and ARMOUR, JJ.

Court, District of Montreal, and maintaining the plaintiff's action for damages with costs.

1903

MONTREAL ST. RY. CO. v. McDOUGALL.

At the trial, LAVERGNE, J., dismissed the action, stating his reasons for doing so as follows:—

"Considérant que le dit accident ne résulte nullement d'aucun fait ou faute de la défenderesse ou de ses employés, que dans la circonstance en question le char de la défenderesse était conduit à une vitesse raisonnable; qu'immédiatement avant la collision la voiture du demandeur n'était pas sur la voie ferrée de la défenderesse; que ce n'est qu'au moment même de la collision du demandeur qu'elle a glissé sur la voie ferrée de la défenderesse par le fait du cheval du demandeur ou de celui qui le conduisait et sans aucune faute de la part de la défenderesse ou de ses employés."

On appeal the majority of the Court of King's Bench reversed this decision, the grounds for reversal, as stated by the majority of the court, being recited in the judgment of Mr. Justice Girouard, now reported. Mr. Justice Hall dissented, stating the circumstances of the case and his reasons for dissent, as follows:—

"HALL, J. (dissenting):—I agree entirely with the judgment of the learned trial judge, and the reasons upon which it is based. I can discover in the evidence no proof of negligence in any form on the part of the respondents and their employees, and consequently cannot concur in the decision of my colleagues holding the company responsible for the damages sustained by the appellant (plaintiff).

"The railway company were in the exercise of the statutory rights in the operation of their train service; their track was laid within the limits of the highway under authority of the Municipality of Verdun, which municipality had imposed no conditions upon the company as to the rate of speed at which the train service might be operated. Near the place where the accident happened, a sign was suspended with the word 'Slow' upon it, a direction given by the manager of the street railway company, not for the protection of the public, as there was no crossing there, but only to caution conductors to slacken speed in rounding the curve

1903

MONTREAL ST. RY. CO. v. MCDOUGALL.

at that point to prevent the car from leaving the track. As a matter of fact, the car was running at a very moderate rate of speed, not much, if anything, over seven miles per hour.

"The appellant driving from Montreal toward his home in Verdun, was using the left hand roadway for reasons explained in the evidence. The portion of the roadway available for driving is alleged to have been narrow and with a slight incline toward the railway track, conditions for which the respondents were in no way responsible, and of which their employees neither had, nor were bound to have, any knowledge. They were conditions depending entirely upon the Municipality of Verdun, of which appellant was a resident and a ratepayer. The appellant alleges that his horse was a perfectly quiet and docile one and had never before shewn the least nervousness at the sight or hearing of the street cars. He saw the car approaching at about the distance of 100 feet. Just as the car came opposite him, his horse made a slight sideway movement toward the left; this had a corresponding effect upon the rear part of the sleigh, moving it in the opposite direction toward the railway track, a movement accelerated, as appellant alleges, by the incline of the highway in the same direction. This part of the sleigh struck the car upon the side, the force of the shock being sufficient to throw appellant from his sleigh upon the road, but not apparent to the employees upon the car, who were unaware that any accident had happened. A passenger on same car during that evening was under the impression that the car had been struck by some object.

"Admitting all these facts, what possible negligence was there on the part of the motorman on that car? Proceeding at a moderate rate of speed, with no crossing immediately in advance, he sees from his cab window a sleigh driven toward him along the highway parallel with the railway track and sufficiently distant from it to create not the least suspicion of danger of collision or accident of any kind. The horse was moving quietly and without any indication of fright or even nervousness, and his driver appeared to have him well in hand. Should the motorman have reasoned with

himself that that horse might at a given moment swerve toward the left, and thus bring the rear of the sleigh into collision with his car, and acting upon this contingency, have stopped his car or even reduced its speed to a snail's pace? If such be the condition under which the street car service is to be operated it would be as well to dispense with electricity and substitute oxen as a motive power. The imagination would be powerless to conceive every possible contingency that might occur to the thousands of vehicles which the cars must meet and pass in their daily rounds, and the only safety would therefore be in a rate of speed which could be instantaneously checked whenever one of these events happened, although there would be nothing in the apparent normal conditions which would make such an event probable. I cannot conceive that the settled jurisprudence of the courts will impose such a regulation upon the street railway companies.

"The appellant has met with an unfortunate accident and sustained serious damage, but it was either a pure *accident* for which no one is responsible, or else it was one which resulted from the nervousness of his horse or the bad condition of the highway; if the former, then he must bear the loss without recourse; if the latter, then his remedy is against his fellow ratepayers in Verdun, who were and are under a legal obligation to him, as well as to non-residents, to keep their streets in safe condition. The respondents are under no obligation whatever to look after, much less to repair the streets of Verdun, nor to light them, although one of appellants' grievances seemed to be that the head light of the car did not illuminate the street sufficiently to enable him to properly direct his horse. It would doubtless be an advantage to appellant and other ratepayers of Verdun to have the respondents light the streets of that municipality and shovel the snow from them, but they have not contracted to do so, and any defect in those respects cannot be made a ground of liability on their part.

"The appellant seemed to be under the impression that the head-lights upon the street cars were maintained for the

1903

MONTREAL ST. RY. CO. v. MCDOUGALL.

benefit of the inhabitants of Verdun, and hence that they had a right to complain of their inefficiency. This is not the case. They are maintained solely for the company's use, to enable the motorman to know his locality and watch the condition of the track ahead of him. The side light they throw upon the highway is accidental, available for whatever it may be worth, but establishes no claim and imposes no basis of liability upon the street railway company.

"In my opinion, the appellant has established no negligence or liability on the part of the respondents, and his appeal should be dismissed."

Atwater, K.C., and *Archer*, for the appellants.
Monk, K.C., and *Rivet*, for the respondent.

THE CHIEF JUSTICE:—In my opinion this appeal should be allowed for the reasons given by Mr. Justice Hall in his dissenting judgment in the court below.

SEDGEWICK, J.:—I concur in the opinion of my brother Davies, and think this appeal should be allowed.

GIROUARD, J.:—L'intimé reclame de l'appelante $5,000 à titre de dommages-intérêts qu'il aurait souffert par suite d'une collision de sa voiture en mars, 1901, avec un des chars de l'appelante sur le chemin de Verdun, dans la banlieue de Montréal. La cour supérieure (Lavergne, J.), après avoir vu et entendu les témoins, arriva à la conclusion qu'il n'y avait pas faute de la part de la compagnie et renvoya l'action avec dépens. En appel, ce jugement fût infirmé et elle fût condamnée à payer $3,573 et les dépens, M. le juge Hall différant. La majorité de la cour n'a pas exprimé d'opinion en dehors du texte du jugement, qui est très explicite:—

Vu que, lors de l'accident, la parties du chemin où la collision a eu lieu était, et avait été depuis quelque temps, en mauvais état et n'était pas eclairée; que la nuit était noire et que la lumière electrique à l'avant du char n'était pas suffisante pour permettre d'arrêter le dit char à temps pour l'empêcher de frapper les objets que la garde-moteur pourvait apercevoir sur ou près de la voie: que le coté droit du chemin

public était obstrué par la neige et impraticable; que le centre de la voie était couvert de glace et arrondi, dévalait de chaque coté vers les rails et, en conséquence, également impraticable; que le coté gauche du chemin était aussi en partie obstrué par la neige et ne laissait qu'une largeur de cinq à six pieds sur laquelle les traineaux pouvaient circuler; que cet endroit était également couvert de glace et dévalait vers la voie ferrée; qu'il existait une courbe dans le chemin près du même endroit; que la voie était elle-même en mauvais état, et que, dans ces conditions, il était de la prudence la plus ordinaire de la part de la défenderesse, de là laisser circuler ses chars qu'a une vitesse à laquelle le garde-moteur pût les arrêter à temps pour éviter les accidents; qu'en fait les instructions données par la compagnie à ses conducteurs et garde-moteurs étaient d'aller lentement à cet endroit, et que cependant, au moment de la collision et dans les conditions ci-haut mentionnées, la vitesse du char était d'au moins sept milles à l'heure; que le cheval du demandeur, en aperçevant la lumière en avant du char, a donné un coup de tête vers la gauche et que le contre coup a été suffisant pour faire glisser le traineau dans la pente vers le rail et frapper le char; que le choc a été violent, la voiture brisée, le demandeur lancé à plusieurs pieds de distance et sérieusement blessé; que de ces faits, il resulte faute et negligence de la part de la compagnie et de ses employés et préposés engageant la responsabilité de la défenderesse, et que de la part du demandeur, il n'y a eu ni faute ni négligence, mais le simple exercise de son droit de se servir du chemin.

La preuve justifie pleinement ces conclusions. Mr. le juge Hall est d'avis que l'appelante était dans l'exercice de ses doits et qu'elle n'est pas responsable des consequences du mauvais état du chemin, qui était entièrement à la charge de la municipalité de Verdun. Mais les compagnies de tramways, passant par les rues et chemins publics, dovient être prudentes et se conformer aux circonstances. Elles ne doivent pas oublier qu'elles n'en sont pas les propriétaires; ce sont les municipalités ou la Couronne qui en sont les propriétaires pour l'usage du public, qui avait le droit de s'en servir bien avant que les chars électriques fussent connus. Elles n'ont même pas la jouissance exclusive de cette partie du chemin affectée à leur service. La législature ou les municipalités, ou les deux, leur ont seulement permis de s'en servir en commun avec le public. Il ne leur suffit pas de voir à l'efficacité de ce service, de faire monter et descendre les passagers et de les transporter en sureté; elles doivent encore

1903

MONTREAL ST. RY. CO. v. MCDOUGALL. GIROUARD, J.

avoir l'œil sur les passants et les voyageurs à pied et en voiture, et ne rien faire qui puisse indument leur causer du dommage. Il ne leur est pas permis d'ignorer les droits du public, de renverser les voitures et d'écraser les gens qu'elles rencontrent sur leur passage de jour ou de nuit, sans s'inquiéter si ces accidents auraient pu être évités. Les droits d'un chacun doivent être exercés avec prudence eu égard aux circonstances, en sorte que personne ne puisse souffrir sans necessité. L'existence d'un danger est l'élement qui détermine le dégré de viligence, et plus il y a danger, plus la vigilance doit être grande. L'on a droit d'exiger plus de surveillance de la part d'une compagnie de chars électriques, à cause de la force supérieure et rapide dont elle dispose et qui rend plus désastreuses les rencontres aves les passants ordinaires, le gros public, qui a le droit de circuler même sur la voie ferrée. Elle sait que cette voie est dangereuse en hiver et surtout au commencement de mars par l'enlèvement de la neige que la compagnie fait au risque d'élever les deux bords du chemin et d'y creuser au centre un canal, presqu'un précipice. Elle doit, en un mot, si c'est possible, éviter de mettre en péril la propriété et la vie des autres voyageurs. C'est le principe qui domine la matière non seulement dans la province de Québec sous l'empire du code civil, mais encore dans les autres provinces régies par la loi commune anglaise, car il n'y a aucune différence entre les deux systèmes de lois à ce sujet: *Jacquemin* v. *Montreal Street Railway Co.* (1); *Fraser* v. *London Street Railway Co.* (2); *Haight* v. *Hamilton Street Railway Co.* (3); *Myers* v. *Brantford Street Railway Co.* (4); *The Queen* v. *Toronto Railway Co.* (5); *Lines* v. *Winnipeg Electric Street Railway Co.* (6); *Halifax Electric Tramway Co.* v. *Inglis* (7); *Toronto Railway Co.* v. *Snell* (8); *Robinson* v. *Toronto Railway Co.* (9); *Brown* v. *London Street Railway Co.* (10); *Mitchell* v. *City of Hamilton* (11); *Ellis* v. *Lynn and Boston Rd. Co.* (12).

(1) Q. R. 11 S. C. 419.
(2) 26 Ont. App. R. 383.
(3) 29 O. R. 279.
(4) 31 O. R. 309.
(5) 4 Can. Crim. Cas. 4.
(6) 11 Man. R. 77.
(7) 30 Can. S. C. R. 256.
(8) 31 Can. S. C. R. 241.
(9) 2 Ont. L. R. 18.
(10) 2 Ont. L. R. 53.
(11) 2 Ont. L. R. 58.
(12) 160 Mass. 341.

M. le juge King, exprimant l'opinion de cette cour, dans la cause de *Halifax Tramway Co.* v. *Inglis* (1), disait:—

What is or is not reasonable care is a matter of degree and varies with circumstances. The control and management of an instrument of danger to life or limb has always been considered as calling for a higher degree of skill or care, as the measure of what is reasonable, than where no serious consequence is to be apprehended.

Le language du juge en chef Strong dans la cause de *Citizens Light and Power Co.* v. *Lepitre* (2), s'applique également à l'espèce qui nous occupe:

This is therefore a case for the application of the principle now well established, that persons dealing with dangerous things should be obliged to take the utmost care to prevent injuries being caused through their use by adopting all known devices to that end.

Dans la cause de *Royal Electric Co.* v. *Hévé* (3), M. le juge Hall, pour le cour d'appel, dit que les compagnies électriques (dans l'espèce à éclairage) sont tenues "to a supervision and diligence proportionate to the peculiar character and danger of the commodities in which they deal." Et puis, lorsque cette cause vint devant nous, Mr. le juge Taschereau, disait:—

They cannot have taken the high degree of care that the law demands from a company trading in so dangerous an element as electricity.

Enfin Mr. le juge Davies ajoutait:—

The law, in requiring from them the highest care and skill, and the exercise of constant vigilance in their business and operations, does nothing more than, having regard to the extremely dangerous character of the article or substance they supply, is necessary for the proper protection of those with whom they deal.

Le mauvais état de la route, qui est admis par tous les témoins et tous les juges, obligéait le moteur du char à procéder avec précaution et même à s'arrêter pour éviter un accident, et le fait certain que la nuit était bien noire et que

(1) 30 Can. S. C. R. 256. (2) 20 Can. S. C. R. 1.
(3) 32 Can. S. C. R. 462, at p. 466.

1903

[MONTREAL ST. RY. CO. v. MCDOUGALL.

GIROUARD, J.

le char n'avait pas de lumière en avant (head-light), pouvant éclairer la voie et lui laisser voir ou entre-voir les voitures qui approchaient, nécessitait encore plus d'attention et de lenteur. Cette lumière n'est peut-être pas obligatoire; quelques chars la portent et comme elle offre plus de protection, c'était dans l'espèce une faute de ne pas l'avoir. Le char allait à une très grande vitesse, excédant, au dire des témoins même de l'appelante, sept milles à l'heure, la limite extrême permise par la ville de Montréal. Cette limite, il est vrai, n'a pas été imposé par Verdun, mais elle n'indique pas moins qu'elle n'est pas moderée. Le chemin de Verdun est une des grandes routes qui conduisent à Montréal et à plusieurs autres villes qui l'environment et qui forment avec elle un centre de quatre cent mille habitants. Il est beaucoup plus fréquenté que plusieurs rues de Montréal où circulent les petits chars; et même sans règlement limitant la vitesse, la compagnie est tenue de la diriger d'après les circonstances. Même une vitesse de deux ou trois milles à l'heure à un endroit dangereux où le char devrait être arrêté pour éviter un accident, seriat une faute. Dans l'espèce, la vitesse était excessive. Le char allait à une si grande rapidité que le moteur et le conducteur n'ont pas observé de collision pas même un leger choc; ils continuèrent leur route comme si rien n'était arrivé, et dans un instant, ils étaient hors la vue. Un avis de la compagnie, "Slow," peint en grosses lettres sur une planchette à travers la route, l'avertissait de ce danger exceptionnel.* Je ne partage pas le sentiment de M. le juge Hall, que cet avertissement n'intéressait que la compagnie. "To prevent the car from leaving the rail." Le public avait encore plus d'intérêt au ralentissement de la course, puisque la courbe avait pour effet de cacher en partie la vue des voitures venant dans un sens contraire. Le cheval était un animal sur, facile à conduire, et de fait conduit par un homme habitué aux chevaux et à la localité. M. le juge Lavergue et M. le juge Hall ne l'ont pas trouvé peureux ou ombrageux. Le premier considère que la collision a eu lieu "par le fait du cheval du demandeur ou de celui qui le conduisait." M. le

* Cf. *per* DAVIES, J., at p. 295, *post*.

1903

MONTREAL ST. RY CO. v. MCDOUGALL. GIROUARD, J.

juge Hall dit qu'en passant le char, le cheval fit un leger mouvement à gauche, "his horse made a slight movement toward the left." La majorité de la cour d'appel trouve "que le cheval du demandeur en aperçevant la lumière en avant du char, a donné un coup de tête vers la gauche." A la vue de ce char allant presqu'à toute vitesse, lorsqu'il y avait à peine place pour la voiture du demandeur sur le chemin public, il est surprenant que cette voiture, un tout petit *cutter*, à un seul siége, n'aie pas été mise en piéces et son conducteur tué sur le champ. La compagnie est plus redevable à la providence qu'à son employé si elle n'a pas plus à payer.

La décision de cette cour dans *Village of Granby* v. *Menard* (16), a été citée. Mais cette cause était bien differente de celle-ci. Le juge de la première instance, qui avait également vu les témoins, avait ajouté foi aux témoins de la défenderesse de préference à ceux du demandeur. Enfin, la preuve établissait qu'il avait eu raison de conclure comme il le fit. Ici le juge n'a pas de préference pour une classe de témions; ils sont tous également compétents à ses yeux, et la difficulté consiste à apprécier les faits qui ne sont guère contestables ou même contestés. Il s'agit plutôt de savoir si ces faits sont suffisants pour rendre l'appelante coupable de la négligence qui fût la cause de l'accident; et c'est là seulement qu'il y a eu divergence d'opinions. Sur ce point, je partage le sentiment de la cour d'appel, et je suis d'avis de renvoyer l'appel avec dépens.

DAVIES, J.—I agree with the conclusions reached by the trial judge, Mr. Justice Lavergne, and by Mr. Justice Hall, who delivered a dissenting judgment in the Court of King's Bench.

I have had the advantage of reading the judgment prepared by my brother Girouard, and have examined the different cases to which he calls attention on the doctrine of negligence. I am glad to be able to say that there is not any

(16) 31 Can. S. C. R. 14.

1903

MONTREAL ST. RY. CO. v. MCDOUGALL.

DAVIES, J.

difference of opinion between us as to the law on this subject. The difference arises as to its application to the facts of this case.

The plaintiff, in order that he should recover, was bound to prove some negligence on the part of the defendant company, which caused the damage he complained of, or some facts from which negligence may reasonably be inferred. As I gathered from the argument this negligence consisted in the rate of speed the car was running at the time and in the absence of a head-light. The rate of speed which the Court of King's Bench found the car was running was about 7 miles an hour. In itself and apart from special circumstances this rate does not imply negligence. It is the maximum rate permitted in the City of Montreal, while the village through which the car was running at the time of the accident has not established any rate regulating the speed at which the cars might be run. There must, therefore, be evidence in order to fasten a liability on the defendants that the rate of seven miles an hour was, under the circumstances, an improper rate, and next that it caused the accident. I can find no such evidence.

At the time of the argument I was impressed by the suggestion of counsel that the sleigh which the injured plaintiff was driving at the time of the accident had slewed down to and across the rail of the track, and that the advancing car had struck the sleigh and so caused the injury. If this had been so, the questions of the rate of speed and the degree of control which the motorman had over the car, together with the absence of a head-light, would have assumed greater importance. A careful examination of the evidence and the findings of the learned trial judge convinces me, however, that this was not the case. On the contrary I think it is well established that the head or front of the car had passed the plaintiff's sleigh, and that when the latter, owing to the shying of the horse, slewed towards the car track it struck against the side of the car. I am unable to see how the absence of head-lights or the degree of speed at which the car was then being propelled

had anything to do with the collision. In fact the presence of a bright head-light would be calculated rather to frighten horses driving alongside of the car track and meeting the advancing car. If the circumstances were such that the presence of a head-light might have prevented the accident its absence would then be a matter for serious consideration. But I cannot see how, under the circumstances of this case, its absence can be invoked to imply negligence. The facts are that either from seeing the ordinary lights of the car, or from its noise, or from both combined, the horse shied, threw the sleigh against the side of the passing car and so caused the damage complained of. It is admitted that the road or track along which plaintiff was driving was in a very bad condition. But for this the defendant company is in no way responsible. If the accident was really caused by the bad condition of the road, then it would be the Municipality of Verdun and not the street railway company which might be held responsible. But upon this point there was only slight evidence, and, of course, no opinion as to such liability is intended to be expressed by me.

Something was said during the argument as to the notice which the company had put up at this place as a warning to their conductors to go "slow" there, as indicating a knowledge of danger on their part. But the evidence shewed that this notice was intended for trains going from east to west and towards a curve in the road further west than the place of the accident, and had no reference to cars such as the one in question, which had passed the curve and was going east towards Montreal.

I think, therefore, that as no negligence on the part of the defendant company or its servants has been established, the appeal should be allowed, and the judgment of the Superior Court restored.

MILLS, J.—In this case I concur in the judgment delivered by my brother Girouard. The condition of the road was very bad, and it required the exercise of great care on the part of those in charge of the cars of the company when

1903

MONTREAL ST. RY. CO. v. MCDOUGALL

MILLS, J.

running upon the road. It may be that the company were not responsible for the condition of the highway, but neither were those who were using it as an ordinary highway. What we are called upon to consider is not how the condition of the road arose, or who was responsible for that condition, but to recognize it, and to hold that being used by electric cars, it became necessary to travel upon it with great care, and to proceed at such a rate of speed as would ensure as far as possible the safety of those who are travelling upon it with sleighs. It appears from the evidence that some parts of the sleigh track were very narrow, and in many places, especially where the accident occurred, sloped towards the track. The night was dark, and the cars could be seen but for a short distance, and motorman upon the car was unable to see for any considerable distance the vehicles which he was approaching upon the road. The persons in the sleigh approaching the car, and going towards Verdun, endeavoured to keep away from the car, but on account of the steep incline in the road toward the railway track, the sleigh slid against the side of the car and seriously injured the respondent.

If the car had been moving slowly it might have been that little injury would have been done, but on account of the rapid motion of the car the concussion was very great, and the injury which the respondent received was very serious.

I think, therefore, the Court of King's Bench were right in holding that there was negligence; and that we ought not to disturb the judgment of the majority of the court below.

The state of the road made it impossible for the respondent to avoid the collision which took place, and the only way to prevent it from being serious was for those in charge of the car to move slowly upon the more unsafe sections of the road, and thus reduce the chances of collision.

ARMOUR, J.—The questions in this appeal involve merely matters of fact, and I think it ought to be dismissed. 1903

MONTREAL ST. RY. CO. v. MCDOUGALL. ARMOUR, J.

Appeal dismissed with costs.

Solicitors for the appellants: *Préfontaine, Archer, Perron & Taschereau.*

Solicitors for the respondent: *Robillard & Rivet.*

[S. C. File No. 2204.] 1904

THE OTTAWA ELECTRIC RAILWAY CO. v. CITY OF OTTAWA.

APPEAL from the Court of Appeal for Ontario.

Dismissed with costs.

(30th March, 1904.)

[S. C. File No. 2208.] 1903

*March 7, 21.
*March 26.

WILLIAM G. MACLAUGHLIN ET AL. (PLAINTIFFS)..... APPELLANTS,

AND

THE LAKE ERIE AND DETROIT RIVER RAILWAY CO. (DEFENDANTS) .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Jurisdiction—R. S. C. ch. 135, ss. 40, 42—60 & 61 Vict. c. 34 (D.)—Validity of patent—Matter in controversy—Extension of time for appealing—Lapse of order—Practice in office of registrar—Refusal to approve security bond.

Approval of a bond of security for costs of appeal will be refused in cases where it appears that the court would not have jurisdiction to entertain the appeal.

* PRESENT: THE REGISTRAR, in Chambers.

1903

MACLAUGHLIN v. LAKE ERIE AND DETROIT RIVER RY. CO.

There can be no appeal to the Supreme Court of Canada in an action in respect to a patent of invention where the validity of the patent is not in question and it does not appear that the matter in controversy exceeds $1,000, the amount limited by the Act, 60 & 61 Vict. ch. 34 (D.), providing for appeals from the Province of Ontario.

Judgment was pronounced on 12th April, 1902, and the time for appealing was extended until 30th June, 1902. By an arrangement between the parties the application for allowance of the security bond was not heard until January, 1903, and, on 31st January, 1903, the application was refused in the court appealed from.

Held, that upon the delivery of the judgment, in January, 1903, the order extending the time for appealing lapsed and, no further extension having been obtained, there was no jurisdiction in the Supreme Court of Canada to entertain an appeal brought after the expiration of the sixty days limited by section 40 of the Supreme and Exchequer Courts Act.

The power of extending the time for appealing under section 42 of the Supreme and Exchequer Courts Act is vested solely in the Court appealed from or a judge thereof. *Walmsley* v. *Griffith* (13 Can. S. C. R. 434), referred to.

(NOTE.—Cf. *The Ontario and Quebec Railway Co.* v. *Marcheterre* (17 Can. S. C. R. 141), *per* Strong, J.; *Barrett* v. *Le Syndicat Lyonnais du Klondyke* (33 Can. S. C. R. 667), and *The Canadian Mutual Loan and Investment Co.* v. *Lee* (34 Can. S. C. R. 224.)

MOTION for special leave to appeal from the judgment of the Court of Appeal for Ontario, reversing the judgment at the trial, and dismissing the plaintiff's, appellant's, action with costs.

The questions raised upon the application are stated in the judgment of the Registrar, now reported.

J. A. Ritchie, for the motion.

McLaurin, contra.

THE REGISTRAR—This is an application on behalf of the plaintiffs to allow a bond filed as security for an appeal from the judgment of the Court of Appeal for Ontario, to the Supreme Court. The facts of the case are as follows:—

The plaintiff had a patent for certain brake mechanisms, and was desirous of having them placed upon the rolling stock of the defendant company. The parties thereupon entered into an agreement set out in the judgment of Chief Justice Meredith at the trial, which grants a license and right to use the invention and to equip their rolling stock with it. The defendants proceeded to make what they considered improvements to the brake, and placed the improved article upon their cars. The plaintiff thereupon brought the action, in which he claimed:—

1. An injunction for infringing upon his patent by using the altered brake, and from "masquerading" any other brake under the name of the plaintiff;

2. Damages for loss complained of, and costs.

The defendants admitted in their defence that the alterations made by them were covered by the plaintiff's patent and were part of his invention, and that they had never disputed this fact, and claimed that they were entitled under the agreement to alter the brake and use it as so altered upon their rolling stock. To this the plaintiff filed a reply, alleging that if the defendants were right as to their interpretation of the agreement, that it was without consideration, and that the agreement should be rectified to express the true bargain between the parties.

Judgment in the action was given in favour of the plaintiff, enjoining the defendants, their servants, &c., from infringing upon the plaintiff's patent by the use of the altered form of brake, or any brake which was an imitation of the plaintiff's, and giving costs of the motion, but no damages.

On appeal to the Court of Appeal this judgment was reversed and the action dismissed with costs. The judgment of the Court of Appeal was delivered on the 12th April, 1902.

1903

MACLAUGHLIN v. LAKE ERIE AND DETROIT RIVER RY. CO. — THE REGISTRAR.

On the 7th June the time for appealing to the Supreme Court of Canada was extended by an order of the Hon. Chief Justice Moss until the 30th June, but it was expressly provided that the order was not to be deemed an allowance of the appeal. The plaintiff thereupon filed his bond as security for an appeal to the Supreme Court, and at the same time moved for special leave to appeal, and also applied to have his security allowed. The motion for special leave to appeal was disposed of on the 16th June by the Court of Appeal, and an order made dismissing the application with costs. The motion to allow the security was dismissed by the Hon. Chief Justice Moss on the 31st January, 1903.

Upon argument before me it was contended very strenuously by counsel for the appellant, to this court, that the bond being unexceptionable in form and as a security, that the registrar had no option but to make an order allowing the same, and that it was a matter solely for the court's determination to consider whether or not there was jurisdiction to hear the appeal. This contention is opposed to the uniform practice in the office of the registrar sitting as a judge in chambers, and I need refer to only two decisions of the court in support of that statement. The first is *Larivière* v. *School Commissioners of Three Rivers* (1). In this case the registrar, upon an application to allow a bond as security for an appeal, held that there was no jurisdiction in the court to entertain the appeal, and refused to allow the security. An appeal was taken from his judgment to the present Chief Justice of the Court, where the ruling of the registrar was affirmed. From this judgment a further appeal was taken to the full court, when the judgment of Mr. Justice Taschereau was also affirmed. Again, in the later case of *Raphael* v. *MacLaren* (2), which was also an application to the registrar to allow security for costs in an appeal, the registrar gave a lengthy judgment refusing the application with costs, holding that the case was not one in which an appeal lay under section 29 of the Supreme and Exchequer Courts Act. His judgment was affirmed, on appeal, by the Honourable Mr. Justice King.

(1) 23 Can. S. C. R. 723. (2) 27 Can. S. C. R. 319.

I have, therefore, to consider whether this appeal falls within any of the provisions of 60 & 61 Vict. ch. 34, which provides for appeals to the Supreme Court of Canada from the Court of Appeal for Ontario, and, leave to appeal having been refused, the only sections which it could be argued apply to the present appeal are sub-sections (*b*) and (*c*). The latter requires that the matter in controversy shall exceed $1,000. No damages were given at the trial and no evidence has been adduced to shew that the matter in controversy did exceed $1,000. This sub-section, therefore, does not help the appellant. Sub-section (*b*) grants an appeal where the validity of a patent is affected. Although this action has to do with a patent, in my opinion, no contestation arose with respect to its validity.

For these reasons I would, if compelled to dispose of the matter on this ground only, hold that the case was not appealable to the Supreme Court of Canada.

Aside, however, from this question, it is also, in my opinion, clear that the present application is too late. Section 40 of the Supreme and Exchequer Courts Act provides as follows:—

> Except as otherwise provided, every appeal shall be brought within sixty days from the signing or entry or pronouncing of the judgment appealed from.

And by sec. 42 it is provided that the court appealed from, or

> a judge thereof may, under special circumstances, allow an appeal notwithstanding that the same is not brought within the time hereinbefore prescribed in that behalf.

It has been held in this court, *Walmsley* v. *Griffith* (1), that the power to extend the time for bringing an appeal to the Supreme Court under section 42, is vested solely in the court or a judge thereof, from which the appeal is taken.

(1) 13 Can. S. C. R. 434.

1903

MACLAUGHLIN v. LAKE ERIE AND DETROIT RIVER RY. CO. — THE REGISTRAR.

Judgment having been pronounced in the Court of Appeal on the 12th April, 1902, the time for appealing would have expired at the latest on the 12th June following. This time, however, was extended by the order above referred to of the 7th June, but that order only extended the time until the 30th day of June, and no further order was thereafter obtained from the court below extending the time for taking the appeal.

It is quite true that some agreement was come to between the solicitors for the parties whereby the application to have the security allowed was not brought on for final determination until the month of January, and the order refusing to allow the security was only made, as above mentioned, on the 31st January, 1903.

Assuming that the effect of the arrangement between the parties was to extend the time for bringing the appeal until an order was finally made upon the application to allow the security, it appears to me that, once the order of the 31st January was made, the virtue and power of the order of the 7th June entirely disappeared, and that upon the making of that order the parties were practically in the same position as if the order of the 7th June never had been made. There is, therefore, now no order in existence extending the time in which the appeal may be brought, and the period of sixty days provided by section 40 of the Act has long since gone by.

Under these circumstances, I am of the opinion that I have no jurisdiction to allow security for this appeal.

The application is therefore dismissed with costs.

Application dismissed with costs.

Solicitors for the appellants: *Fleming, Wigle & Rodd.*
Solicitor for the respondents: *J. H Coburn.*

[S. C. File No. 2211.] 1903

POOLE v. THE ONTARIO BANK.

APPEAL from the Court of Appeal for Ontario.

Dismissed with costs.

(30th November, 1903.)

[S. C. File No. 2227.] 1904

POUPORE v. THE KING.

APPEAL from the Exchequer Court of Canada.

The questions raised on this appeal involved merely matters of fact in dispute between the contractors for certain works on Division 3 of the Williamsburg Canals, which had been referred to and decided by the Exchequer Court by the judgment appealed from.

Written notes of reasons for judgment were delivered by their Lordships, Justices Nesbitt and Killam, simply reviewing the evidence.

The appeal was dismissed with costs.

(30th March, 1904.)

[S. C. File No. 2229.] 1903

CITY OF MONTREAL v. O'SHEA.

APPEAL from the judgment of the Court of King's Bench, Province of Quebec, affirming the decision of the

1903

CITY OF MONTREAL v. O'SHEA.

Superior Court, District of Montreal, awarding O'Shea $2,500 for breach of conditions of the lease of a stall in Bonsecours market, which had been leased to him, but of which he never got possession.

The city contended that the lease was made through a mistake of one of its employees, who was deceived and misled by false representations made by O'Shea in respect to an exchange of stalls between himself and another lessee.

The appeal was dismissed with costs.

(20th October, 1903.)

[S. C. File No. 2236.]

DOGHERTY v. JENKINS.

APPEAL from the Supreme Court of Prince Edward Island.

Dismissed with costs for want of prosecution.

(12th October, 1903.)

[S. C. File No. 2238.]

THE GRAND TRUNK RAILWAY CO. v. MANN.

APPEAL from the Court of Appeal for Ontario (1 Ont. L. R. 487), affirming the judgment of Falconbridge, C.J., upon the second trial, who found the question of law settled as reported in 32 O. R. 240, and the other issues in favour of the plaintiffs, assessed the damages at $350 and ordered an injunction as prayed.

The case was first tried by Meredith, C.J., whose judgment is reported in 32 O. R. 240. The Court of Appeal, on the ground that there had been a misunderstanding as to the

extent of the defendants' admission in respect to the removal of gravel, gave them the option of a new trial upon payment of costs of the former trial and of the appeal and, in default, dismissed the appeal with costs.

Upon the second trial the judgment was as above noted.

On a second appeal, the judgment of the Court of Appeal for Ontario affirmed the decision of Meredith, C.J., full notes of reasons being given by Moss, C.J. (not reported); Garrow, J., concurred, and Osler, J. (*dubitante*), agreed to the dismissal of the appeal.

The defendants' appeal to the Supreme Court of Canada was dismissed with costs.

(30th November, 1903.)

[S. C. File No. 2239.]

THE S.S. "WESTPHALIAN" v. DESROCHERS.

APPEAL from the Quebec Admiralty Division of the Exchequer Court of Canada withdrawn.

Withdrawn.

(29th June, 1903.)

[S. C. File No. 2244.]

THE SS. "BADEN" v. BOAK.

APPEAL from the Nova Scotia Admiralty Division of the Exchequer Court of Canada.

Settled out of Court.

(9th October, 1903.)

1903

[S. C. File No. 2245.]

THE CITY OF HALIFAX v. THE ATTORNEY-GENERAL FOR NOVA SCOTIA.

APPEAL from the Supreme Court of Nova Scotia.

Case filed, 22nd June, 1903; no proceedings had since.

1904

*March 8.
*March 10.

[S. C. File No. 2246.]

TURNER v. COWAN.

Varying minutes of judgment—Re-payment of costs—Jurisdiction.

MOTION on behalf of the appellant for an order to vary the minutes of judgment as settled under the decision of the Supreme Court of Canada allowing the appeal (34 Can. S. C. R. 160), from the Supreme Court of British Columbia, by adding a direction that the respondents should repay to the appellant the costs which he had been obliged to pay them, under threat of execution, pending the appeal in the Supreme Court of Canada.

May, for the motion.
Smellie, contra.

After hearing counsel for both parties the court reserved judgment, and, on a subsequent day, dismissed the motion with costs. In delivering the judgment of the court, the Chief Justice stated that the matter in question could be dealt with only in the Supreme Court of British Columbia, from which the appeal had been taken.

Motion dismissed with costs.

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* PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and SEDGEWICK, GIROUARD, DAVIES, NESBITT and KILLAM, JJ.

[S. C. File No. 2252.]

1906

*Feb. 26.
*March 5.

WARBURTON v. THE ATTORNEY-GENERAL FOR CANADA.

Expropriation—Compensation—Damages.

APPEAL from the Exchequer Court of Canada. The judgment appealed from awarded compensation for lands taken, on expropriation, and damages incident to such expropriation, and the appeal was to have the amounts so awarded increased upon the evidence of record.

John H. Moss, for the appellant.

Lemieux, K.C., Solicitor-General for Canada, for the respondent.

The judgment of the court was delivered by

IDINGTON, J.—I see no good reason for allowing this appeal. The learned judge had ample evidence before him to entitle him to find thereon as he has, and held that such evidence outweighed that which naturally seems to appellant of more weight.

No question of law is involved. No question is raised of the legal principles that must guide a trial judge in estimating the proper compensation for the land that the Crown has duly expropriated and the injuriously affecting that which remained the property of the appellant.

I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *E. B. Williams.*
Solicitor for the respondent: *F. L. Hasard.*

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* PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and SEDGEWICK, GIROUARD, IDINGTON and MACLENNAN, JJ.

1903

[S. C. File No. 2256.]

HAYES v. THE KING.

APPEAL from the judgment of the Supreme Court of British Columbia, upon a Crown case reserved.

Abandoned.

(29th September, 1903.)

[S. C. File No. 2261.]

RUGGLES v. MIDDLETON AND VICTORIA BEACH RAILWAY CO.

APPEAL from the Supreme Court of Nova Scotia.

Discontinued.

(14th October, 1903.)

(See 35 N. S. Rep. 553.)

[S. C. File No. 2268.]

WALLACE v. RITCHIE.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed with costs.

(5th December, 1903.)

[S. C. File No. 2271.] 1904

McNAUGHTON v. HUDSON.

APPEAL from the Supreme Court of Nova Scotia.

Settled out of court after hearing on the merits.

(13th February, 1904.)

[S. C. File No. 2272.] 1903

VINCENT v. MONTREAL STREET RAILWAY CO. *Oct. 8. *Oct. 20.

Operation of tramway—Negligence—Dangerous way — Removal of ice and snow—Right of way.

APPEAL from the Court of Review, at Montreal.

The judgment appealed from affirmed the decision of Archibald, J., at the trial, dismissing the plaintiff's action with costs.

The action was for damages sustained while the plaintiff was driving along the street railway tracks, on a public highway of the City of Montreal, between high banks of snow and ice which had accumulated on both sides of the tramway, in the month of March, 1902. As the car came along the tracks, behind the plaintiff's vehicle, warning was given by sounding the gong and the rate of speed was reduced; plaintiff, however, delayed getting off the tracks until the car was very close to him, and then, in turning out to the side of the street, his sleigh slid on the inclined banks, was struck by the side of the car and the injuries complained of were sustained.

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*PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and SEDGEWICK, GIROUARD, DAVIES, NESBITT and KILLAM, JJ.

1903

VINCENT v. MONTREAL ST. RY. CO.

The trial judge held that the tramway company had the right of way on the line of its tramway, that the injuries sustained were the direct result of the plaintiff's own imprudence and dismissed the action with costs.

Beaudin, K.C., and *Desaulniers*, for the appellant.

Archer, K.C., for the respondents.

After hearing counsel for both parties, the court reserved judgment and, on a subsequent day, the judges being equally divided in opinion, the appeal stood dismissed with costs.

Appeal dismissed with costs.

1904

[S. C. File No. 2273.]

WHELAN v. McDOUGALL.

APPEAL from the Court of King's Bench, Province of Quebec, appeal side.

Dismissed with costs.

(10th March, 1904.)

1903

[S. C. File No. 2275.]

BRUHM v. FORD ET AL.

APPEAL from the Supreme Court of Nova Scotia.

Settled out of court.

(3rd December, 1903.)

[S. C. File No. 2277.] 1903

THE MONTREAL STREET RAILWAY CO. v. CARROLL.

APPEAL from the Court of Review at Montreal.

Settled out of court.

(22nd September, 1903.)

[S. C. File No. 2280.] 1904

*March 24; May 23. *June 8.

THE CONSUMERS' ELECTRIC COMPANY (DEFENDANTS), ... (APPELLANTS,

AND

THE OTTAWA ELECTRIC COMPANY (PLAINTIFFS), RESPONDENTS.

Electric lighting—Terms of franchise agreement—Use of highway—Poles and wires.

On appeal from the Court of Appeal for Ontario.

APPEAL from the judgment of the Court of Appeal for Ontario, on an appeal by the plaintiffs, varying the judgment of MacMahon, J., by striking out the 7th paragraph thereof and dismissing a cross-appeal by the defendants with costs.

The companies were carrying on business in the City of Ottawa, in Ontario, supplying light, heat and power by electricity under the terms of franchise agreements with the city giving them the right to use the streets for the erection of poles with wires for the distribution of electricity. The agreements were practically in the same terms and subject to the

* PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and SEDGEWICK, GIROUARD, DAVIES and KILLAM, JJ.

1904

CONSUMERS' ELEC. CO. v. OTTAWA ELEC. CO.

condition that the consent and approval of the city engineer should be obtained prior to the location of the poles. The plaintiffs had poles with wires erected on the streets, with the necessary consent and approval, for some years before the defendant company was organized. On commencing business the defendants obtained the approval of locations by the city engineer, and proceeded to erect poles and to string wire in close proximity to the existing poles and wires of the plaintiff company, interfering, as was alleged, with the transmission of electricity on the plaintiff's poles and otherwise causing damages and danger by induction, etc.

The action claimed an injunction to restrain the defendants from erecting and maintaining poles and wires in proximity to the plaintiff's poles and wires, to compel the removal of poles and wires already erected upon certain streets, and asked for damages caused by unlawful interference with the plaintiffs' system then in operation.

On the trial of the cause the judge's decision was generally in favour of the plaintiffs; it ordered the removal of certain poles erected by the defendants, restrained them from erecting or maintaining poles with wires within three feet of the plaintiff's wires, etc., and, by the seventh paragraph of the judgment, it was provided as follows:

"7. Notwithstanding anything contained in the preceding paragraphs hereof, the defendants shall be at liberty to erect poles on such streets in the pleadings mentioned as were prior to the commencement of this action occupied by poles and wires of the plaintiffs, and to be at, where necessary, a less distance than three feet therefrom, provided that before using any such poles the defendants shall protect the plaintiffs' wires by insulators or other devices sufficient for such purpose to the satisfaction of Newton J. Ker, the city engineer of the City of Ottawa."

The judgment appealed from allowed the plaintiffs' appeal with costs, and ordered the judgment of the trial judge to be amended by striking out the above quoted paragraph, otherwise the said judgment was affirmed and the cross-appeal was dismissed with costs.

1904

CONSUMERS' ELEC. CO. v. OTTAWA ELEC. CO.

On an appeal to the Supreme Court of Canada, after hearing counsel on behalf of both parties, judgment was reserved and, upon suggestion of the court, the following consent was filed by the respondents:

"In deference to the suggestion of the court, but without admitting that the appellants have any proper right to maintain poles between the wires of the respondents at a less distance than three feet, the respondents are willing and hereby offer to undertake to move their wires so that they will be at least three feet from the poles and wires of the appellants, as they existed at the commencement of this action, on such of the streets in the pleadings mentioned as were prior to the commencement of this action occupied by poles and wires erected on both sides thereof."

On a subsequent day, the appeal was dismissed with costs, the judgment appealed from to be, however, modified in conformity to the consent filed by the respondents' counsel at the argument.

Appeal dismissed with costs.

Riddell, K.C., and *Glyn Osler*, for the appellants.

George F. Henderson and *D. J. McDougal*, for the respondents.

[S. C. File No. 2291.]

SALE v. WATTS.

MOTION for special leave to appeal from the Court of Appeal for Ontario.

Dismissed with costs.

(8th January, 1904.)

[S. C. File No. 2292.]

IN RE SARAH MENARD.

1904

Habeas corpus—Criminal appeals—Grand jurors—Selection of talesmen—Jurisdiction.

*March 29.

APPEAL from the order of SEDGEWICK, J., refusing an application for a writ of habeas corpus upon commitment to

*PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and SEDGEWICK, GIROUARD, DAVIES and KILLAM, JJ.

1904

IN RE MENARD.

the Mercer Reformatory, at Toronto, under conviction for theft at the Fall Assizes for the County of Carleton, in Ontario (1903).

The petitioner took objection to the regularity of her trial and conviction on the ground that the presiding judge, MacMahon, J., without any request having been previously made for the appointment of a talesman to serve on the grand jury which found the indictment, and without directing the sheriff to select a talesman, in the manner provided by the statute in that behalf, permitted an intruder, ostensibly placed there as a talesman, to serve on said grand jury and take part in the presentment.

Upon the motion by way of appeal coming on to be heard,

Mahon, for the appellant, asked leave to withdraw the appeal, stating that, as now advised, it appeared that the redress sought could be granted only by the Court of Appeal for Ontario.

Appeal withdrawn accordingly.

1904

*NOV. 4.

[S. C. File No. 2296.]

LISGAR ELECTION CASE; WOODS ET AL. v. STEWART.

Controverted election—Abatement of appeal—Dissolution of Parliament—Return of deposit—Practice.

APPEAL from the Controverted Elections Court (14 Man. Rep. 268), reporting that corrupt practices had not prevailed extensively at the election in question, and that the evidence did not warrant further inquiry into the matters complained of by the petitioners.

At the time when the appeal came on for hearing there had been a dissolution of the Parliament in which the re-

* PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and SEDGEWICK, GIROUARD, DAVIES and NESBITT, JJ.

spondent had been returned as the member elected, and it was ordered that judgment should be entered declaring that the petition had abated by reason of the dissolution of Parliament, and that the petitioners were entitled to be re-paid the amount deposited in the office of the prothonotary of the Court of King's Bench for Manitoba, as security for the costs of the petition and of the appeal with accrued interest.

[S. C. File No. 2300.]

McLAUGHLIN CARRIAGE CO. v. WICKWIRE.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed with costs.

(23rd May, 1904.)

[S. C. File No. 2303.]

DINELLE v. BOURDON.

APPEAL from the Court of Review, at Montreal.

The parties were heard and judgment was reserved. On a subsequent day the appeal was dismissed with costs, the judgment appealed from, however, to be varied, and the words "casse et annule à toutes fins que de droit l'acte de société intervenu entre les parties, passé devant le notaire H. P. Pepin, le 3 décembre, 1901," to be struck out from the *dispositif* of the judgment of the Superior Court.

(16th May, 1904.)

1904

[S. C. File No. 2304.]

*May 13.
*May 16.

THE QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES (DEFENDANTS) ....APPELLANTS,

AND

HIS MAJESTY THE KING (PLAINTIFF)...RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Breach of trust — Interest on bonds — Unlawful acts by Crown officials—Ultra vires—Withholding interest from Crown—Necessity of impleading other interested parties—Practice.

APPEAL from the Exchequer Court of Canada (8 Ex. C. R. 390), which had maintained an information by the Attorney-General for Canada seeking the recovery of interest upon certain bonds of the trustees, defendants, held by the Government of the Dominion of Canada, as trustee for the Provinces of Upper and Lower Canada, under the provisions of the British North America Act, 1867.

On the opening of the appellants' arguments it appeared that, while some interest had been paid on similar bonds to other bondholders, the trustees had, for a number of years, ceased to pay any interest upon the bonds held by the Crown, but had applied the whole of the funds available for dividends to the payment of interest on the other bonds.

Counsel were stopped by the court announcing that the argument could not be further proceeded with until the other bondholders were made parties to the cause, and that the responsibility of having them added rested with the Crown. The court also announced that the form of the order to be made would be dealt with on a subsequent day, when,

SEDGEWICK, J. (for the court) ordered:—That the appeal should not now be heard, but that the judgment appealed from should be opened and the matter remitted to the

* PRESENT: SEDGEWICK, GIROUARD, DAVIES, NESBITT and KILLAM, JJ.

Exchequer Court of Canada for the purpose of having representation therein of all necessary parties according to the due practice of the said court, before final judgment should be given by the court therein.

Ordered accordingly.

Stuart, K.C., and *Lafleur*, K.C., for the appellants.
Shepley, K.C., for the respondent.

[ED. NOTE.—The case subsequently came up on another appeal which was dismissed with costs. See report 38 Can. S. C. R. 62.]

[S. C. File No. 2307.]

ARMSTRONG v. BEAUCHEMIN.

APPEAL from the Court of King's Bench, Province of Quebec, appeal side.

Dismissed with costs.

(16th May, 1904.)

(See 6 Que. P. R. 128.)

[S. C. File No. 2308.]

BUCHANAN v. CROWE.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed with costs for want of prosecution.

(14th March, 1904.)

(See 36 N. S. Rep. 1.)

1904

*March 16.
*March 22.

[S. C. File No. 2312.]

BRESNAN ET AL. v. BISNAW ET AL.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Jurisdiction—Amount in controversy—Adding interest to judgment—60 & 61 Vict. ch. 34 (D.)—R. S. O. (1897) ch. 51, s. 116.

In an appeal from the Province of Ontario, interest allowed by statute cannot be added to the amount of the judgments recovered in order to make the case appealable *de plano* under the provisions of the Act, 60 & 61 Vict. ch. 34 (D.). *Toussignant* v. *County of Nicolet* (32 Can. S. C. R. 353), followed.

Motion for the approval of a bond for security for costs of an appeal from the judgment of the Court of Appeal for Ontario, affirming the judgment of the Divisional Court, which had reduced the verdict in favour of the plaintiffs to the amount of $1,000, with costs.

The questions at issue upon the motion are stated in the judgment of the Registrar, now reported.

German, K.C., for the motion.
G. F. Henderson, contra.

THE REGISTRAR—This is an application for an order allowing a bond filed by the appellants, as security for the costs of an appeal from the Court of Appeal for Ontario. No exception is taken to the form of the bond, nor as to the financial qualification of the parties thereto. The respondent, however, objects that the case is not one in which an appeal lies *de plano*.

The facts as disclosed by the affidavits and material filed shew that the respondents brought an action against the appellants and recovered judgment for the sum of $3,000. On appeal to the Divisional Court of Ontario, judgment was directed to be entered, on 27th April, 1903, against the de-

* PRESENT: THE REGISTRAR, in Chambers.

fendants, present appellants, for $1,000 and costs. From this judgment an appeal was taken by the present appellants to the Court of Appeal, which was dismissed, on the 25th January, 1904, and it is from this latter judgment that the appellants now propose to carry an appeal to the Supreme Court of Canada.

The question to be decided is whether or not there can be taken into consideration interest since the 27th April, 1903, on the said judgment for $1,000, so as to bring the case within the provisions of the Act, 60 & 61 Vict. ch. 34, which, by sub-section (*c*), provides that an appeal should not lie unless

> the matter in controversy in the appeal exceeds the sum or value of $1,000 exclusive of costs.

The right to interest on the judgment depends solely upon section 116 of the "Ontario Judicature Act," which will be found in the Revised Statutes of Ontario (1897), ch. 51, which reads as follows:—

> Unless it is otherwise ordered by the court, a verdict or judgment shall bear interest from the time of the rendering of the verdict or of giving the judgment, as the case may be, notwithstanding proceedings in the action, whether in the court in which the action is pending or in appeal.

I have read, I think, all the decisions of this court which bear upon the question and I have been unable to find one expressly in point, although some of the cases which arose in the Province of Quebec, under section 29 of the Supreme and Exchequer Courts Act, appear to me to support the contention that, in determining the matter in controversy, we can only look at the amount of the judgment. *Vide Champoux* v. *Lapierre* (1); *Gendron* v. *Macdougall* (1).

This is the construction which has been placed upon corresponding provisions regulating appeals in the Province of Ontario from the Divisional Court to the Court of Appeal. In the case of *Foster* v. *Emory* (2), it was held that

(1) Cout. Dig. 56. (2) 14 Ont. P. R. 1.

1904

BRESNAN ET AL. v. BISNAW ET AL. THE REGISTRAR.

the provisions of the Ontario Act, R. S. O. (1887) ch. 51, s. 148, which provided, amongst other things, as follows:—

> In case a party to a cause wherein the sum in dispute upon the appeal exceeds $100, exclusive of costs, is dissatisfied with the decision of the judge, upon an application for a new trial, he may appeal to the Court of Appeal,

would not allow an appeal where interest required to be added to a judgment for $100 to give jurisdiction. Mr. Justice Maclennan, in that case, said:—

> By section 148 of the Revised Statutes of Ontario (1887) ch, 51, the right to appeal depends upon the sum in dispute upon the appeal. I think the sum in dispute is the $100 for which judgment was given, and that alone. The interest which has since accrued is not in dispute, and never was, and could not be; it is given by the statute as the result of the judgment. It is the judgment that is in appeal, not its results or consequences, and the judgment is only for $100.

Again in the case of *Sproule* v. *Wilson* (1), the decision in *Foster* v. *Emory* (2), was applied and affirmed, both by the Master in Chambers, and on appeal, by the Honourable Mr. Justice Rose.

The question, I think, is covered by the judgment in *Chowdry* v. *Chowdry* (3). In that case there was a judgment of the court of first instance for a sum under the amount required to permit of an appeal to the Judicial Committee of the Privy Council, but, if interest on the judgment were added, the amount involved would be amply sufficient to give jurisdiction. The judgment of the Judicial Committee was delivered by Lord Chelmsford, in which he says:—

> It has been determined, a short time ago, by their Lordships, in the case of *Roy* v. *Guneschunder*, that the Sudder Courts have no authority, under the order in council of the 10th of April, 1838, to add the interest accruing subsequent to the decree to the capital sum for the purpose of reaching the appealable amount.

The order in council reads as follows:—

> That from and after the 31st day of December next, no appeal to Her Majesty, Her Heirs and Successors, in council, shall be

(1) 15 Ont. P. R. 349. (2) 14 Ont. P. R. 1.
(3) 8 Moo. Ind. App. 262.

allowed by any of Her Majesty's Supreme Courts of Judicature at Fort William, in Bengal, Fort St. George, Bombay, or the Court of Judicature of Prince of Wales Island, Singapore, and Malacca, or by any of the courts of Sudder, Dewanny, Adawlut, or by any other courts of judicature in the territories under the government of the East India Company, unless the petition for that purpose be presented within six calendar months from the day of the date of the judgment, decree or decretal order complained of, and unless the value of the matter in dispute in such appeal shall amount to the sum of ten thousand company's rupees, at least. (MacQueen's Privy Council Practice, p. 728.)

The view taken by Mr. Justice Maclennan, and as I think, by the Judicial Committee, in the last mentioned case, appears to me to be the correct one. The interest is payable pursuant to the section of the Judicature Act to which I have referred, and is a matter, in my opinion, collateral altogether to the judgment, and should not be taken into consideration in considering the amount involved in the appeal. This view is in accord with the decision of the Supreme Court in the case of *Toussignant* v. *The County of Nicolet* (5), where the present Chief Justice said:

> It is settled law that neither the probative force of a judgment nor its collateral effects, nor any contingent loss that a party may suffer by reason of a judgment, are to be taken into consideration when our jurisdiction depends upon the pecuniary amount, or upon any of the subjects mentioned in section 29 of the Supreme Court Act.

I am of the opinion, therefore, that no appeal lies in the present case, and the motion to allow the security is, therefore, refused with costs.

Motion refused with costs.

Solicitors for the appellants: *DuVernet, Jones, Ross & Ardagh.*

Solicitor for the respondents: *H. A. Stewart.*

(5) 32 Can. S. C. R. 353.

1905

[S. C. File No. 2313.]

THE KRAMER-IRWIN ROCK AND ASPHALT CO. v. THE CITY OF HAMILTON.

APPEAL from the Court of Appeal for Ontario.

Discontinued.

(22nd February, 1905.)

1904

[S. C. File No. 2314.]

*March 21.
*March 25.

THE LONDON STREET RAILWAY CO. v. THE CITY OF LONDON.

Special leave to appeal—Discretion—Matter in controversy.

MOTION for special leave to appeal from the Court of Appeal for Ontario.

(See 9 Ont. L. R. 439.)

The only notes of reasons delivered were as follows:—

NESBITT, J.—The questions are in regard to the issue of a mandatory order respecting the running of cars and when the city can demand extensions of the lines of tracks. I do not see that the questions involved are of a character to warrant the exercise of the discretion of the court in giving special leave.

Motion refused with costs.

Hellmuth, K.C., for the motion.

Aylesworth, K.C., contra.

* PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and SEDGEWICK, DAVIES, NESBITT, and KILLAM, JJ.

[S. C. File No. 2318.] 1904

*March 25.

THE ALGOMA CENTRAL AND HUDSON BAY RAILWAY CO. v. FRASER.

Practice—Non-prosecution of motion.

On a NOTICE of MOTION for special leave to appeal from the Court of Appeal for Ontario.

Denton, K.C., for the respondent, Fraser, informed the court that he appeared pursuant to the notice returnable on 25th March, 1904. The appellants did not appear to support the motion.

The motion was dismissed with costs, which were fixed by the court at $50.

Motion dismissed with costs.

* PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and SEDGEWICK, GIROUARD, DAVIES and KILLAM, JJ.

[S. C. File No. 2320.] 1907

IN RE TOLLS ON CANADIAN PACIFIC RAILWAY.

REFERENCE by the Governor-in-Council under sec. 37 of the Supreme and Exchequer Courts Act as amended by 54 & 55 Vict. ch. 25, sec. 4.

Standing for hearing.

(1st June, 1907.)

1904

[S. C. File No. 2321.]

THE GRAHAM MANUFACTURING CO. v. ELLIS.

APPEAL from the Exchequer Court of Canada.

Withdrawn.

(7th June, 1904.)

[S. C. File No. 2324.]

THE GRAND TRUNK RAILWAY CO. v. HOCKLEY AND DAVIS.

APPEAL from the Court of Appeal for Ontario.

Dismissed with costs.

(23rd May, 1904.)

[S. C. File No. 2327.]

LEWIN v. LEWIN.

APPEAL from the Supreme Court of New Brunswick.

Struck off the roll of cases inscribed for hearing on request of counsel.

(20th May, 1904.

(See 36 N. B. Rep. 365.)

[S. C. File No. 2330.]

1904

*Nov. 29.
*Dec. 1.

KNOCK v. OWEN.

Varying minutes of judgment—Division of costs—Appellant partly successful.

MOTION to vary the minutes of judgment (35 Can. S. C. R. 168) as settled by the registrar, or for amendment of the judgment by declaring the appellant entitled to her costs in the Supreme Court of Canada and in the courts below, on the ground that, as she had succeeded on one point, and in part as to another point, the costs ought to be allowed in her favour in the first case, and ought not to go against her in the other.

Wade, K.C., for the motion.

W. B. A. Ritchie, K.C., contra.

The following memorandum was delivered by GIROUARD, J., upon the dismissal of the motion.

GIROUARD, J.—The court has already disposed of this particular matter in our formal judgment, where we read: "No costs of this appeal, and no interference with the disposition of the costs in the courts below" (1). The question of costs had been fully considered by the court when that judgment was rendered, and when we did so we did not overlook the fact that the appellant had partially succeeded. But such partial modification of the judgment appealed from does not alter the fact that substantially the respondent succeeded in both courts.

We, therefore, see no reason to induce us to reverse ourselves.

Motion dismissed with costs.

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* PRESENT: GIROUARD, DAVIES, NESBITT, and KILLAM, JJ.

(1) Cf. 35 Can. S. C. R., at p. 174, *per* Davies, J.

1904

*June 1.
*June 8.

[S. C. File No. 2339.]

THE JOHN DICK CO. (DEFENDANTS).....APPELLANTS,

AND

WILLIAM H. GORDANEER (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF JUSTICE FOR ONTARIO.

Right of appeal—62 Vict. c. 11, s. 27 (Ont.)—Special leave to appeal per saltum — Questions in controversy—Negligence—Damages—Amendment of pleadings—Rule 615—Nonsuit—Verdict—Procedure.

Since the enactment of the 27th section of chapter 11 of the statutes of Ontario, 62 Vict. (1899), a party appealing to a Divisional Court of the High Court, in a case where an appeal lies to the Court of Appeal for Ontario, has no right of appeal from the judgment of such Divisional Court to the Supreme Court of Canada, without special leave. *Farquharson* v. *The Imperial Oil Co.* (30 Can. S. C. R. 188), distinguished.

In the present case, as the findings of the jury, upon which a verdict was entered, made it apparent that there was no necessity for amending the statement of claim or for any additional finding of a controversial fact, the Divisional Court was justified in permitting an amendment claiming damages as well under the Ontario Workmen's Compensation for Injuries Act as at common law.

MOTION for special leave to appeal *per saltum* from the judgment of a Divisional Court of the High Court of Justice for Ontario, affirming the judgment of the trial court in favour of the plaintiff for $1,250 with costs.

A similar motion was refused by the registrar, in chambers (23rd May, 1904), and a motion, by way of appeal from him to a judge of the Supreme Court, in Chambers, was referred to the full court by Mr. Justice Nesbitt.

The circumstances under which the motions were made are stated in the following judgment by

THE REGISTRAR.—This is an application on behalf of the defendants for leave to appeal *per saltum* from a judg-

* PRESENT: SEDGEWICK, GIROUARD, DAVIES, NESBITT and KILLAM, JJ.

ment of a Divisional Court of Ontario affirming the judgment entered at the trial in favour of the plaintiff, upon the findings of the jury, awarding the plaintiff $1,250 damages. The action was instituted by the plaintiff claiming damages for the injury which he sustained through the negligence of the defendant company in providing defective and unsafe machinery in their factory. The action was framed claiming damages for negligence at common law, and was not coupled with a claim under the Ontario Workmen's Compensation for Injuries Act, but the Divisional Court, being satisfied with the findings of the jury, allowed the pleadings to be amended so as to claim compensation under this Act, although the plaintiff might not have been able to succeed at common law.

Under the practice which obtains in the Province of Ontario, the defendants, having appealed to the Divisional Court, had no further appeal to the Court of Appeal, except by special leave of that court. They, thereupon, applied for leave to a judge of the Court of Appeal, and their application was refused by Mr. Justice Osler, who was satisfied, on a review of the evidence, that the verdict of the jury was correct.

The defendants now ask for leave to appeal to the Supreme Court *per saltum* from the judgment of the Divisional Court, counsel at the same time claiming that the defendants have an appeal *de plano* from the judgment of the Divisional Court, but, there being some doubt on this point, he prefers to make an application for the special leave of the court, just as was done in the case of *Farquharson* v. *The Imperial Oil Co.* (1).

In the material before me, I do not find it was urged in the courts below that the Divisional Court, under Rule 615, had not power to make the amendment it did and give such judgment upon the amended pleadings as the evidence warranted. The ground is now pressed by counsel for the appellants, but this court has frequently held that it will not

(1) 30 Can. S. C. R. 188.

1904

JOHN DICK CO. v. GORDANEER. — THE REGISTRAR.

interfere in matters of procedure and practice unless grave injustice would, otherwise, result. *Finnie* v. *The City of Montreal* (1). To succeed in the present application, therefore, the appellants must shew that the Divisional Court, and Mr. Justice Osler in the Court of Appeal, erred in holding that the trial judge was right in refusing a nonsuit, and that the case was properly submitted to the jury. The evidence was fully considered by the judges and I concur in their conclusions.

It is well settled, I think, in this court that leave to appeal *per saltum* will only be granted where either the taking of an appeal to the Court of Appeal would be an unnecessary expense, as that court would be bound by one of its own decisions in a similar case, the effect of which the appellant seeks to avoid: *Moffatt* v. *The Merchants Bank of Canada* (2), *Kyle* v. *The Canada Co.* (3), *The Attorney-General for Ontario* v. *The Vaughan Road Co.* (4), or where some exceptionally important matters are involved: *Farquharson* v. *The Imperial Oil Co.* (5), *The Ontario Mining Co.* v. *Seybold* (6).

This disposes of the application, but I do not desire, by my judgment, to prejudice or preclude the defendants from appealing to the Supreme Court if they have the right so to do independently of any leave to appeal. The limitations placed upon appeals to the Supreme Court from the province of Ontario by 60 & 61 Vict. ch. 34 (D.) only apply to appeals from the Court of Appeal and not to appeals from the Divisional Court, if the Divisional Court is, under sec. 24 of the Supreme and Exchequer Courts Act, the highest court of final resort so far as these defendants are concerned. This case, in my opinion, is entirely on fours with that of *Farquharson* v. *The Imperial Oil Co.* (5), and, if the opinions, in this regard, of Sir Henry Strong, then Chief Justice, and Mr. Justice Gwynne, are correct, the defendants have an appeal *de plano*, but the court in that case expressed no opinion on that point. I do not understand that *The Ottawa Electric Co.* v. *Brennan* (7), is a decision

(1) 32 Can. S. C. R. 335.
(2) 11 Can. S. C. R. 46.
(3) 15 Can. S. C. R 188.
(4) Cass. Prac. (2 ed.), 37.
(5) 30 Can. S. C. R. 188.
(6) 31 Can. S. C. R. 125.
(7) 31 Can. S. C. R. 311.

which disposes of the right to appeal *de plano* from the Divisional Court, as, in that case, the application was one for leave to appeal *per saltum*, and the court held that, there being no appeal to the Court of Appeal, either *de plano* or by special leave, it was not a case in which leave to appeal *per saltum* could be granted. I do not understand that there has been any decision of the Supreme Court expressly holding that there is no appeal *de plano* from the Divisional Court, where no appeal lies from the Divisional Court to the Court of Appeal.

The motion is refused with costs.

Upon the hearing of the motion to a judge in chambers, by way of appeal from the above decision, the question was referred to the full court by His Lordship Mr. Justice Nesbitt, and the motion coming on to be heard before the full court;—

DuVernet appeared for the motion.

Huyck, K.C., contra.

The judgment of the court was delivered by

NESBITT, J.—The answers of the jury, fairly read, indicate that the negligence causing the accident which was found by them, was the condition of the shifting apparatus, and, if that is the correct view, there would not be any necessity for an amendment of the statement of claim or any additional finding of a controversial fact, and the course pursued by the Divisional Court, under Rule 615, was justified within the authorities.

Upon the question of law as to whether or not there should have been a nonsuit, we do not think the case of sufficient importance to warrant the granting of special leave, and apparently, since the passing of sec. 27, ch. 11, Ontario Statutes, 1899 (62 Vict.), the reasoning of His Lordship Mr. Justice Gwynne, in the case of *Farquharson* v. *The Imperial*

1904

JOHN DICK CO. v. GORDANEER.

NESBITT, J.

Oil Co. (1), is no longer applicable, and there is no right of appeal without special leave.

Leave refused with costs.

Motion refused with costs.

(S. C. File No. 2343.)

1904

*Dec. 2.

VICTOR SPORTING GOODS CO. v. THE HAROLD A. WILSON CO.

Appeal—Jurisdiction—Matter in controversy—Patent of invention—R. S. C. c. 61, s. 46.

APPEAL from the Court of Appeal for Ontario.

MOTION to quash the appeal for want of jurisdiction on the grounds that (1) the matter in controversy on the appeal, exclusive of costs, was less than $1,000, (2) the validity of the patent was not affected, but a question involved merely as to the construction of a statute, and (3) that special leave to appeal had not been obtained from the Court of Appeal for Ontario.

The hearing on the motion was postponed until hearing on merits.

On the hearing it appeared that the appellants held letters patent of invention for a punching-bag, and respondents, before the patent issued, had purchased a bag and manufactured a number from it. After the issue of the patent this action was brought by the appellants for infringement in selling what was left of the goods so manufactured by the respondents. The latter relied on R. S. C. (1886) ch. 61, sec. 46, which provides that a person manufacturing the subject matter of the invention, before issue of patent, could sell what he had on hand after its issue, and that such sale would not affect the patent as to other persons unless done with the consent of the patentee.

* PRESENT: SEDGEWICK, GIROUARD, DAVIES, NESBITT and KILLAM, JJ.

(1) 30 Can. S. C. R. 188.

The appellants claimed that the consent mentioned referred to the first part of the section, as to manufacturing, etc., as well as to the latter portion, and also that the section only referred to *bonâ fide* manufacture, and not to a case such as this, where the respondents procured the sample fraudulently with the object of infringing the patent, which, to their knowledge, had been applied for.

Upon hearing the arguments on the merits judgment was reserved and, subsequently, the appeal was quashed with costs as of a motion to quash.

Appeal quashed with costs.

Rose, for the appellants.

Bayly, and *E. Armour*, for the respondents.

[S. C. File No. 2344.]

LYON v. McKENZIE.

MOTION for special leave to appeal from the Exchequer Court of Canada.

Entered but never prosecuted.

(5th July, 1904.)

[S. C. File No. 2349.]

THE BARQUE "BIRGITTE" v. FORWARD.

APPEAL from the Nova Scotia Admiralty Division of the Exchequer Court of Canada.

Abandoned without costs.

(1st December, 1904.)

1904

[S. C. File No. 2350.]

THE BARQUE "BIRGETTE" v. MOULTON.

APPEAL from the Nova Scotia Admiralty Division of the Exchequer Court of Canada.

Abandoned without costs.

(1st December, 1904.)

[S. C. File No. 2353.]

AHEARN v. BOOTH.

APPEAL from the Court of Appeal for Ontario dismissed with costs.

Mr. Justice Nesbitt delivered a memo. of his reasons as follows:

"I would dismiss this appeal for the reasons given by the Chief Justice in the court below."

Appeal dismissed with costs.

(1st December, 1904.)

1905

[S. C. File No. 2358.]

WHITNEY v. MEANS.

APPEAL from the Supreme Court of Nova Scotia affirming the judgment at the trial entered, on findings for the plaintiff.

1905

WHITNEY v. MEANS.

The action was for the recovery of 500 shares in the Dominion Iron and Steel Co. under an alleged agreement by the defendant, appellant, or for damages for breach of the contract.

The appeal was allowed with costs and the action dismissed with costs.

The majority of the Court, Sedgewick, Davies and Killam, JJ., were of opinion that the evidence was not sufficient to prove the contract as alleged. Girouard and Nesbitt, JJ., dissented, for the reasons given in the court below.

(31st January, 1905.)

[S. C. File No. 2359.]

1904

WHITE v. THE QUEBEC SOUTHERN RAILWAY CO.

APPEAL from the Exchequer Court of Canada.

Withdrawn.

(27th September, 1904.)

[S. C. File No. 2361.]

NEW FAIRVIEW CORPORATION v. LOVE.

APPEAL from the Supreme Court of British Columbia.

Settled out of court.

(19th September, 1904.)

1905

[S. C. File No. 2366.]

CORPORATION OF DELTA v. WILSON.

APPEAL from the Supreme Court of British Columbia. On the case being called, counsel for respondent suggested that the court had no jurisdiction to entertain the appeal. Counsel for the appellant, after consideration, stated to the court that he was unable to distinguish the case from that of *The Mutual Reserve Fund Life Insurance Association* v. *Dillon* (1), and the appeal was quashed without costs.

(30th March, 1905.)

1904

*Dec. 5.

1905

*Jan. 31.

[S. C. File No. 2368.]

McLEAN v. McKAY.

Construction of deed—Mortgage or sale—Equity of redemption.

APPEAL from the judgment of the Supreme Court of Nova Scotia affirming the trial court judgment.

The action was for a declaration that two deeds executed, in 1881, of land at Broad Cove Shore, Inverness County, N.S., and drawn up by the parties themselves, although absolute in form, were in reality intended to operate as mortgages to secure payment of a debt owing by the plaintiff to the defendant of about $800 for a lot of horses, and also for an account to the plaintiff for $17,000 recently received by the defendant upon the sale by him of a portion of the property.

*PRESENT: SEDGEWICK, GIROUARD, DAVIES, NESBITT and KILLAM, JJ.

(1) 34 Can. S. C. R. 141.

At the trial, Mr. Justice Weatherbe held that, on the evidence, no case had been made out to disturb the defendant's title, and he dismissed the action with costs. This judgment was unanimously affirmed by the full court, and the plaintiff appealed asking for reversal of these judgments on the ground that they are not justified by the evidence admitted, and alternatively for a new trial on account of improper rejection of evidence.

W. B. A. Ritchie, K.C., for the appellant.

Newcombe, K.C., and *Mellish*, K.C., for the respondent.

After hearing counsel for both parties, the court reserved judgment and, on a subsequent day, dismissed the appeal with costs, the only reasons for judgment delivered being as follows:

NESBITT, J.—I would dismiss the appeal with costs on the ground of abandonment of the right to redeem.

KILLAM, J.—I have trouble in accepting the rulings as to the reception of evidence upon which argument was made before us. But for this trouble, I would think the judgment of the court below correct upon the grounds taken. It appears to me, however, that the plaintiff and his wife abandoned any right to redemption in consideration of the return of the money paid. That being so, any ground of objection on account of the rejection of evidence is unimportant.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

1904

*Nov. 15.

1905

**April 7.
**May 2.

[S. C. File No. 2375.]

THE VILLAGE OF BRUSSELS v. McCRAE ET AL.

Appeal—Extension of time—Order by single judge—Jurisdiction—Order by court appealed from—Municipal by-law.

APPEAL from the judgment of the Court of Appeal for Ontario, reversing the judgment of the Chancellor of Ontario, which dismissed, with costs, the respondents' motion to quash a by-law for borrowing money for the construction of a sewer in the Village of Brussels.

The appeal was entered in the Supreme Court of Canada under an order made by Mr. Justice Maclaren, one of the judges of the court appealed from, extending the time for bringing the appeal.

When the appeal came on to be heard in the Supreme Court (15th November, 1904), the Court, *suo motû*, quashed the appeal, with costs as of a motion to quash, for want of jurisdiction to hear the same, on the ground that the order should have been made by the court from which the appeal was asserted, and not by a single judge thereof.

Subsequently (23rd January, 1905), upon motion before the Court of Appeal for Ontario, an order was made granting special leave for the appeal and extending the time for bringing such appeal until and including the then next sittings of the Supreme Court of Canada.

The appeal was then heard upon the merits.

Aylesworth, K.C., and *W. M. Sinclair* for the appellant.

Proudfoot, K.C., for the respondents.

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* PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and SEDGEWICK, DAVIES, NESBITT and KILLAM, JJ.

** PRESENT: SEDGEWICK, GIROUARD, DAVIES, NESBITT and IDINGTON, JJ.

1904

VILLAGE OF BRUSSELS v. MCCRAE ET AL.

After hearing counsel for both parties, judgment was reserved and, on a subsequent day, the appeal was dismissed with costs. The only notes of reasons delivered were as follows:

IDINGTON, J.—I think, for the reasons given by the Chief Justice of Ontario, in the judgment appealed from, that the by-law in question was properly quashed and that this appeal should be dismissed with costs.

Appeal dismissed with costs.

[S. C. File No. 2381.]

1906

PRICE v. THE CITY OF HAMILTON.

MOTION for special leave to appeal from the Court of Appeal for Ontario.

Granted.

Costs to be costs in the cause.

(21st November, 1904.)

Appeal abandoned, 6th June, 1906.

[S. C. File No. 2382.]

ROBERT v. THE KING.

APPEAL from the Exchequer Court of Canada.

Settled out of court.

(27th March, 1906.)

1905

[S. C. File No. 2384.]

HAMILTON STEEL AND IRON CO. v. COOPER.

APPEAL from the Court of Appeal for Ontario.

Settled out of court.

(4th April, 1905.)

[S. C. File No. 2390.]

TOBIQUE MANUFACTURING CO. v. HALE.

APPEAL from the Supreme Court of New Brunswick (36 N. B. Rep. 360).

Dismissed with costs by consent.

(1st March, 1905.)

[S. C. File No. 2391.]

THE CHICOUTIMI PULP CO. v. RACINE.

APPEAL from the Court of Review at Quebec.

Dismissed with costs for want of prosecution.

(31st January, 1905.)

[S. C. File No. 2392.]

1905

THE MUTUAL RESERVE FUND LIFE ASSOCIATION v. DILLON.

*March 30.
*May 2.

Life insurance — Misrepresentation — Findings of jury — Evidence of experts—Classes of opinions.

APPEAL from the Court of Appeal for Ontario affirming the judgment entered in favour of the plaintiff upon the findings of the jury.

The judgment now appealed from was upon the second trial ordered by the judgment from which appeal was sought in the former case before the Supreme Court of Canada (34 Can. S. C. R. 141), the case, this time, being heard upon the merits.

T. G. Blackstock, K.C., and *Henderson* for the appellants.

Lucas for the respondent.

The appeal was dismissed with costs, the only reasons for judgment delivered being as follows:

DAVIES, J.—After a most careful perusal of the evidence in this case, subsequent to the very able argument addressed to us by Mr. Blackstock on behalf of the appellants, I am satisfied that there was sufficient evidence to go to the jury on which they could make the findings they did. It is true the evidence was conflicting, more especially that given by the experts. But it is clear that it was specially the province of the jury to determine which class of opinions of these divided experts they would accept. The verdict is one which, in my opinion, reasonable men might, under the evidence, fairly find, and with which, therefore, courts of appeal should not interfere.

The arguments before us were confined almost altogether to the truth and materiality of the answer to the question put to the applicant for insurance, at the time of the application, as to his being afflicted with "the com-

* PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and SEDGEWICK, GIROUARD, DAVIES and IDINGTON, JJ.

1905

MUTUAL RESERVE FUND LIFE ASSOCIATION. v. DILLON.

plaint or disease of open sores." The answer respecting the age of the applicant was not pressed and, I think, properly so, as it would not have been possible, under the facts of the case, to have held that the answer given to that question could have avoided the policy. It is not necessary, therefore, to deal with any of the questions raised below on this branch of the case.

The appeal should be dismissed with costs.

IDINGTON, J.—For the reasons assigned in the opinion of the Chief Justice of Ontario, I think the judgment entered at the trial ought to stand. I, therefore, think this appeal should be dismissed with costs.

Appeal dismissed with costs.

1906

[S. C. File No. 2396.]

THE OTTAWA SEPARATE SCHOOL TRUSTEES v. GRATTON.

APPEAL from the Court of Appeal for Ontario (9 Ont. L. R. 433).

Abandoned.

(26th May, 1906.)

1905

[S. C. File No. 2397.]

MONTREAL STREET RAILWAY CO. v. THERRIEN.

APPEAL from the Court of Review, at Montreal.

Entered but never prosecuted.

(1st February, 1905.)

[S. C. File No. 2398.]

1905

*Feb. 1.

IN RE THE MONTREAL COLD STORAGE AND FREEZING COMPANY, IN LIQUIDATION; WARD v. MULLIN.

"Winding-up Act"—Leave to appeal—Discretion—Construction of Dominion statutes—Appeal de plano—R. S. C. (1886) c. 129. s. 76.

Where an important question respecting the construction of a Dominion statute is involved, the discretion allowed by section seventy-six of the "Winding-up Act" should be exercised, and leave to appeal granted, but that Act does not give the right of appealing *de plano*. *The Lake Erie and Detroit River Railway Co.* v. *Marsh* (35 Can. S. C. R. 197), followed.

APPLICATION for leave to appeal from the Court of King's Bench, Province of Quebec, appeal side, under the "Winding-up Act" (R. S. C. (1886) ch. 129, sec. 76).

THE REGISTRAR.—When the application first came before me it was contended by the petitioner, and this contention is repeated in the written argument filed by his counsel, that, upon the petitioner establishing that the amount involved exceeded $2,000, he was practically entitled, as of right, to bring his appeal and have his security allowed.

I do not so construe the section in question. On the contrary, I am of the opinion that the words

an appeal shall lie to the Supreme Court of Canada by leave of a judge of the said Supreme Court,

must receive the same construction in this section as has been placed upon them in other statutes that confer jurisdiction upon the Supreme Court only after leave or special leave has been granted by that Court. By 60 & 61 Vict. ch. 34, an appeal is given to the Supreme Court from the Court of Appeal for Ontario by special leave of the Supreme Court, and, quite recently, in the case of *The Lake Erie and Detroit River Railway Co.* v. *Marsh* (1), Mr. Justice Nesbitt, speak-

* PRESENT: GIROUARD, J., in Chambers.

(1) 35 Can. S. C. R. 197.

1905

IN RE MONTREAL COLD STORAGE AND FREEZING CO. WARD v. MULLIN. THE REGISTRAR.

ing for the court, lays down some general principles applicable to applications of this sort, and which, it appears to me, when applied to the facts of this case, are conclusive of the application. He says that

> where the case involves matter of public interest, or some important question of law, or the application of Imperial or Dominion statutes, or a conflict of provincial and Dominion authority, or questions of law applicable to the whole Dominion, leave may well be granted.

In the present case, the judgment of the Court of King's Bench (appeal side), as pronounced by the Chief Justice of that court, makes it clear that an important question of law is involved in the adjudication of this appeal, namely, the extent to which the apparently unlimited power of the liquidator, with the approval of the court, to compromise creditors' claims, given by section 61 of the "Winding-up Act," has been modified or restricted by the provisions of the statute, 62 & 63 Vict. ch. 43, sec. 3, which makes provision for a compromise being binding upon all the creditors which is made under the supervision of the court after the same has been approved by a majority of the creditors representing three-fourths in value of the creditors' claims.

It appears to me that we have here a case which expressly falls within the class above referred to by Mr. Justice Nesbitt, one involving the interpretation to be placed upon a very important statute of the Parliament of Canada. I think, therefore, leave to appeal should be granted.

Subsequently (1st February, 1905), the decision of the Registrar was approved by Mr. Justice Girouard, in Chambers.

Leave to appeal granted, costs to be costs in the cause.

On 11th May, 1905, the appeal was dismissed for want of prosecution.

[S. C. File No. 2408.] 1905

THE CITY OF MONTREAL v. GORDON.

Municipal corporation—Aid to civil power—Pay of militia—Legislative jurisdiction—Civil rights and obligations.

APPEAL from the Court of King's Bench, Province of Quebec, appeal side, declaring the municipal corporation liable for the pay of militia called out in aid of the civil power.

Both courts below found against the city which appealed on the grounds (1) that the Parliament of Canada had no constitutional right, in the Militia Act, to impose civil oblgations upon any provincial municipality for the payment of the troops, and (2) that as the riots were confined to the harbour controlled by Dominion commissioners and outside the corporation limits, the city was not liable under the statute even should it be held constitutional.

Atwater, K.C., and *Ethier*, K.C., for the appellant.

Cooke, K.C., for respondent.

The appeal was dismissed with costs without calling upon counsel for the respondent for any argument.

(13th March, 1905.)

[S. C. File No. 2411.] 1905

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS, *April 3, *May 15.

AND

MARY E. DEPENCIER (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—"Lord Campbell's Act"—Findings of jury—Verdict—Damages.

Where there is evidence in support of a verdict, upon proper directions to the jury by the trial judge, a court of appeal ought not

* PRESENT: SEDGEWICK, GIROUARD, DAVIES, NESBITT and IDINGTON JJ.

1905

GRAND TRUNK RY. CO. v. DEPENCIER.

to interfere with the assessment of damages unless they appear to be so excessive that no reasonable men, upon such evidence, would have awarded such an amount.

Judgment appealed from affirmed.

APPEAL from the Court of Appeal for Ontario affirming the judgment entered upon the verdict of the jury, at the trial.

A passenger on the defendants' railway was killed in an accident, at Watford, Ontario, on 26th December, 1902, and in an action for damages, a verdict was recovered for the plaintiff, damages being apportioned as follows:

To the widow, plaintiff	$5,000 00
To the eldest son, aged 18 years	800 00
To the second son, aged 16 years	1,100 00
To the daughter, aged 12 or 13 years	100 00
To the youngest son, aged 5 years	3,000 00
Total	$10,000 00

The company defended the action generally, but subsequently admitted liability, and paid $5,500 into court, under the Ontario Rule of Practice No. 419.

The defendants' principal grounds of appeal, in the court below, repeated on the present appeal, were that counsel for the plaintiff was permitted to state to the jury the amount which had been paid into court, that the jury in consequence, regarding the company as *caput lupinum*, awarded an excessive sum for damages, and that the evidence did not justify the excessive assessment on which the judgment against the defendants was entered.

Riddell, K.C., for the appellants.

Hellmuth, K.C., and *J. Moss*, for the respondent.

SEDGEWICK, J., concurred in the dismissal of the appeal with costs.

GIROUARD, J.—The grievance of the appellants is that the amount of the verdict is excessive. They have offered

$5,500 in court. I am not prepared to say that the verdict is unreasonable.

DAVIES, J.—I have had the greatest difficulty in reaching a conclusion in this case, because, while I was satisfied that the damages awarded by the jury were excessive and much beyond what I would have given under the evidence, had I been a juryman, I was not so clear and convinced beyond all doubt as to justify me in reversing the unanimous judgment of the Court of Appeal confirming the verdict.

I could not bring myself to say positively that, under the circumstances, the verdict was one which reasonable men could not fairly find.

The Act under which the damages were awarded, commonly known as "Lord Campbell's Act," limits the damages which can be awarded to pecuniary damages suffered by the interested parties. These damages are, of course, very different from those which may be awarded in cases where questions of sentiment and suffering are allowed to be considered. In cases under "Lord Campbell's Act," such considerations are rightly excluded in the damages awarded, therefore are more within the control of the court.

But, having some doubts, I act upon the well known rule that the judgment appealed from should not be disturbed in such a case.

NESBITT, J., also concurred in the dismissal of the appeal with costs.

IDINGTON, J.—I am under the impression that the verdict in this case might well have been less than the total amount given by the jury. I do not see, however, any misdirection on the part of the learned trial judge, nor do I see any other grounds upon which a new trial could be directed. There is evidence, if believed by the jury, that would support their finding and thus bring it within the rule that no verdict should be set aside simply on the ground of ex-

1905

GRAND TRUNK RY. CO. v. DEPENCIER.

IDINGTON, J.

cessive damages, unless the damages are so excessive that no twelve men could reasonably have found so. I cannot say, large as I think the amount allowed, that it is of that excessive character. I, therefore, think that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants, *W. H. Biggar.*

Solicitors for the respondent, *Barwick, Aylesworth, Wright & Moss.*

[S. C. File No. 2413.]

NICOL v. CHISHOLM.

APPEAL from the Supreme Court of Nova Scotia.

The appeal was dismissed with costs for the reasons stated by Graham, J., in the court below. Nesbitt, J., *hesitante.*

The only notes of reasons delivered were as follows:

NESBITT, J.—As the majority of the court affirm the judgment appealed from, I shall not dissent, but I accept the view with great hesitation.

Appeal dismissed with costs.

(9th March, 1905.)

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* PRESENT: SEDGEWICK, GIROUARD, DAVIES, NESBITT and IDINGTON, JJ.

[S. C. File No. 2415.] 1905

THE KING v. McLELLAN.

APPEAL from the Exchequer Court of Canada.

Notice of appeal given. Appeal never prosecuted.

(17th February, 1905.)

[S. C. File No. 2424.]

LEMIEUX v. PAQUET; L'ISLET ELECTION CASE.

APPEAL from the Controverted Elections Court.

Discontinued.

(29th September, 1905.)

[S. C. File No. 2427.]

THE GRAND TRUNK RAILWAY CO. v. SPEERS.

Railways—Negligence—"Fatal Accidents Act"—R. S. O. (1897) c. 129, s. 10.

APPEAL from the Court of Appeal for Ontario.

The appeal was heard on 30th May, 1905.

Riddell, K.C., for the appellants.
McKay, K.C., for the respondents.

1906

GRAND TRUNK RY. CO. v. SPEERS.

On 26th June, 1905, a re-hearing was ordered, the court intimating that the re-hearing should be upon the whole case, but drawing the attention of counsel specially to the case of *Mason* v. *Town of Peterborough* (1), and to the combined effect of the "Fatal Accidents Act," and of sec. 10, ch. 129, R. S. O. (1897)—the questions being as to whether the two actions can now be maintained, or, if not, which one must fail.

The case was subsequently settled out of court.

(15th March, 1906.)

1905

[S. C. File No. 2430.]

HAYES v. PERRY.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed for want of prosecution.

(3rd April, 1905.)

[S. C. File No. 2433.]

PATTERSON v. LANE.

APPEAL from the Supreme Court of the North-west Territories.

Discontinued and dismissed with costs.

(29th May, 1905.)

(1) 20 Ont. App. R. 683.

[S. C. File No. 2434.] 1905

THE TORONTO RAILWAY CO. (DEFENDANTS)..... APPELLANTS, *June 7. *June 13.

AND

IRENE P. MITCHELL (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Operation of tramway—Negligence—Evidence—Findings of jury.

Where there was some evidence to support the verdict the Supreme Court of Canada refused to reverse the findings.

APPEAL from the Court of Appeal for Ontario affirming the judgment of the trial court, which ordered a verdict to be entered for the plaintiff upon the findings of the jury.

The judgment of the court was delivered by

DAVIES, J.—I am not able to say that there was not evidence before the jury from which reasonable men might not have found the verdict they did. Part of that evidence consisted in the plan before the trial court shewing the street where the accident occurred and the relative positions of the cross-streets, the car, child and the witnesses. Very much depended upon these relative positions, as the crux of the dispute was whether the motorman could or ought to have seen the child start from the sidewalk to run across the street. These relative positions were pointed out by the witnesses on the plan, and the trial court and the jury had the full benefit of these explanations, which, it is obvious, we cannot have, the positions they pointed out on the plan not having been marked thereon.

The trial judge left the case to the jury in a comprehensive charge as to which no exception is taken; he was of opinion that there was some evidence upon which the jury could find negligence against the defendants and refused to non-suit. The Court of Appeal has dismissed the appeal

*PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and SEDGEWICK, DAVIES, NESBITT and IDINGTON, JJ.

1905

TORONTO RAILWAY CO. v. MITCHELL.

DAVIES, J.

against the verdict, and we are now asked to say that there was no evidence to go to the jury and that the non-suit should have been granted.

The evidence is weak, I admit, and in some respects contradictory, but there certainly was some evidence to go to the jury, and evidence, I think, from which reasonable men might fairly draw the conclusion they did.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Kappelle and *Bain* for the appellants.

Bristol for the respondent.

1906

[S. C. File No. 2436.]

IN RE ATLAS LOAN COMPANY; BELFRY v. COOK ET AL.

APPEAL from the Court of Appeal for Ontario.

Settled out of court.

(May, 1906.)

1905

*May 12.
*May 29.

[S. C. File No. 2441.]

BRETON v. GONTHIER DIT BERNARD.

Actio negatoria servitutis — Boundary ditch—Estoppel—Waiver of objections—Evidence.

APPEAL from the judgment of the Court of Review, at Quebec, affirming the judgment of the Superior Court.

* PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and GIROUARD, DAVIES, NESBITT and IDINGTON, JJ.

District of Quebec, which maintained the plaintiff's (respondent's) action with costs.

The appellant, defendant, under orders from the rural inspectors of the Parish of St. Gervais, County of Bellechasse, extended a boundary ditch on the line between his farm and Bernard's so as to drain some low lands in the rear of these lands where Spring and Fall floods formed a pool of surface water. Bernard paid his share of the work and apparently acquiesced in the order of the inspectors, but later on brought an action *negatoria servitutis* against Breton on the grounds that the extension of the ditch had the effect of flooding his lands, that the inspectors acted without authority and that he had never consented that his lands should be injured by draining the pool over them. The Superior Court set aside the order of the inspectors, ordered the extension of the ditch to be filled in and condemned Breton to pay $10 damages and all the costs. This judgment was affirmed by the Court of Review (Pelletier, J., dissenting) by the judgment appealed from.

Belleau, K.C., for appellant.

Stuart, K.C., and *Bedard*, K.C., for respondent.

The appeal was allowed with costs of the appeal to the Supreme Court of Canada and in the Court of Review, and the action was dismissed with costs, Nesbitt and Idington, JJ., dissenting.

The only notes of reasons for judgment were delivered by the dissenting judges, as follows:—

NESBITT, J. (dissenting.)—In this action the parties are neighbours, and the dispute is whether the plaintiff is bound to submit to a ditch which was dug by the defendant on the boundary line between the plaintiff's and defendant's land, and for which the plaintiff contributed $12.

The article in the Municipal Code under which a boundary ditch is dug is 420: such a ditch is for drainage between two parcels of land. When the draining is of several parcels

1905

BRETON
v.
GONTHIER
DIT
BERNARD.

NESBITT, J.

art. 867 governs. In this case the council apparently set the rural inspectors in motion who made a report in favour of a line ditch, but it is argued that the point fixed of necessity drained a pond of seven acres in length and about an acre in width, and so in the result created a watercourse.

There seems no doubt but that the proper steps were not taken to establish a watercourse, and the case is put upon the ground of the consent of the plaintiff evidenced by a letter from a notary consenting to the award of the rural inspectors, and the payment of the $12 with a knowledge of the work done.

An examination of the evidence shews, I think, that the plaintiff never in fact consented to more than a line ditch and, as the so-called consent cannot operate as an estoppel as the defendant's position was in no way altered by the letter, I think he is entitled to contest the imposition of a serious servitude on his land. I think, having regard to the uncertainty of the inspectors' award, that it was of doubtful validity even if jurisdiction existed in them to make direction as to a line ditch. And the terms of the letter are confined to a ditch such as the inspector could award, and not to go beyond.

I would affirm the judgment below and dismiss the appeal.

IDINGTON, J. (dissenting.)—It was not competent for the inspector to act upon the instruction of the council. His authority must come from one of the parties direct by art. 420 of the Municipal Code. And if the report made in the case in question is to be treated as at the request of one of these parties, then the servitude it prescribes is such as he had not authority for to prescribe. He had no right to prescribe a ditch that would create a watercourse having a large area of land beyond that of these owners. That, the council alone had the power to make provision for, but did not here.

Again the ditch that is to be prescribed by an inspector should be defined both as to depth and width. This inspec-

tor admits he did not observe the matter with such care that he could define the capacity of the ditch to be dug or have regard to the limits of his jurisdiction as an inspector. Mr. Justice Langelier, who alone dissents from the four other judges who have passed upon this matter, observes this want of direct authority under art. 420, but does not to my mind satisfactorily dispose of it.

1903

BRETON v. GUNTHIER DIT BERNARD.

IDINGTON, J.

Bringing in the Mackenzie letters does not help. It does not give jurisdiction if it had not existed. It must be treated as an adoption of what a third party without jurisdiction had said might be done. And thus treated it is not an agreement, as there was not that accord with the other party to make it so. And as a voluntary license it was revocable and was revoked when this appellant tried to go beyond what respondent says and I believe understood it to mean.

I think the learned trial judge and the Court of Review decided rightly, and that the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant; *Belleau, Belleau and Belleau.*

Solicitors for the respondent; *Bedard and Chalouet.*

[S. C. File No. 2443.]

1905

THE TORONTO RAILWAY CO. v. MUNRO ET AL.

APPEAL from the Court of Appeal for Ontario.

Settled out of court.

(31st May, 1905.)

1905

[S. C. File No. 2444.]

FITZGERALD v. WALLACE.

APPEAL from the Court of Appeal for Ontario.

Dismissed with costs.

DAVIES, J., handed down a memo. that he concurred for the reasons given in the Court of Appeal.

(13th June, 1905.)

[S. C. File No. 2445.]

WARD v. THE MONTREAL COLD STORAGE AND FREEZING CO.

APPEAL from the Court of Review, at Montreal.

Settled out of court.

(26th April, 1905.)

[S. C. File No. 2446.]

WENTWORTH v. THE ACADIA LOAN CORPORATION.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed with costs by consent.

(October, 1905.)

[S. C. File No. 2447.] 1906

THE UNION BANK OF CANADA v. BRIGHAM ET AL.

Execution of will—Mismanagement of estate—Fraud against creditors of beneficiary.

APPEAL from the Court of Appeal for Ontario.

The appeal was allowed with costs of all parties to be paid by the defendants T. G. Brigham and I. Brigham, as per memorandum in judgment of the court delivered by Idington, J.

The learned judge, in his notes, set out the circumstances under which the executors of the late C. J. Smith, of Ottawa, Ont., proceeded to the winding up of his estate by forming a joint stock company in which each of the beneficiaries took stock in proportion to their interests under the will, Isaac Brigham, one of the beneficiaries, being then on military service in South Africa, agreeing to the arrangement made, in reply to a letter explaining the proposition, in rather indefinite terms, by sending to his brother, T. George Brigham, at Ottawa, a cablegram simply saying "Yes." He then shews how the manipulation of the assets so complicated the situation, after the organization of the company, in a manner so detrimental to the interests of creditors of Isaac Brigham, that the proceedings should be declared fraudulent and void as against these creditors, and states the terms in which the judgment appealed from should, in consequence, be varied, the costs of all parties to the appeal being ordered to be borne by George and Isaac Brigham.

Appeal allowed with costs.

(1st May, 1906.)

(ED. NOTE.—Leave to appeal was refused by the Privy Council, 27th Feb., 1907.)

1905

[S. C. File No. 2448.]

MORGAN v. THE BRITISH YUKON NAVIGATION COMPANY.

APPEAL from the Supreme Court of British Columbia.

Not prosecuted.

(18th May, 1905.)

1906

[S. C. File No. 2452.]

THE TORONTO HOTEL CO. v. SLOANE ET AL.

Contract—Inapplicable conditions—Action for quantum meruit.

APPEAL from the Court of Appeal for Ontario, affirming the judgment entered for the plaintiffs at the trial upon findings of the jury in their favour in respect to the value of work done in the construction of a hotel under a contract that had been abandoned on account of the conditions of the walls and ceilings being, as alleged, unfit for carrying on the work.

The appeal was dismissed with costs.

(6th November, 1906.)

1906

*June 5.

[S. C. File No. 2454.]

THE JOHNSON'S CO. v. WILSON ET AL.

Appeal—Jurisdiction—Action en bornage—Order for expertise—Final judgment.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, Province of Quebec,

* PRESENT: FITZPATRICK, C.J., and GIROUARD, DAVIES, IDINGTON and MACLENNAN, JJ.

setting aside the judgment of the Superior Court, District of St. Francis, with costs and ordering expertise. 1906

JOHNSON'S CO. v. WILSON ET AL.

The appellants brought the action for the establishment of the boundary between their lands and the lands of the respondents in the township of Coleraine, County of Megantic. At the trial, Lemieux, J., ordered the boundaries to be settled according to the original plans of survey and subdivision of the townships of Ireland and Coleraine, the division line to commence at a post indicated on one of the plans and to be run on a course parallel with the old line shewn as the boundary between Ireland and Coleraine.

On an appeal by the respondents, the Court of King's Bench considered that the line between lots 9 and 10 in range "B," of Coleraine, as laid out on the ground upon the original survey of that township, was intended to serve as the guiding line for the establishment of the other side lines, including those of the lands in question, and, by the judgment appealed from, the judgment of Mr. Justice Lemieux was set aside, the case remitted back to the trial court and it was ordered that experts should establish the course of the line between said lots 9 and 10 to serve as the base for determining the division line between the lands in question in the cause, and that, upon the report of the experts, such further order should be made in the Superior Court as to law and justice might appertain.

On the appeal by the plaintiffs to the Supreme Court of Canada, the respondents moved to quash the appeal for want of jurisdiction on the grounds that the action did not affect the titles to the lands, and that the judgment of the Court of King's Bench was not a final judgment within the meaning of the provisions of the Supreme and Exchequer Courts Act limiting the jurisdiction of the court in regard to appeals.

Gilman, K.C., for the motion, cited *Molson* v. *Barnard* (1), *The Emerald Phosphate Co.* v. *The Anglo-Continental Guano Works* (2), and *Chamberland* v. *Fortier* (3).

(1) 18 Can. S. C. R. 622. (2) 21 Can. S. C. R. 422.
(3) 23 Can. S. C. R. 371.

1906

JOHNSON'S CO. v. WILSON ET AL.

Lafleur, K.C., for the appellants, was not called upon for any arguments.

THE COURT dismissed the motion with costs.

Motion dismissed with costs.

ED. NOTE.—In *Willson* v. *The Shawinigan Carbide Co.* (37 Can. S. C. R. 535), this case was referred to by Girouard, J., at page 538, as follows: "A final judgment (*jugement définitif*), is not necessarily the last one of the court, for we have held frequently, and more particularly in the recent case of *Johnson's Company* v. *Wilson*, that the whole issue between the parties might be finally disposed of by a judgment which is not the last one."

1906

*Oct. 25, 26.
*Nov. 15.

HEARING ON THE MERITS.

Crown grant—Construction of deed—Prescription—Instructions for original survey—Surveyor's report—Plans and field notes—Location of boundary line—Evidence—Findings by trial judge.

The hearing of the appeal, upon the merits, came on;—

Gilman, K.C., for the respondents, renewed the motion to quash the appeal, but the court ordered the hearing upon the merits to proceed. A motion was also made by him to substitute the American Asbestos Company as respondents, which was spoken to by both parties and the question reserved as to whether or not the company could be thus substituted or merely added as parties on the appeal.

Stuart, K.C., and *Lafleur*, K.C., for the appellants.

Gilman, K.C., and *Boyd* for the respondents (*MacMaster* with them).

The court heard the parties on the merits of the appeal, and on the motion to substitute or add new parties and, on a subsequent day, allowed the appeal with costs and restored the judgment of the trial judge.

* PRESENT: FITZPATRICK, C.J., and GIROUARD, IDINGTON, MACLENNAN and DUFF, JJ.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—The plaintiffs' predecessor was grantee from the Crown of lot 31, range B., Township of Coleraine, and the defendants' predecessor was grantee from the Crown of lot 32 in the same range. These lots adjoin one another, the easterly limit of lot 32 being the westerly limit of lot 31. The northerly end of this common limit is fixed; and the question between the parties is what (on the true construction of the Crown grants, through which the parties derive their respective titles) is its course from this point.

It is not disputed that the description in the grants refers to the survey of the range in question made in 1867 by one Poudrier; in other words, lot 31 granted to the plaintiffs' predecessor and lot 32 granted to the defendants' predecessor, are respectively lots 31 and 32 of this range as surveyed by Poudrier in that year. The first paragraph of the instructions delivered to Poudrier was as follows:—

> You will next proceed to the survey of the St. Francis Road, in the Township of Coleraine, and lay off a range of lots on both sides thereof, of the perpendicular breadth of 13 chains each, posted and numbered from the east towards the west, commencing at the point where the road intersects the S. W. line of Thetford; the range on the north side to be called A., and the range on the south, range B., the side-line of the lots to run automatically north 10 degrees east and south 10 degrees west, both ranges terminating at the established S. E. outline of the Township of Ireland run by D. P. S. Frs. Fournier in 1822, and with which the line run by Mr. Blaicklock, as the N.W. limit of Mr. Glover's mining lot is expected to coincide,—should they not, you will carefully establish the difference, and also the distance from your point of intersection to the N. E. limit of said mining block, and course thereof.
>
> You will in any case adopt the old line as the true limit of the Township of Coleraine as erected by letters patent in 1861.

Poudrier having executed the survey, in due course returned to the Department of Crown Lands his field notes, accompanied by his report; and a plan of the survey appears to have been made an official record of the department on the 28th of January, 1867.

In his report Poudrier thus refers to the method followed by him in laying out range B.:—

1906

JOHNSON'S CO. v. WILSON ET AL.

THE CHIEF JUSTICE.

J'ai ensuite procédé à diviser les lots des rangs A. et B. sur le chemin de St. François en adoptant la direction de la grande ligne séparent les townships de Ireland et Coleraine laquelle distance j'ai divisé en trente deux lots de treize chaines de front perpendiculaire, à l'exception du premier lot qui a une largeur de 15 chaines 67 mailles."

This passage, read in conjunction with the paragraph quoted above from the instructions, in my opinion leaves no room for doubt:

(1) That lot 32 (according to Poudrier's survey of range B.) has for its western limit the town line between Coleraine and Ireland;

(2) That it is a lot having a perpendicular width of 13 chains; and

(3) That its easterly limit is a line parallel to the town line referred to.

If this view be correct it is sufficiently obvious—and upon this indeed the parties to the litigation are in agreement—that the only point at issue is the true location of the town line between Coleraine and Ireland.

This, in my opinion, for the reasons put by the learned trial judge, so fully and clearly as to make a further statement of them superfluous, is by the evidence shewn to be the line ascertained by Mr. Addie, the plaintiffs' surveyor.

The court of appeal has taken a view different from that of both parties respecting the method to be pursued in ascertaining the limit in question; and has held that it is to be determined by drawing through the fixed end of it a line not necessarily parallel to the town line referred to—but parallel to the line of division between lots 9 and 10 of range B., as established on the ground by Poudrier in 1867; and has remitted the action to the Superior Court with directions that the last mentioned line shall be ascertained by the surveyors appointed by the parties, and the limit in dispute fixed accordingly.

This Court which — with great respect to the court of appeal — I do not think can be sustained, appears to be based mainly upon the following passage which appears in the instructions delivered to Poudrier:

And in order to establish a guide line for the course of the side-lines aforesaid, you will from your lot posts aforesaid, on the road between Nos. 10 and 11, run the side-line between the said lots N. 10 E. astronomically to its intersection with the rear line aforesaid, planting a stone boundary and post which you will inscribe with the number of the lot and range A.

It is conceded that Poudrier did not establish the line projected in this instruction; nor indeed any line upon the course there laid down; and moreover that the course indicated was impossible as a guide for the direction of the lines of division between the lots into which the range was to be divided. But it is said that he did establish the division line between lots 9 and 10, and it appears to have been assumed that this was done for the purpose of laying down upon the ground a line which should afford such a guide.

I cannot find any evidence which seems to support this latter view. The simple point is this: Is lot 32, conveyed to the appellants' predecessor in title through the original grant from the Crown, a lot having for its easterly boundary a line parallel to the boundary between lots 9 and 10, or a line parallel to the town line? The passage quoted from Poudrier's report shews that the town line furnished the course which governed the course of the lines of division between all the lots into which he sub-divided the range. Poudrier moreover planted posts at the intersection of the lines of division with the St. Francis Road. How was the true location of the points of intersection ascertained? Obviously (considering that the lots were to be of 13 chains perpendicular width), by first ascertaining the line of division; this line of division in each case being simply a line drawn parallel to the town line at a given perpendicular distance from it; that between lots 31 and 32 being distant 13 chains; that between 30 and 31, twice thirteen chains; and so on. The location of the limit between lots 9 and 10 could be ascertained in the same way and only in the same way. In other words, the posts referred to fixed upon the ground the termini of a series of division lines drawn through these posts parallel to the town line; thereby furnishing the

1906

JOHNSON'S CO. v. WILSON ET AL.

THE CHIEF JUSTICE.

data for running these division lines without any necessary reference to the line between lots 9 and 10.

That a purpose was served by the establishment on the ground of the line between lots 9 and 10 is plain enough when one looks at the plan. The southerly boundary of the range was to be parallel to the general direction of St. Francis Road. The road, at a point almost coinciding with its intersection with that line, diverges in a northerly direction, and since the rear boundary of the range must take a corresponding direction, it was obviously desirable that a monument should be fixed marking the point of divergence on that boundary.

For these reasons, I think the learned trial judge proceeded rightly in regarding the direction of the boundary in question as governed by the direction of the town line, and the appeal should be allowed and the judgment of the Superior Court restored.

Appeal allowed with costs.

Solicitors for the appellants; *Brown & Macdonald.*

Solicitors for the respondents; *Gilman & Boyd.*

[S. C. File No. 2455.]

McINERNY v. THE KENNEDY ISLAND MILL CO.

APPEAL from the Supreme Court of New Brunswick.

The appeal was dismissed with costs, the decision in the case of *Finnie* v. *The City of Montreal* (1), being followed.

(23rd February, 1906.)

(1) 32 Can. S. C. R. 335.

[S. C. File No. 2456.] 1906

THE NATIONAL MANUFACTURING CO. v. SHARPLES ET AL.

APPEAL from the Exchequer Court of Canada.

Dismissed without costs by consent of the parties upon a settlement arrived at during the argument.

(9th March, 1906.)

[S. C. File No. 2458.]

THE INTERNATIONAL HARVESTER CO. v. GRAHAM.

APPEAL from the Court of Appeal for Ontario.

Dismissed with costs.

(6th April, 1906.)

[S. C. File No. 2459.]

BLACKSTOCK v. RITCHIE.

APPEAL from the Court of Appeal for Ontario.

Upon suggestion and consent filed by the parties, there having been a settlement made out of court, the case was struck from the roll and an order made that the judgment of the court below should be varied by directing that no costs should be payable from the commencement of the proceedings by either party to the other, and that the appeal to the Supreme Court of Canada should, otherwise, be dismissed without costs.

(6th and 16th November, 1906.)

See *Weddell* v. *Ritchie* (1), *Toronto General Trusts Corporation* v. *Central Ontario Railway Co.* (2).

(1) 10 Ont. L. R. 5. (2) 10 Ont. L. R. 347.

1906

[S. C. File No. 2462.]

SPINDLER v. FARQUHAR.

Shipping — Charter-party — Condition to load and proceed with dispatch—Delay—Loss of cargo—Recovery of freight—Action.

APPEAL from the Supreme Court of Nova Scotia (38 N. S. Rep. 183), dismissed with costs for the reasons given in the court below.

Mr. Justice Davies delivered a note to the effect that he agreed with the reasons given by Townshend, J. (38 N. S. Rep. at p. 197) in the court below.

[S. C. File No. 2474.]

RITCHIE v. WEDDELL.

APPEAL from the Court of Appeal for Ontario.

Upon suggestion and consent filed by the parties, there having been a settlement made out of court, the case was struck from the roll and an order made that the judgment of the court below should be varied by directing that no costs should be payable from the commencement of the proceedings by either party to the other, and that the appeal to the Supreme Court of Canada should, otherwise, be dismissed without costs.

(6th and 16th November, 1906.)

See *Weddell* v. *Ritchie* (1), *Toronto General Trusts Corporation* v. *Central Ontario Railway Co.* (2).

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* PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and GIROUARD, DAVIES, IDINGTON and MACLENNAN, JJ.

(1) 10 Ont. L. R. 5. (2) 10 Ont. L. R. 347.

[S. C. File No. 2475.] 1906

GAGNON v. CYR.

APPEAL from the Supreme Court of New Brunswick.

Dismissed with costs.

(23rd February, 1906.)

[S. C. File No. 2476.] 1906

*Nov. 8, 15, 16.
*Nov. 23.

ELLA M. BURKE AND OTHERS (DEFENDANTS)..... APPELLANTS,

AND

SAMUEL J. RITCHIE (DEFENDANT).....RESPONDENT;

IN THE MATTER OF THE TORONTO GENERAL TRUSTS CORPORATION (PLAINTIFFS) AGAINST THE CENTRAL ONTARIO RAILWAY COMPANY AND OTHERS (DEFENDANTS).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Agreement for delivery of bonds—Mistake.

In the action by the corporation against the railway company a reference was made to the master to decide the ownership of certain bonds of which Burke, one of the defendants, had become purchaser at a judicial sale in the course of litigation between the appellants and the respondent. They had executed an agreement providing that, on payment of $5,000, the price of adjudication, and a judgment for $67,000 against Ritchie, the bonds should be transferred to him. Ritchie contended that only $5,000 was to be paid, and that after he had signed the agreement he discovered the mistake in its provision for payment of the larger sum. The Master decided that Ritchie was entitled to the bonds upon payment of the smaller sum. His ruling was reversed by Meredith, C.J., but was restored by the judgment of the Court of Appeal.

* PRESENT: FITZPATRICK, C.J., and GIROUARD, DAVIES, IDINGTON and DUFF, JJ.

1906

BURKE v. RITCHIE.

Held, reversing the judgment appealed from, that upon a correct view of the evidence, the judgment of Meredith, C.J., was right and should be restored.

APPEAL from the judgment of the Court of Appeal for Ontario, which reversed the judgment of Meredith, C.J., setting aside the ruling of the Master, on a reference, deciding that the respondent was entitled to certain bonds in question upon the payment of $5,000 only.

The circumstances of the case are stated in the judgment now reported.

Shepley, K.C., and *Blackstock*, K.C., for the appellants.

Hellmuth, K.C., and *J. H. Moss*, for the respondent.

The following opinions were delivered:

THE CHIEF JUSTICE (oral).—I am of opinion that this appeal should be allowed with costs, and that the judgment of Mr. Justice Meredith should be restored.

GIROUARD, J.—This is another instance which illustrates that a lawyer is often a poor adviser in his own case. The late Judge Burke, here represented by the appellants, dictated a deed of compromise or settlement underhand of quite a large number of lawsuits and proceedings pending between himself and the respondent, both in the Province of Ontario and the State of Ohio. It is not necessary to make any special reference to these cases to determine the present appeal. He says, in his deposition, that they were all settled and to be discontinued, and that the option stipulated by the respondent that Burke would transfer the two hundred and twenty-five bonds of the Central Ontario Railway to himself or his assignee, was to be exercised on on or before the first of January, 1903, only on the payment of $5,000 and $70,000, the $5,000 being the amount paid by Burke for the said bonds at auction, and the $70,000 being the amount of one of the judgments, in principal and interest, obtained in the Circuit Court of Summit County, Ohio, against the respondent and his wife. On the contrary, the respondent swears that the amount was only $5,000.

The argument has been full and lengthy and was presented by able counsel on both sides, and at the end of the four days it occupied, I confess I was far from having formed a comprehensive view of the case. After serious deliberation, I have, however, arrived at the conclusion that the judgment of Mr. Justice Meredith should prevail and should not have been disturbed by the Court of Appeal.

The agreement, indeed, is not as clear as it could be, especially in view of the other papers made and signed simultaneously, where Burke admits that the judgment obtained in Summit County Court had been fully satisfied and settled, being the judgment which led to the exacting of the payment of the $70,000 above mentioned. If instead Burke had merely stipulated in the deed that $5,000 and $70,000 should be paid to him, without mentioning the judgment, his case would undoubtedly be more clear. However, we must endeavour to find out the intention of the parties from the terms of the agreement.

As a matter of fact, no money was paid by the respondent and none was due, as he had yet a long delay of several months to provide the same. These discharges were made and signed only to discharge the judgments, and not the conditional indebtedness, which remained exigible, as provided for in the deed of settlement, that is, when the respondent would exercise his option in due time and demand the delivery of the $225,000 bonds.

As this case is not one of mutual mistake, the settlement is the only document which can help us in determining its meaning, and, in this respect, I believe there cannot be any doubt, as remarked by Mr. Justice Meredith.

In the first place, Burke declares that he is desirous to have the said Summit judgment or decree cancelled or assigned to some person to be named by the respondent upon the following consideration;—

> That the said party of the second part shall and does hereby undertake and promise to pay the said party of the first part the consideration which he paid for the said two hundred and twenty-

1906

BURKE v. RITCHIE.

GIROUARD, J.

five bonds at auction, to wit, five thousand dollars, and interest thereon from the date of the sale thereof, and that he, the said Ritchie, will also pay to the said party of the first part the amount of said decree rendered in favour of the first party in the said Circuit Court, and which action is now pending in the Supreme Court, to wit, being, with interest up to the time of the said decree, about the sum of seventy thousand dollars, with interest thereon from the rendition of said decree up to the time of payment.

And, in the next paragraph, it is declared that the said transfer would be made,

upon payment of the said $5,000 and interest thereon, and the amount of the decree so rendered in the Circuit Court of Summit County, Ohio.

And, further on, the parties declare "that the indebtedness above described" shall be paid on or before the 1st January, 1903, with interest thereon. And, further on again, the parties refer to this "payment of the indebtedness above mentioned."

After this settlement, Burke could not resort to his judgment or decree to enforce the payment of the sum of money it represented, either against the respondent or his wife. It was discharged and settled to all intents and purposes and the settlement was substituted for the said judgment. It matters not whether the settlement had been profitable to the respondent or not; he was the best judge of his own interests, and his dealings connected with this litigation shew that he was a shrewd business man. There was no fraud that I can see on either side, and the Court of Appeal has not found that there was any. The mistake of one of the parties is not sufficient to void a contract of this character.

I am not prepared to say finally that the respondent has not made a good bargain. He got full release from the Summit decree, not only as far as he was personally concerned, but also, against his wife, and relinquished the lien which Burke had acquired on her property to an amount much larger than was necessary to secure the payment of the decree in principal and interest. He was not bound to

1906

BURKE v. RITCHIE.

GIROUARD, J.

pay the amount of this judgment, except in one case,—if he wished to exercise the option stipulated. The respondent has tendered only $5,000, and I believe that this tender was insufficient.

In my opinion, the appeal should be allowed and the judgment of Mr. Justice Meredith restored with costs.

DAVIES, J.—I am of opinion that this appeal should be allowed and the judgment of Meredith, J., restored. I should have been well content to have rested my opinion upon the very clear and, to my mind, conclusive reasoning of that learned judge, without an additional word.

But the conclusions reached by the Court of Appeal for Ontario in reversing that judgment seem to me to require some explanation of my inability to concur in them. It is therefore absolutely necessary that a short statement should be repeated of the more prominent facts which led up to the agreement as to the meaning of which the contest in this appeal turns.

This agreement was the culmination of bitter and protracted litigation between the parties Burke and Ritchie, in the courts of the United States for a number of years. Proceedings had been taken at one time in the United States District Court for the Northern District of Ohio, by one James B. McMullen, and another against Ritchie, Burke, Rayne, Cornell and others, alleging the recovery of a judgment by them against Ritchie in Ontario, but that, owing to the latter's insolvency, they were unable to realize anything from their judgment, and further alleging that Ritchie was entitled to the equity of redemption in certain bonds and stocks pledged by him with his co-defendants, and asking to have an account taken of Ritchie's indebtedness to such parties, and that the securities held by them respectively might be sold and any balance after deducting Ritchie's indebtedness be paid over to the McMullens on account of their judgment against Ritchie.

An account was subsequently taken and it was found that Ritchie was indebted to Burke in $269,023.03, and to

1906

BURKE v. RITCHIE.

DAVIES, J.

the other defendants in larger amounts, and subsequently the bonds, stocks, and securities were sold by order of the court and each of the defendants purchased the securities respectively pledged to him and credited the purchase money upon the amounts found due them respectively.

In Burke's case the balance found due to him by Ritchie after crediting the proceeds of the sale of the securities he held was $57,192, and for that amount judgment was entered for Burke and execution awarded him.

The sale of these securities was afterwards confirmed, ratified and made absolute by the court.

In 1900, Ritchie and his wife instituted proceedings in the Circuit Court of the United States of America for the Northern District of Ohio against Burke and the other parties to the suit of *McMullen* v. *Ritchie*, for the purpose of having the judgment therein and the sale of the securities thereunder vacated and set aside.

The defendants demurred to Ritchie's bill and their demurrer was sustained, whereupon Ritchie appealed to the United States Circuit Court of Appeals, and this appeal was standing for argument at the time the agreement in question was made.

Ritchie was also the appellant in another appeal to the Supreme Court of the State of Ohio from a judgment which Burke had obtained against him and his wife in the Circuit Court of Summit County in September, 1900, for the sum of $67,086.92, being the amount of the balance of the debt and interest which Ritchie owed Burke and which judgment declared that certain bonds, stocks and securities in the hands of Cornell's executors, and which were claimed by Mrs. Ritchie as her own, should in equity be appropriated to the payment of the $67,000 due by Ritchie to Burke, and directed the Cornell executors to sell a sufficient amount of such securities to pay off Ritchie's indebtedness to Burke.

The Cornell executors were of course parties to these proceedings and judgment, and from this judgment Ritchie

also appealed to the Supreme Court of Ohio, and this appeal also was standing for argument at the time the agreement now in litigation was entered into.

As matters therefore stood when the two parties met on the 10th March, 1902, to make a settlement, Burke held two judgments in his favour, one declaring the purchase by him of the stocks and securities before mentioned to be valid and adjudging the balance of $57,000 odd with interest to be still due to him, and the other and later judgment in the Summit Court of Ohio awarding him judgment for the $57,000 with interest increasing the amount to $67,000, and adjudging him equitable execution against the Cornell stocks claimed by Mrs. Ritchie and directing these stocks to be sold to satisfy the judgment.

Ritchie on the other hand had appealed from both judgments and both appeals were standing for hearing.

These proceedings and appeals necessarily formed clouds upon the title of the securities which Burke had purchased and upon those which Mrs. Ritchie claimed as hers, and of course prejudiced their sale or disposition as notice of the proceedings had been very widely circulated amongst financial men.

Under the circumstances the two men came together and the agreement of the 10th March, 1902, was entered into.

The question involved in this appeal is whether, by this agreement, Ritchie became entitled to 225 bonds of $1,000 each of the Central Ontario Railway Co., with the coupons attached, which bonds Burke had previously purchased at the judicial sale for $5,000, on re-payment to Burke of the $5,000 without interest, or whether he had to pay Burke, in addition to the $5,000, a further sum of about $70,000, being the balance of the original debt with interest due by Ritchie to Burke and secured by the judgments previously referred to.

The recitals in the agreement, as well as its operative part, do not seem to me to leave this question open to any

1906

BURKE v. RITCHIE.

DAVIES, J.

doubt. They are clear, and provide for the payment of both sums to Burke by Ritchie before the latter could exercise his option of purchasing the bonds.

It seems also to be clear beyond doubt that the courts cannot rectify the terms of the agreement and make them conform to what is alleged to have been the real understanding of the parties for several reasons. Such rectification could only be made when the evidence was such as enabled the court to find that the agreement as signed did not express the real meaning of the parties, and further that the minds of the parties were *ad idem* to the proposed rectification, and such evidence must be cogent and conclusive. The statement of claim herein only submitted that the contract as proved really meant what Ritchie contends for and did not make any charge of fraud or of mutual mistake or ask for any rectification.

No one could successfully contend that there was such cogent and conclusive evidence as would justify any rectification, and the question at issue was, therefore, reduced to the simple one of the true meaning of the written agreement.

The judgment appealed from professed to have found such true meaning to have been in accordance with Ritchie's contention from the latter clause of the agreement, which says:—

> And that any action now pending in any court between the parties, except in regard to the decrees of the Circuit Court of Summit County, above mentioned, shall be dismissed by the plaintiff and all errors released so that thereafter from no existing cause whatever shall any litigation of any kind be instituted by one against the other for the ownership of any stock held or owned by either in any company or corporation in which either one or the other has at any time been interested.

I am quite unable to reach any such conclusion.

The decree in the Circuit Court of Summit County which was excepted in the above recited clause was so excepted for plain and obvious reasons, but for reasons quite consistent with the construction of the agreement and indeed with

its plain language requiring Ritchie to pay the amount secured by such decree to Burke along with the $5,000, before he could redeem the bonds. That excepted decree it will be remembered declared two distinct things, first, that Burke was entitled to judgment for the amount of the debt then due by Ritchie to him, about $70,000, and secondly, that Burke was also entitled to equitable execution against the Cornell bonds and stocks, so called, which were claimed by Mrs. Ritchie, and that these bonds and stocks should be sold to satisfy, pay and discharge Burke's judgment.

For reasons of his own Ritchie seems to have desired that, as to this particular decree in the Circuit Court of Summit County, he should have the option of having it "cancelled or assigned to some person to be named by him," and the recitals to the agreement in question expressly state that to be his desire and also the willingness of Burke to comply with it.

It seems, therefore, to me alike natural and proper that the latter part of the agreement providing for the formal releasing and satisfaction of the several actions pending in the courts should have excepted this special one, which it had been previously provided should either be cancelled or assigned as Ritchie might determine, and that the conclusion drawn by the Court of Appeal that the election by Ritchie the day following the agreement to have this Summit County judgment formally satisfied by Burke operated to discharge Ritchie from the express obligation he had assumed in case he desired to redeem the 225 bonds of the Central Ontario Railway Co., of paying Burke the $70,000 as well as the $5,000, is not justifiable.

The real meaning of the agreement was that all previous litigation should be put an end to, the formal judgments satisfied, one of them assigned instead of being formally satisfied if so desired by Ritchie, and that he, Ritchie, should have the right of redeeming the bonds held by Burke at any time before the month of January following, on payment of the real amount due Burke, $75,000, and if he failed so to redeem, Burke should thereafter hold the bonds

1906

BURKE v. RITCHIE.

DAVIES, J.

absolutely and Ritchie should not be under any further obligation to pay the debt or any part of it.

The special exception, therefore, of this Summit County judgment in the latter part of the agreement and its formal satisfaction by Burke the following day at Ritchie's request and in the exercise of the special right of election given to him by the agreement of having it satisfied or assigned, are not, in my opinion, at all inconsistent with the express terms of the agreement that Ritchie might redeem the bonds held by Burke, but only by paying the two amounts of $5,000 and $70,000 due to Burke.

The contention that the satisfaction of this judgment operated absolutely to discharge Ritchie not only from the obligation to pay the amount of the judgment to Burke, which all parties concede it did, but also resulted in reducing the amount of the option which the agreement stipulated he should have in redeeming the bonds, is ingenious and, from one standpoint, plausible.

It fails to convince me because it is at variance with the express stipulation of the agreement of the parties emphasized by repetition that Ritchie was to have the bonds only on payment of both amounts, the $5,000 and the $70,000, and because the exception in this clause and the satisfaction of the judgment the day following the agreement are perfectly consistent with the stipulation for the redemption of the bonds only on payment of both amounts, the agreement having provided for the satisfaction or assignment of the judgment as Ritchie should elect, and for Ritchie's discharge from any obligation to pay Burke the amount of the judgment or any part of it in case he failed or elected not to exercise his option of redeeming the bonds.

If, instead of electing, on the day following the execution of the agreement, to have the Summit County judgment marked satisfied, Ritchie had elected to have had it assigned to trustees for his benefit and that of his wife as provided for in the agreement, could it have been in that case successfully argued that such assignment operated as a payment

on account of the option to purchase the bonds to the amount secured by the judgment?

That suggestion, of course, only puts the argument in another, but I venture to think, if possible, a still stronger light.

IDINGTON, J.—I think the appeal herein should be allowed and the judgment of Mr. Justice Meredith restored. I can add nothing useful to what he has said in support thereof.

DUFF, J.—The appellants are the executor and executrix of the late Stevenson Burke, who at his death was the registered holder of certain mortgage bonds constituting a charge upon the property of the Central Ontario Railway Co. The railway having been sold under a judgment of the High Court of Justice, the Local Master at Belleville (upon reference to him to ascertain the holders of the company's bonds) found that the bonds referred to were (subject to the payment of $5,000 with interest from a certain date) the property of the respondent. This finding was, on appeal, reversed by Meredith, J., but afterwards was restored by the Court of Appeal, from whose judgment the present appeal is brought.

It is admitted that on the 10th March, 1902, the appellants gave the respondent an option to purchase these bonds, and, in substance, although the Court of Appeal has looked at it from another aspect, the controversy relates, I think, to the terms of that option; the respondent's case being that under these terms the purchase price was fixed at $5,000; and the appellants', that in addition to that sum the respondent was, as a condition of the option, to pay the amount still unpaid ($69,000) on a judgment which Burke had recovered against the respondent in the Circuit Court of Summit County in the State of Ohio.

Some years prior to the date mentioned, the respondent borrowed from the appellant $150,000; and to secure the repayment of that sum assigned to Burke (among other

1906

BURKE v. RITCHIE.

DUFF, J.

things) the bonds in question. As the result of a series of legal proceedings, the particulars of which are not material, the property in the bonds became vested absolutely in Burke, and at the date of the option Burke had, in respect of the respondent's indebtedness, judgments against him personally in various courts of the United States, all of which (as Maclennan, J., finds in his reason for judgment delivered in the Court of Appeal) had then become merged in the judgment of the Summit County Circuit Court already referred to. The respondent, on the other hand, had instituted actions impeaching these personal judgments as well as the proceedings through which Burke had acquired a title to the subject of his securities, and these actions, or appeals arising out of them, were then pending.

In this state of affairs Burke and the respondent came to a settlement; and a document (which it was intended should express the terms of it) was executed by both of them. This instrument (which was dictated by Burke in the presence of the respondent) is unhappily framed; but upon the main point in controversy its language is clear. It provides that the respondent shall have an option to purchase the bonds in question; and in unmistakeable terms prescribes as the conditions of the option that (within a given time) the respondent shall pay the sum of $5,000 and the amount still unpaid ($69,000) on the judgment referred to. It is not suggested that the respondent has ever, in the exercise of this option, paid or offered to pay more than $5,000, and in order, therefore, to make good his claim he must establish a case sufficient to justify the judicial rectification of the instrument, or shew that he was relieved from the condition requiring payment of the judgment.

For the reasons given by Meredith, J., I think the evidence is not sufficient to sustain the finding of the Master that Burke agreed to an optional sale of the bonds for the price of $5,000. I therefore proceed to consider whether, by reason of the subsequent conduct of the parties, the respondent can succeed on the alternative ground above mentioned.

1906

BURKE v. RITCHIE. DUFF, J.

On the day the agreement was executed, and the following day, four other documents were executed, all obviously designed to effect that which all parties aver was their intention in entering into the settlement, namely—that all litigation pending between them should cease and that the respondent should be released from all subsisting judgments which had been obtained by Burke. One of these documents, admittedly executed on the second day, was a formal acknowledgment by Burke that the respondent had satisfied the judgment mentioned in the condition referred to. The Court of Appeal has held that the legal effect of the execution of this acknowledgment was to relieve the respondent from this condition; and that thereupon the respondent became entitled under the terms of option to a transfer of the bonds on payment, within the time prescribed, of the sum of $5,000.

I cannot agree with this view. The course of reasoning which led the Court of Appeal to it seems to proceed mainly upon the ground that the terms of the settlement, as expressed in the agreement, except from the operation of the settlement the judgment in question.

I do not think it necessary to express any opinion upon this point of construction. Counsel for the respondent quite properly conceded that the agreement is at least open to a construction in the sense opposite to that placed upon it by the Court of Appeal; and it is common ground that if, on its true reading, it does effect such an exclusion, it so far fails to express the intention with which it was executed.

It is manifest as well from the oral evidence of the parties as from the terms of the instrument, that the agreement was intended to embrace two distinct subjects matter,—the settlement of the litigation (including the release of the subsisting judgment), and the granting of the option. Admittedly the settlement involved, as a term of it, the execution by Burke of a formal assignment or discharge of the Summit County judgment; on the other hand, one of the plainly expressed conditions upon which the option was to be exercisable, was the payment within the prescribed time

1906

BURKE v. RITCHIE.

DUFF, J.

of the amount still unpaid on that judgment. How then are we to regard the formal discharge executed by Burke the day after the execution of the agreement? As implementing the obligation which, whatever the true construction of the agreement, he believed he was under to give such a discharge as a term of the settlement, or as a waiver or binding acknowledgment of the fulfilment of the condition.

I confess I can see no sound reason why the terms both of the settlement and of the option should not be given their full effect and, consequently, none for holding that in performing his obligations under the settlement he necessarily abandoned any of his rights in respect of the option.

So with regard to the view that the onus rested on Ritchie "to shew that the discharge signed by him under the circumstances ought not to have its legal effect." Once it appears that the execution of the discharge was required by the terms of the settlement, there seems to be nothing in its execution (either in point of fact or of legal effect) which bears upon the substantial controversy between the parties, namely, that which concerns the terms of the option to purchase as originally agreed to by Burke.

Appeal allowed with costs.

Solicitors for the appellants; *Beatty, Blackstock, Fasken, Riddell & Mabee.*

Solicitors for the respondent; *Barwick, Aylesworth, Wright & Moss.*

1905

[S. C. File Nos. 2481, 2482.]

HALIFAX ELECTION CASES; ROCHE v. HETHERINGTON; CARNEY v. HETHERINGTON.

APPEALS from the Controverted Elections Court dismissed with costs for the reasons given by Weatherbe, C.J., and preliminary objections to the petitions to stand dismissed with costs.

(1st December, 1905.)

[S. C. File No. 2492.] 1906

THE CANADIAN PACIFIC RAILWAY CO. v. FORSYTHE.

APPEAL from the Court of Appeal for Ontario (10 Ont. L. R. 73) dismissed with costs.

None of the judges expressed any opinions except Mr. Justice Idington, who delivered a written memorandum to the effect that "for the reasons assigned by the Court of Appeal," the appeal should be dismissed with costs.

(14th April, 1906.)

[S. C. File No. 2497.]

DROLET v. LA BANQUE NATIONALE.

APPEAL from the Court of Review at Montreal.

Dismissed with costs for want of prosecution.

(19th February, 1906.)

[S. C. File No. 2499.] 1905

MARBLE SAVINGS BANK v. THE KING ET AL.

APPEAL from the Exchequer Court of Canada.

Discontinued.

(23rd October, 1905.)

1906 [S. C. File No. 2506.]

ST. ANTOINE ELECTION CASE; AMES v. PLEAU.

APPEAL from the Controverted Elections Court.

Dismissed with costs for want of prosecution.

(20th February, 1906.)

1905 [S. C. File No. 2508.]

SMITH v. THE INDIANA MANUFACTURING CO.

MOTION for special leave to appeal from the Exchequer Court of Canada.

Refused with costs by Idington, J.

(21st November, 1905.)

1906 [S. C. File No. 2511.]

*March 15.

BRADLEY ET AL. v. SAUNDERS.

Construction of Will — Executors and trustees — Power of appointment — Appeal — Jurisdiction—Matter in controversy—Special leave to appeal refused.

APPEAL from the judgment of the Court of Appeal for Ontario, affirming the decision of the trial judge.

This case arose from a provision in a will appointing two brothers of the testator executors and trustees, that "in

* PRESENT: SEDGEWICK, GIROUARD, DAVIES and MACLENNAN, JJ.

the event of the death or inability or refusal to act of either of said trustees, then my surviving brothers and sisters, or a majority of them," should have power of appointment.

After the testator's death, the executors named obtained probate of the will and three months later one of them died.

A year after his death, a majority of the brothers and sisters surviving appointed the plaintiff executor and trustee in his place.

The surviving executor refused to recognize such appointment, claiming that the power could only be exercised in case of the refusal or death at the time of the testator's death.

The plaintiff (respondent) brought an action to have it declared that he was a trustee under the will, and for a mandatory order to compel the surviving trustees (appellants) to permit him to assist in administering the trusts.

The trial judge held that the plaintiff was properly appointed, reserving all the other issues. The Court of Appeal for Ontario affirmed his judgment.

MOTION to quash the appeal for want of jurisdiction on the ground that there was no title to real estate involved and that the case was not, otherwise, appealable to the Supreme Court of Canada under the provisions of the Supreme and Exchequer Courts Acts and its amendments.

Aylesworth, K.C., for the motion.

Riddell, K.C., for the appellants, opposed the motion and alternatively asked that special leave for an appeal should be granted on account of the importance of the questions involved.

The motion to quash was allowed by the court and the application for special leave to appeal was refused.

Appeal quashed with costs.

1905

[S. C. File No. 2513.]

*Dec. 11.
*Dec. 13.

THE HAMILTON BRASS MANUFACTURING CO. v. THE BARR CASH AND PACKAGE CO.

Appeal—Special leave—Matter in controversy—Discretionary order —Practice.

MOTION for special leave to appeal from the Court of Appeal for Ontario.

By agreement, the appellants were to manufacture and sell cash and package carriers, and, after charging up the cost of construction, to divide the net profits with the respondents, who were patentees of the articles. The profits were divided up to August, 1895, when appellants, claiming a breach of the conditions, treated the contract as ended, but continued to manufacture and sell.

In an action against them for an account, they pleaded termination of the contract; account stated and settled; statute of limitations, and breach by the respondents.

On a reference to the Master to take the accounts, he held that appellants were licensees and that the account should only go back to 1901; that it should be taken to the time of the issue of the writ, and that the contract was terminated by notice after the judgment on which the reference was made.

The Mater's report was affirmed by Mr. Justice Street, but the Court of Appeal held that the appellants were grantees and not licensees, and that the statute of limitations could not be invoked; that the Master should take the account to the date of his report, and that it was beyond the scope of his functions to decide that the contract was at an end, and even if not, he was wrong, as the facts did not shew a termination.

Staunton, K.C., for the motion.

Boultbee, contra.

* PRESENT: SIR ELZÉAR TASCHEREAU, C.J., and GIROUARD, DAVIES, IDINGTON and MACLENNAN, JJ.

The motion was refused by the court on the ground that the questions in controversy upon such an appeal would not justify the exercise of judicial discretion in granting an order for special leave.

Motion refused with costs.

NOTE.—Subsequently an appeal was taken from the above judgment, *de plano*, the appellants claiming that the pecuniary amount in controversy actually exceeded one thousand dollars. This appeal was heard by the Supreme Court of Canada, on 22nd and 23rd November, 1906, and, on 11th December, 1906, the appeal was allowed in part without costs. See 38 Can. S. C. R. 217.

[S. C. File No. 2514.]

HANSON BROTHERS ET AL v. BEIQUE.

APPEAL from the Exchequer Court of Canada.

Dismissed with costs for want of prosecution.

(18th June, 1905.)

[S. C. File No. 2516.]

PREFONTAINE v. BEIQUE ET AL.

APPEAL from the judgment of the Exchequer Court of Canada by a creditor of the South Shore Railway Company.

Notice filed, 13th December, 1905.

On 23rd February, 1906, a suggestion was filed notifying the death of the appellant.

Case still pending on 1st June, 1907.

1905

[S. C. File No. 2520.]

DARRAGH v. McCUTCHEON.

APPEAL from the Supreme Court of New Brunswick.

Abandoned.

(6th November, 1905.)

1906

[S. C. File No. 2526.]

JACKSON v. DRAKE, JACKSON & HELMCKEN.

Amending minutes of judgment — Correcting error — Suit against partnership—Special leave for motion to full court—Practice.

APPEAL from the Supreme Court of British Columbia.

Motion on behalf of the appellant to vary the minutes of the judgment allowing the appeal, made on special leave obtained on 29th May, 1906, by providing that the said appellant should recover the amount sued for with costs "against the said respondents," instead of "against H. Dallas Helmcken, the surviving defendant."

The action was against a partnership, and on the appeal by the plaintiff, they were represented by the surviving partner only. In allowing the appeal (37 Can. S. C. R. 315, at pages 319-320) the court inadvertently directed that judgment should be entered for the plaintiff against the surviving defendant only.

After hearing counsel for the parties, respectively, the court ordered that the amendment should be allowed as applied for, without costs.

Motion granted without costs.

(12th June, 1906.)

[S. C. File No. 2527.] 1906

MILLER v. THE GLOBE PRINTING CO.

APPEAL from the Court of Appeal for Ontario.*

After hearing counsel for the appellant and without calling upon counsel for the respondents for any arguments, the appeal was dismissed with costs.

The judgment of the court was announced, as follows, by

SEDGEWICK, J.—The majority of the court do not see any ground for disturbing the unanimous judgment of the Court of Appeal in this case.

IDINGTON, J., dissented.

(29th March, 1906.)

Appeal dismissed with costs.

* PRESENT: SEDGEWICK, GIROUARD, DAVIES and IDINGTON, JJ.

[S. C. File No. 2528.]

THE PEOPLES LIFE INSURANCE CO. v. TATTERSALL.

APPEAL from the Court of Appeal for Ontario.

Dismissed with costs.

(15th March, 1906.)

1906

*March 13.
*March 16.

[S. C. Files Nos. 2530, 2531.]

CASS v. COUTURE; CASS v. McCUTCHEON.

Appeal — Practice — Amendment of pleadings — Discretionary order—Procedure—Final judgment.

Where no injustice had been done in the refusal of leave to amend pleadings, the court refused to interfere with the orders made by the courts below in the exercise of judicial discretion and quashed the appeals.

APPEALS from judgments of the Court of King's Bench for Manitoba (14 Man. Rep. 458), reversing the judgment of Perdue, J., by which the orders of the referee in chambers, permitting amendments to the pleadings, had been affirmed.

The appeals involved the same question, namely, whether a trustee may in an action founded on breach of contract, made between him and a third party, to recover, on behalf of the *cestui que trust*, damages which the *cestui que trust* may have sustained where the *cestui que trust*, a contemplated joint stock company, was not in existence at the time of the contract, but had been incorporated before the breach occurred. The statements of claim were considered defective as filed, and motions to amend were made and allowed by the referee in chambers, whose orders were affirmed, on appeal, by a judge in chambers.

On further appeal, the full court reversed the orders by the judgments appealed from.

MOTIONS to quash were made in both cases on the grounds that such judgments were not final and, consequently, could not be appealed from, and that they affected matters of procedure only in the courts below, and were made in the exercise of judicial discretion which could not be reviewed. The motions were supported by

Curle, for the respondents.

Chrysler, K.C., for the appellant, in each case, contra.

* PRESENT: SEDGEWICK, GIROUARD, DAVIES, IDINGTON and MACLENNAN, JJ.

1906

CASS v. COUTURE.

CASS v. MCCUTCHEON.

The motions to quash had been enlarged and were spoken to by counsel at the hearing upon the merits.

After hearing counsel on behalf of both parties, judgments were reserved, and, on a subsequent day, the court dismissed the appeals with full costs.

The only reasons for judgment delivered were as follows:—

IDINGTON, J.—These cases involve nothing that has finally determined the rights of anybody.

They raise merely the question of whether or not the court below have exercised a proper discretion in relation to an amendment of the pleadings, where the court were not bound by any rule of law or statute to amend, and I see no refusal of natural justice such as might entitle us to entertain these appeals.

I think, therefore, that they ought to be quashed with costs of appeals.

Appeals quashed with costs.

[S. C. File No. 2534.]

1906

BIGELOW v. EASTERN TRUSTS CO.

APPEAL from the Supreme Court of Nova Scotia.

Dismissed with costs for want of prosecution.

(19th February, 1906.)

1906

[S. C. File No. 2537.]

*April 3—6.
*April 14.

THE CITY OF TORONTO v. THE METALLIC ROOFING CO. OF CANADA.

Conditions of contract — Execution of works — Specifications—Dismissal of contractor—Value of work performed—Extras—Damages—Taking accounts—Costs.

Where the condition of a contract in regard to claims for extras was not complied with, the court held that no such claim could be allowed, but, as the contractor had been improperly dismissed, an alternative claim for damages was allowed.

(ED. NOTE.—This case is shortly noted at 37 Can. S. C. R. 692.)

APPEAL from the Court of Appeal for Ontario.

The questions at issue on the appeal sufficiently appear from the judgments reported.

Shepley, K.C., and *McKelcan*, for the appellants.

Tilley and *Johnston*, for the respondents.

SEDGEWICK and GIROUARD, JJ., concurred in the judgment allowing the appeal for the reasons stated by Davies, J.

DAVIES, J.—I think this appeal must be allowed in part and the reference to the Master to take the accounts somewhat varied.

I agree with the Chancellor who tried the case and with the Court of Appeal that the plaintiffs are entitled to be paid for the work done by them on the whole roof under the contract, and to this extent I agree with the reference.

I think, however, that the argument advanced by Mr. Shepley as to the true construction of clauses 7 and 10 of the contract between the parties must prevail, and that additional work or extras cannot be recovered by the respond-

* PRESENT: SEDGEWICK, GIROUARD, DAVIES, IDINGTON and MACLENNAN, JJ.

ents against the city unless, as specified in clause 7, it is first authorized by the architect in writing and countersigned by the chairman of the property committee. The special exception of this particular requirement in clause 10 from the operation of that clause shews this clearly.

This being so and the respondents not having secured compliance with this condition precedent before doing the extra work for which they claim payment, that claim must be struck out of the reference.

But I see no reason whatever why the respondents' claim for damages for being improperly dismissed, and prevented from carrying out their contract, should not be referred to the Master for assessment.

In the Court of Appeal the argument seems to have gone on the assumption that if the main claim was allowed the extras should follow. But the plaintiff, in his reasons for appeal, was careful to contend that, if he was not allowed for extras, he must be entitled to prove his damages in case his dismissal from the contract was held to be illegal.

As I feel myself obliged to yield to the clear words of the contract regarding extras, and exclude them from the reference to the Master, I at the same time am equally clear that the reference of the damages which had been excluded should be included.

I only desire to add that, after examining the cases to which our attention was called by Mr. Shepley, and carefully weighing his argument, I am quite unable to accept his conclusion that the special contract in this case in any way constituted, or could have been intended to constitute, a guarantee from the respondents that the roof covering they contracted to supply and fasten on as provided by the contract would be weather or water-tight. The contract was not to roof in or supply a roof for a building, but to cover an existing roof with specified material in a specified manner. When this was done, the contract was completed.

1906

CITY OF TORONTO v. METALLIC ROOFING CO.

DAVIES, J.

The appeal should be allowed, and the reference to the Master amended by excluding the claim for extra work and including that for damages.

As both parties have been successful partly in their contentions in this court, there should be no costs on this appeal.

IDINGTON, J.—I have read the judgment of my brother Sir Louis Davies and concur in the principle upon which it proceeds.

I fear, however, if we send this to the Master without anything further, that injustice may be done the plaintiffs, or further litigation arise to determine the meaning of the reference.

The plaintiffs have seen fit to claim as extras for work which might well, for aught I know, be held to be attributable to the execution of what the contract requires, and as done thereunder, without having to rely upon the provisions for extras. If they erred in that regard they should not be punished by reason of such error.

The work, as first done, may not have been worth anything as a fulfilment of the contract, though the plaintiffs contended it was.

The work as lastly done, or both that firstly and lastly together, may be in fulfilment of the contract, rendering it valuable work, which is to be assessed by the Master as done under the contract.

The contractors ought not to be met now with the answer thereto that their own contention may give a plausible, but only a plausible, sort of support to.

Nor should the value of the work as it now stands be enhanced by reason of its having been done twice over, so to speak, once in one way and again in another way.

The Master should proceed as if the contentions, pro and con, in respect of extras had never existed, and estimate the value of the work as it stood when the plaintiffs were dismissed, on the basis of the prices the tender proposed it should be done for, in a good workmanship-like manner, and, so far as within and attributable to the contract and the execution thereof, without resorting to the clause authorizing extras.

If and so far as necessary to resort to that provision no allowance should be made for it.

MACLENNAN, J., concurred for the reasons stated by Mr. Justice Davies.

Appeal allowed in part without costs.

Solicitor for the appellant: *W. C. Chisholm.*

Solicitors for the respondents: *Thomson, Tilley & Johnston.*

[S. C. File No. 2541.]

THE OTTAWA ELECTRIC RAILWAY CO. v. DODD.

APPEAL from the Court of Appeal for Ontario.

Dismissed with costs.

(14th May, 1906.)

1906

[S. C. File No. 2543.]

THE GOLD LEAF MINING CO. OF ONTARIO v. CLARK ET AL.

APPEAL from the Court of Appeal for Ontario dismissed with costs, for the reasons given in the court below, Idington, J., dissenting.

Mr. JUSTICE IDINGTON discussed the agreement between the parties, in a written judgment, taking a different view and concluding that the appeal ought to have been allowed with costs.

(12th June, 1906.)

[S. C. File No. 2544.]

THE KING v. PRICE.

APPEAL from the Exchequer Court of Canada (10 Ex. C. R. 105).

Discontinued with costs.

(14th September, 1906.)

[S. C. File No. 2545.]

CONNOLLY ET AL. v. THE KING.

APPEAL from the Exchequer Court of Canada.

Dismissed for want of prosecution.

(8th October, 1906.)

[S. C. File No. 2548.] 1906

PEDRO J. DEGALINDEZ ET AL. (DEFENDANTS)..... APPELLANTS, *Oct. 12, 15. *Oct. 25.

AND

WILLIAM OWENS (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Appeal—Findings of fact—Reversing on appeal—Practice.

Unless the appellant adduces clear proof that there was error in concurrent findings on questions of fact in the courts below, the Supreme Court of Canada ought not to interfere.

Cf. *Whitney* v. *Joyce* (95 L. T. 74.)

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, which maintained the plaintiff's action with costs.

The action was to recover $5,832.25 with interest for a claim against the Atlantic and Lake Superior Railway Company, which, it was alleged, the defendants undertook to pay in order to get possession of the railway and obtain certain subsidies for its construction. In both courts below the plaintiff was successful and the defendants appealed, contending that, as a matter of fact, any agreement which had been entered into amounted either to a guarantee or constituted a sale of a debt, that no such debt actually existed and that if any amount was ever due to the plaintiff, it had been paid and satisfied before action.

T. Chase Casgrain, K.C., for the appellants.

F. S. Maclennan, K.C., for the respondent.

THE CHIEF JUSTICE.—It is a well settled rule of this court that when the question is whether or not concurrent

* PRESENT: FITZPATRICK, C.J., and GIROUARD, IDINGTON, MACLENNAN and DUFF, JJ.

1906

DEGALINDEZ ET AL. v. OWENS.

judgments of the courts below should be reversed by reason of erroneous views of the facts of the case having been taken, it is incumbent upon the appellant to adduce the clearest proof that there was such error in the judgments, or so to speak, to put his finger on the mistake.

I concur in the view taken by my brother Idington that the appeal should be dismissed with costs for the reasons assigned in the courts below.

GIROUARD, J., concurred with the Chief Justice.

IDINGTON, J.—For the reasons assigned in the courts below, I think the appeal herein should be dismissed with costs.

MACLENNAN and DUFF, JJ., concurred with the Chief Justice.

Appeal dismissed with costs.

1906

*March 29.
*March 30.

[S. C. File No. 2549.]

THE CANADIAN NORTHERN RAILWAY CO. v. T. D. ROBINSON & SON.

Appeal from Board of Railway Commissioners—Want of jurisdiction—Railway Act, 1903.

His Lordship entertained some doubt as to the jurisdiction of the Board of Railway Commissioners for Canada, and, consequently, granted leave for an appeal.

Cf. *The Montreal Street Railway Co.* v. *The Montreal Terminal Railway Co.* (35 Can. S. C. R. 478.)

(NOTE.—For report on merits see 37 Can. S. C. R. 541.)

MOTION on behalf of the railway company for leave to appeal from an order of the Board of Railway Commissioners for Canada directing the company to provide the respondents, a firm dealing largely in coal, with a siding upon or near the firm's coal-yards, adjacent to the Winnipeg

* PRESENT: MR. JUSTICE MACLENNAN, in Chambers.

station of the company, for the unloading of the firm's supplies of coal from the company's cars.

1906

CANADIAN NORTHERN RY. CO. v. ROBINSON & SON.

G. F. Macdonell for the motion.

Howell, K.C., contra.

A. G. Blair, Jr., for the Board of Railway Commissioners.

MACLENNAN, J.—The only ground on which the motion is, or could be rested, under the Railway Act, 1903, is a want of jurisdiction on the part of the commissioners. After examining the several sections of the Act applicable to the case, and considering all that was urged with much ability before me, on both sides, I think the question of jurisdiction is not so clear that I ought not to allow the railway company to have it discussed before the Supreme Court.

I therefore grant the leave applied for, the costs of the motion to be costs on the appeal.

Motion granted.

[S. C. File No. 2550.]

1906

*March 22.

DOUGALL v. CHOUILLOU.

Appeal — Jurisdiction — Amount in controversy — Rescission of contract—Adding of interest to give jurisdiction.

MOTION for approval of security for the costs of an appeal from the Court of King's Bench, Province of Quebec, appeal side.

An application was first made to the Registrar in Chambers and the present motion was by way of appeal before Girouard, J., in chambers.

The action was under a contract for the sale of goods for $3,125, by the respondent, plaintiff, who alleged that the goods delivered were not according to contract, that he

* PRESENT: MR. JUSTICE GIROUARD, in Chambers.

1906

DOUGALL v. CHOUILLOU.

offered to return them to the defendant, appellant, who refused to receive them, and, thereupon, after notice, he sold the goods at the risk of the appellant, and he claimed damages for loss of profits less than $2,000.

The appellant contended that the real matter in controversy was the rescission of the contract, which was for an amount exceeding $2,000; that the amount claimed, with interest added, would exceed $2,000 and that questions of importance to the mercantile community were involved in the cause.

After hearing counsel on behalf of both parties the motion was dismissed with costs, on the ground that the Supreme Court of Canada had no jurisdiction to hear the appeal.

Motion dismissed with costs.

1906

*Dec. 3.
*Dec. 11.

[S. C. File No. 2553.]

THE GRAND TRUNK RAILWAY COMPANY, APPELLANTS,

AND

THE CANADIAN PACIFIC RAILWAY COMPANY AND THE CITY OF LONDON, RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Operation of railways—Interchange of traffic—Use of tracks—Interswitching — Conditions imposed — Traffic rates—Jurisdiction of Board of Railway Commissioners—Railway Act, 1903, ss. 137, 253, 266, 267, 271, 214—6 Edw. VII. c. 42, s. 8—Occupation of property of other companies—Construction of statute.

APPEAL from an order of the Board of Railway Commissioners for Canada made, on the application of the appel-

* PRESENT: GIROUARD, DAVIES, IDINGTON, MACLENNAN and DUFF, JJ.

lants, which authorized them to construct, maintain and operate, at the City of London, Ontario, a branch line for the interchange of cars to and from industrial and business sidings on the lines of both railways, subject to the condition that traffic arrangements between the companies in respect thereto should be approved by the Board. The city was made a party as being interested in having the facilities provided and fair traffic rates fixed.

The Board granted leave for the appeal and, in accordance with the provisions of section 41 of the "Railway Act, 1903," the following questions were submitted with the approval of the Board:—

"1. Had the Board authority, under the 'Railway Act, 1903,' and particularly under sections 253, 271, and 214, to make the order in question under the circumstances shewn in the record in this case?

"2. Are sections 266 and 267 of the 'Railway Act, 1903,' applicable under the circumstances of this case where one and the same through rate is charged to and from all points within the district lying in and about the City of London to which the said order applies?

"3. Does the order appealed from involve the obtaining by the Canadian Pacific Railway Co. of the use of the tracks, station, or station-grounds of the Grand Trunk Railway Co., at London, for which the Grand Trunk Railway Co. should obtain compensation under the 'Railway Act, 1903,' and particularly under section 137?

"4. Was the Board 'bound, as a matter of law,' to take into consideration, in estimating the remuneration or compensation to be allowed to the Grand Trunk Railway Co. in consequence of or for what was required of that company by the said order:—

"(*a*) The magnitude of the business of the Grand Trunk Railway Co. at London as compared with that of the Canadian Pacific Railway Co. at that point;

1906

GRAND TRUNK RY. CO. v. CAN. PAC. RY. CO. AND CITY OF LONDON.

"(*b*) The comparative advantage which each of the said two companies can offer to the other there;

"(*c*) A comparison of the loss which one company is likely to sustain with the gain likely to accrue to the other company from the giving of these facilities which the law required;

"(*d*) The amount which may have been expended by the Grand Trunk Railway Co. in the acquisition of their terminal facilities at London or the value of their investments therein, otherwise than as evidence of the fair value of the service to be rendered and of the use of the facilities to be afforded under the said order;

"(*e*) The amount of any further investment of capital which the Grand Trunk Railway Co. may be obliged to make in order to carry out the terms of the said order, otherwise than as excepted by the last preceding paragraph?"

Lafleur, K.C., and *Biggar*, K.C., for the appellants.

McMurchy, for the Canadian Pacific Railway Co., respondents.

T. G. Meredith, K.C., for the City of London, respondent.

The judgment of the court was delivered by

DAVIES, J.—Since this appeal was taken from the decision of the Railway Commissioners, Parliament has enacted an amendment to the Railway Act,* placing beyond doubt the power of the Commissioners to make such an order as the one now appealed from.

Our decision, therefore, as to what was the true meaning of the original Act is of no public importance, and we do not see any good purpose in stating reasons for the conclusion we have reached that the appeal must fail.

* 6 Edw. VII. ch. 42, sec. 8.

We should answer the first and second questions in the affirmative and all others in the negative.

Appeal dismissed with costs.

Solicitor for the appellants; *W. H. Biggar.*

Solicitor for the Canadian Pacific Railway Co., respondents; *Angus McMurchy.*

Solicitor for the City of London, respondent; *T. G. Meredith.*

[S. C. File No. 2554.]

THE GRAND TRUNK RAILWAY CO. v. THE CANADIAN PACIFIC RAILWAY CO. AND THE CITY OF TORONTO.

APPEAL from the judgment of the Court of Appeal for Ontario, which affirmed the decision of the trial judge, holding the Grand Trunk Railway Company liable to contribute towards the construction and maintenance of an elevated traffic bridge on York street in the city of Toronto.

The Appeal was dismissed with costs.

(18th May, 1906.)

[S. C. File No. 2555.]

WOLFF ET AL. v. BROOK.

APPEAL from the Court of Review, at Montreal, affirming the judgment of Fortin, J., in favour of the plaintiff,

1906

WOLFF ET AL. v. BROOK.

(respondent) for $1,803, commissions claimed by him at a rate per head on the killing account of the Montreal Abattoir Co. as due to the Canadian Casing Co., and $400 for damages for breach of contract.

The defendants (appellants) pleaded to the plaintiff's action that on a proper construction of the contract all commissions had been duly paid, and that if there had been any breach of contract it was on account of the plaintiff's fault in respect to dealing with local butchers in Montreal and that there was no right to damages.

The appeal was dismissed with costs, the only notes of reasons for judgment delivered were those of His Lordship Mr. Justice Idington, which were, in effect, that the plaintiff had fulfilled the conditions of the contract, that he was entitled to the commissions allowed by the courts below and that the assessment of damages was reasonable, under the circumstances.

Appeal dismissed with costs.

(8th October, 1906.)

[S. C. File No. 2556.]

GOULET v. THE WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY.

APPEAL from the Court of King's Bench, appeal side, Province of Quebec, reversing the judgment of the Superior Court, District of Montreal, and dismissing the appellant's action with costs.

The action was for breach of contract in respect to the supply of electric power for the manufacture of bricks, at Shawinigan Falls, Que. The defence was that no binding agreement had been entered into by them or by any person

authorized by them. At the trial the plaintiff recovered judgment for $1,925, but this judgment was reversed by the judgment appealed from.

1906

GOULET v. WESTINGHOUSE E. & MFG. CO.

After hearing counsel on behalf of the appellant, the court dismissed the appeal with costs, without calling upon counsel for the respondents for any arguments.

Appeal dismissed with costs.

Laflamme for the appellant.

T. Chase Casgrain, K.C., for the respondents.

(12th October, 1906.)

[S. C. File No. 2557.]

1906

THE GRAND TRUNK RAILWAY CO. (DEFENDANTS).. APPELLANTS,

AND

MOORE (PLAINTIFF) ..... RESPONDENT.

*May 16.
*May 28.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Operation of railways—Highway crossings—Inconsistent findings—Questions to jury—Practice—Mistrial.

Where the findings of the jury were conflicting and inconsistent to such a degree as to satisfy the court that there had been a mistrial, a new trial was directed.

Judgment appealed from reversed, Idington, J., dissenting.

APPEAL from the judgment of the Court of Appeal for Ontario, directing a verdict to be entered in favour of the plaintiff for the amount of damages found by the jury at the trial, the trial judge, Magee, J., having refused to enter judgment for either party upon the findings.

* PRESENT: SEDGEWICK, GIROUARD, DAVIES, IDINGTON and MACLENNAN, JJ.

1906

GRAND TRUNK RY. CO. v. MOORE.

The action was by the widow of the late William Moore, who was struck and killed by a train at the crossing of the appellants' railway on Bloor street in the City of Toronto.

At the time of the accident deceased was walking westwards on Bloor street, about sunset, at a point near the railway crossing where the tracks are slightly above the general grade of that street. Other persons on the street at the same time saw the train coming and ran past deceased, over the tracks, ahead of the train, but deceased, who was walking slowly, was struck by the train and killed. Other persons who were near saw the train with the head-light and windows of the coaches shining, about a quarter of a mile away. They called to deceased, who was walking with his head down a few yards from the track, but he paid no attention to their cries and went on towards the crossing.

In answer to four questions submitted, the jury found that the accident had been caused by the negligence of the defendants in the operation of the train in omitting to ring the bell, and they assessed damages to the plaintiff at $2,700. In answer to the 3rd question: "Could William Moore have avoided the injury by the exercise of reasonable and ordinary care?" the jury said:—"Yes. But it has not been proven to us that he did not use ordinary care."

After these answers had been returned, in consequence of the apparent inconsistency of this answer, a fifth question was put to the jury:

"If William Moore had used reasonable and ordinary care would he have sustained the injury? The jury first answered:—"In absence of evidence to prove that he did not use ordinary care we believe he did use ordinary care." Then, being asked to reconsider their answers, they changed this answer to "Yes." Then two other questions were put to them, as follows:—6. "Did the deceased William Moore use reasonable and ordinary care in going towards and on the track upon the occasion of the injury?" Answer:—"Yes."

7. "If he did not do so, wherein was he negligent?" Not answered.

When answering the sixth question, the jury struck out their answer to the fifth question, but, after again retiring, restored their answer "Yes" to that question.

Mr. Justice Magee declared that, on these answers, he could not enter judgment for either of the parties and ordered that the action should be re-tried. By the judgment appealed from, judgment was ordered to be entered for the plaintiff for the amount found by the jury with costs.

Nesbitt, K.C., and *Riddell*, K.C., for the appellants.

Glyn Osler and *E. G. Morris* for the respondent.

The judgment of the majority of the court was delivered by,

SEDGEWICK, J.—The question whether or not the deceased was guilty of contributory negligence under the peculiar circumstances of this case is one for the jury. The findings of the jury are conflicting and inconsistent on this point, and a careful reading of what took place, after the jury brought in their first findings and before and up to the time they brought in their answers to the additional questions submitted to them by the trial judge, satisfies us that there was a mistrial and that the order or judgment of the trial judge should be restored, a new trial granted, and the appeal allowed with costs in this court.

Under the special circumstances of the case there shall be no costs to either party in the Court of Appeal, the costs of the trial to abide the event.

IDINGTON, J. (dissenting)—The issues here are for a jury. The questions submitted and answers thereto, taken as a whole, can be, for the reasons assigned by Mr. Justice Osler, so read as to uphold the results arrived at. Some features of the proceedings leading up to the verdict as it stands are so unsatisfactory that I would have felt as well satisfied if the Court of Appeal could have seen its way to let the case stand as Mr. Justice Magee left it. I cannot,

1906

GRAND TRUNK RY. CO. v. MOORE.

IDINGTON, J

however, find that the Court of Appeal has so erred in coming to the result it has as to justify a reversal.

It is not for the purpose of having a new trial, I imagine, but for the purpose of having our judgment dismissing the action, that the appellants are here with a fairly arguable case. We cannot accede to that part of their motion and I think ought not to assent to the incidental part of the appeal. We ought not to encourage appeals from one appellate court to another in such matters of what, after all, is merely in the nature of procedure.

I would dismiss the appeal.

Appeal allowed with costs.

Solicitor for the appellants; *W. H. Biggar.*

Solicitor for the respondent; *E. G. Morris.*

[S. C. File No. 2558.]

LEAHY v. TOWN OF NORTH SYDNEY.

Varying minutes of judgment.

MOTION to vary the minutes of judgment (37 Can. S. C. R. 464) as settled in order to conform to the intention of the court, in respect to the direction as to the expropriation of the plaintiff's land.

Newcombe, K.C., for the motion.

Drysdale, K.C., contra.

The motion was allowed without costs and upon terms and in the form stated in a special memorandum by Maclennan, J.

(16th October, 1906.)

[S. C. File No. 2570.] 1906

THE SHIP "C. F. BIELMAN" (DEFENDANT)..APPELLANT *Nov. 19, 20. *Dec. 5.

AND

C. W. CADWELL (PLAINTIFF).....RESPONDENT,

ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT OF THE EXCHEQUER COURT OF CANADA.

Admiralty law — Navigation — Negligence — Overtaking vessel — Findings of fact—Cause of collision.

The Supreme Court of Canada affirmed the decision of the trial judge who, guided by the probabilities resulting from his appreciation of conflicting evidence, found that the appellant ship was entirely to blame for the collision complained of by attempting to pass the vessel injured in close proximity and at undue speed, thereby causing the smaller vessel to sheer to port and collide with her in a narrow channel.

APPEAL from the judgment of the local judge, in admiralty, for the Toronto Admiralty District of the Exchequer Court of Canada, which maintained the plaintiff's action for damages with costs.

The appellant ship and the respondent's ship "G. T. Burroughs" came into collision in the circumstances stated in the judgment now reported, in Canadian waters, and injuries were sustained by the respondent's ship for which he instituted the action.

The "Bielman" was of 3,000 tons burthen and the dimensions mentioned in the judgment; the "Burroughs" was a much smaller ship of 130 tons burthen, and both ships were at the time of the collision proceeding down the St. Clair River. The "Burroughs" was ahead of the "Bielman," and the latter, wishing to pass, gave the proper signal, but when the bows of the ships were abreast the collision occurred.

The local judge, Hodgins, J., found that the "Burroughs" complied with the rules of navigation by keeping on her

* PRESENT: FITZPATRICK, C.J., and DAVIES, IDINGTON, MACLENNAN and DUFF, JJ.

1906

THE "BIELMAN" v. CADWELL.

course, but that the "Bielman" came too close and caused the collision by the suction due to the displacement of the water, by her greater bulk. The appellant contended that such suction or displacement in order to bring two vessels together could only come from the stern, and that it was only the bow of the "Burroughs" that was attracted, apparently, as the stern of the "Bielman" was about 200 feet behind the stern of the other ship.

A. H. Clarke, K.C., and *A. R. Bartlett* for the appellant.

J. H. Rodd for the respondent.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—This is a case of damage promoted by the owners of the ship "G. T. Burroughs" against the owners of the ship "C. F. Bielman," both foreign ships registered in ports of the United States. By the pleadings and findings of fact, it appears:—

On the morning of 31st May, 1905, at about 12.45, a collision took place between the "G. T. Burroughs" and the "C. F. Bielman" at a place in the St. Clair River, just below what is known as the South-East Bend.

The "G. T. Burroughs" was a steamer of 109 feet in length, 27 feet beam and 9 feet draught, and the "C. F. Bielman," a steamer of 305 feet in length, 42 feet beam and 18 feet draught. The weather was clear, the wind light from the south-west. Both vessels were proceeding down the river on the same course, fully laden, the "C. F. Bielman" having the barge "McLaughlin" in tow. The navigable channel of the river, at the point where the collision occurred, is about 700 feet wide, very winding, and is referred to in the evidence as dangerous. One of the witnesses describes it as "Collision Bend, because accidents happen there." There were several vessels in the locality at the time of the collision. Under these circumstances the "C. F. Bielman," going at the rate of about 9 miles, attempted to overtake and pass the "G. T. Burroughs" on the latter's port side.

It is unnecessary to refer to the well known rules which require caution as to speed in a dangerous and crowded channel, and put upon the overtaking and pursuing vessel the obligation to keep out of the way of the overtaken vessel, which latter has the right of way, her only duty being to hold her course. It is sufficient to say that, as the boats were abreast, the bow of the "C. F. Bielman," apparently being somewhat ahead and at a distance apart of less than 250 feet, which is the extreme limit fixed by any of the witnesses, a collision occurred; the bow of the "G. T. Burroughs" swung towards the "C. F. Bielman," and struck her amidships; as a result of the blow, the "G. T. Burroughs" sank.

It is argued by the appellant that the "G. T. Burroughs" was not properly manned and that proper steps were not taken by those on board of that steamer at the critical moment to guard against an accident.

Even if it be admitted that, on the whole, the evidence of both sides is, on some points, conflicting and nicely balanced, I am of opinion that the court below was properly guided by the probabilities of the respective cases which are set out, and the balance of probability favours the theory adopted by the learned trial judge that the collision was the result of the suction produced by the passage through the water of a relatively large vessel, such as the "C. F. Bielman" overtaking a smaller vessel in close proximity and at a rate of speed which, under the circumstances, was too great and which suction caused the "G. T. Burroughs" to sheer over to port and collide with the "C. F. Bielman."

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Clarke, Bartlett & Bartlett.*

Solicitors for the respondents: *Rodd & Wigle.*

1907 [S. C. File No. 2574.]

THE CUSHING SULPHITE FIBRE CO. v. CUSHING.

APPEAL from the Supreme Court of New Brunswick, which dismissed an appeal from the judgment, at the trial, by Barker, J.

The appeal was dismissed with costs. The only reasons delivered in writing were by Davies, J., who agreed with the reasons stated by Barker, J., in the court below, and by Idington, J., who differed merely as to an inference drawn from correspondence in relation to the contract in question and, otherwise, agreed with his decision.

(19th February, 1907.)

1906 [S. C. File No. 2578.]

COOPER ET AL. v. BUNNELL.

APPEAL from the Court of King's Bench for Manitoba, affirming the judgment of Perdue, J., at the trial, which dismissed the plaintiff's action with costs.

Appeal dismissed with costs.

(15th November, 1906.)

1905 [S. C. File No. 2579.)

DUNPHY v. THE MONTREAL LIGHT, HEAT AND POWER CO.

APPEAL from the Court of King's Bench, appeal side, province of Quebec (Q. R. 15 K. B. 11).

Discontinued with costs in favour of the respondent.

(16th July, 1905.)

[S. C. File No. 2580.] 1906

THE OTTAWA ELECTRIC CO. v. CITY OF OTTAWA.

Appeal—Practice—Postponement pending appeal to Privy Council.

APPEAL from the Court of Appeal for Ontario (12 Ont. L. R. 290).

When the appeal came on for hearing, counsel for the respondent suggested to the court that the city had taken an appeal from the same judgment direct to the Judicial Committee of His Majesty's Privy Council and moved that, pending said appeal, all proceedings in the present appeal should be stayed.

The court ordered that until the decision of the appeal by the respondent to the Privy Council all proceedings upon the present appeal should be stayed and suspended.

Ordered accordingly.

(5th November, 1906.)

[S. C. File No. 2582.] 1906

WOOD v. LEBLANC ET AL. *Dec. 15. *Dec. 26.

Assessment of damages—Concurrent findings—Practice on appeal.

Where the judge at the trial had heard and seen the witnesses and had, on proper principles, assessed damages according to his appreciation of the evidence, his decision being adopted by the court in banc, the court refused to interfere on appeal.

APPEALS from the judgment of the Supreme Court of New Brunswick, affirming the decision of Barker, J., at the trial.

* PRESENT: FITZPATRICK, C.J., and DAVIES, IDINGTON, MACLENNAN and DUFF, JJ.

1906

WOOD
v.
LEBLANC
ET AL.

The dispute arose in respect to the title to a block of wilderness lands at Sackville, Westmoreland County, N.B., which had been for over sixty years utilized for cutting timber by a number of persons residing in the vicinity, by tacit permission of the Crown, their claims being known as the "Sackville Claims. (See *Wood* v. *LeBlanc* (1).

The action was brought by the appellant, under a title set up by him, for an injunction against a number of these people, respondents, as trespassers, who, on their part, counterclaimed for damages in case of eviction.

At the trial, Barker, J., entered a verdict for damages for various amounts in favour of the respondents, respectively, and the appeal was upon the ground that the damages had been so assessed upon wrong principles of law.

Teed, K.C., for the appellant.

Friel for the respondents.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—These appeals are dismissed with costs. The learned judge who granted the injunction, subject to the undertaking then entered into by the appellant to abide by any order the court might make as to damages, assessed these damages, after hearing all the witnesses *viva voce*, and as it has not been shewn to our satisfaction that Judge Barker acted on a wrong principle in fixing the *quantum*, we must, necessarily, give great weight to the conclusions which he reached, adopted as they have been by the court of appeal for New Brunswick.

Appeals dismissed with costs.

Solicitor for the appellant; *M. G. Teed.*

Solicitor for the respondents; *James Friel.*

(1) 34 Can. S. C. R. 627.

[S. C. File No. 2583.]

1906

*Oct. 10, 11.
*Oct. 25.

WILLIAM ROBB (DEFENDANTS).....APPELLANTS,

AND

MICHAEL STAFFORD (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Reviewing questions of fact on appeal—Findings of trial judge.

The findings of the trial judge who heard the witnesses and had an opportunity of appreciating their demeanour ought not to be disturbed on appeal.

The judgment appealed from was reversed and the judgment at the trial restored.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Montreal, and maintaining the plaintiff's action with costs.

The action was brought by the respondent for $10,000 damages for alleged breach of contract of an agreement for the sale of certain property in the city of Montreal for the purposes of a livery stable. At the trial, Mr. Justice Tellier dismissed the action, but his judgment was reversed by the judgment appealed from and damages were awarded to the plaintiff for the alleged breach of contract in the sum of $3,600 with costs.

The decision of the appeal depended upon the appreciation of the evidence as to the facts of the case, and, in so far as the circumstances of the case were material to the issues raised on the appeal, they are stated in the judgment of His Lordship, the Chief Justice, now reported.

Atwater, K.C., and *White*, K.C., for the appellant.

Campbell, K.C., for the respondent.

* PRESENT: FITZPATRICK, C.J., and GIROUARD, IDINGTON, MACLENNAN and DUFF, JJ.

1906

ROBB v. STAFFORD.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—I am of the opinion that the judgment appealed from should be reversed and the judgment of the Superior Court restored.

In April, 1901, the respondent, Stafford, plaintiff in the Superior Court, leased for a term of five years from the defendant Robb, now appellant, certain premises on Drummond street, Montreal, used as a livery stable.

It is alleged by the plaintiff in his declaration that contemporaneously with the making of the lease he was given an option to purchase the property at any time during its currency for the sum of $22,500, and that defendant, having sold the property to one McGarr, in breach of this option, was liable in damages to the plaintiff.

The exact date of the option, the terms upon which it was given, whether verbal or written, and in fact the existence of an option, is to some extent put in doubt by the appellant, and in this respect the evidence of record is unsatisfactory.

I agree, however, with Mr. Justice Tellier (the trial judge) that an option or right of pre-emption was given to Stafford, and there can be no doubt on the evidence that, at the time the final negotiations were entered into for the purchase of the property by McGarr from Robb, both parties to the sale proceeded on the assumption that Stafford had some interest in it beyond that conveyed by the terms of his lease. On Robb's suggestion McGarr, acting through one Ogilvie, approached Stafford, who was at times represented by Marler, N.P., for the purchase of this interest as well as for a lease of his rights under the lease and, after negotiations extending over a considerable period, Stafford agreed to sell all his rights to McGarr for the sum of $5,000, which sum was fixed by him without reference to Robb.

Questioned at the trial by his own counsel, Stafford gives the following evidence:

Q. Were you ever offered $5,000 for your rights in that property?

A. Yes.

Q. By whom?

A. Mr. Ogilvie.

Q. Were you ever actually offered it in cash?

A. Mr. Putnam made me an offer of seven thousand five hundred dollars.

Q. I am not speaking of the arrangements—I am asking you whether you ever got a tender made to you of five thousand dollars in cash?

A. Yes, Mr. Ogilvie, from Mr. McGarr.

Q. How did he do it?

A. He wrote to that effect.

The letter referred to reads as follows:

Montreal, November 4th, 1903.

W. deM. Marler, Esq.,
Montreal.

Dear Sir:

I beg to thank you for your letter of yesterday's date in reference to the Stafford-McGarr matter. As I told you, my clients have decided that they will not give more than $5,000 for Stafford's lease. In order that Stafford may re-consider matters I shall wait until Friday before closing elsewhere. The proposition we make him is that we pay him $5,000 on signing of transfer of property, such transfer to be made within one month from present date and that Stafford gives us possession not later than July 15th, 1904.

Yours truly,

(Sgd.) DOUGLAS W. OGILVIE.

That this offer was to cover all Stafford's interest in the property is admitted by him in his evidence:—

Q. You said the $5,000 was to cover everything?

A. Yes.

Q. That is to say you were to give up everything you had?

A. Yes, the improvements I had put on it.

Q. Anything else?

A. Nothing else.

Q. What about the option?

A. Well, that included my rights on the property—my option, and the rights upon the property which I had.

Q. You did not consider the improvements which you had put in worth as much as five thousand dollars, did you?

A. No.

1906

ROBB v. STAFFORD.

THE CHIEF JUSTICE

This offer to purchase made by Ogilvie for McGarr was accepted in writing on the 6th November. The letter, which it is admitted was drafted by Marler and signed by Stafford, reads as follows:—

Montreal, November 6th, 1903.

Dear Sirs:

In consideration of $5,000 to be paid to me before the 15th November, 1903, I will agree to cancel on the 15th July, 1904, my lease from Wm. Robb of the Robb Property on Drummond Street. Kindly accept this offer in writing.

Yours truly,

(Sgd.) MICHAEL STAFFORD.

Messrs. D. W. Ogilvie & Co.

The offer was accepted in writing and the bargain concluded. The further correspondence is not produced although spoken of by both Robb and Stafford when examined as witnesses.

It is true that the letter of the 6th November fixes a date for the payment of the $5,000, namely, 15th November, 1903. Stafford admits, however, that subsequently, at the request of Ogilvie, McGarr's agent, the delay was extended by him without reference to Robb to the 19th November. Informed of the agreement between McGarr and Stafford and that the delay for the payment of the $5,000 had been extended by Stafford for McGarr's convenience to the 19th, Robb executed the deed of sale on the 18th.

Questioned on this point Robb says:—

Q. Will you take communication of the letter, copy of which is filed as Exhibit D-1 at enquête, and state if that is the letter you refer to?

A. Yes, I believe that is the letter.

Q. That is signed by Michael Stafford?

A. Yes, and written apparently by Mr. Marler in his office.

(Plaintiff consents to the copy D-1 being filed.)

Q. This is dated November 6th, 1903?

A. Yes.

Q. And addressed to D. W. Ogilvie?

A. Yes.

1906

R.
v.
STAFFORD.

THE CHIEF JUSTICE

Q. And that is the $5,000 you have referred to in your examination in chief?

A. Yes.

Q. And it was after seeing this letter which was shewn to you by Stafford that you considered yourself free from all further responsibility as regards him?

A. After seeing that letter, I considered myself free, although, as I have stated in my evidence, I waited until I saw the written acceptance of it.

Q. What did you consider the acceptance of that offer?

A. The acceptance of the five thousand?

Q. Yes?

A. The letter that Ogilvie brought to me shewing me Stafford's signature as a written acceptance of the five thousand dollars.

Q. Well, who brought you this letter of November 5th, 1903, signed by Stafford, copy of which is filed as D-1? Was it Stafford or Ogilvie?

A. Ogilvie.

Q. He brought you that letter?

A. This apparently is the letter that Ogilvie brought to my office, in which he said, "Here now I have Stafford's written acceptance of that offer." So anxious was he about getting immediate possession that he told me "I am not going to be satisfied with this; I am going to have the thing put in notarial form." These were the words he used.

And again:—

Q. Now who told you about the delay being extended from the 15th November to a subsequent date?

A. Ogilvie did, in Dunton's office, and he produced the letter, which he held up in this way (indicating) and said, "Here is Mr. Marler's letter granting that delay."

Q. Did you read the letter?

A. I did not. I considered that I was dealing with honourable people, and I could not imagine for a moment that any deception was being practised.

On the same point Stafford says:—

Q. And then I think you told us that after you found that Mr. Robb had signed a deed of sale, you wanted to know what about your five thousand dollars. Is that right?

A. When they wrote and asked for the extension from the 15th to the 19th, I went and seen Mr. Marler and granted that extension, and when the 19th came I telephoned to Mr. Ogilvie and asked him what about the transfer of the property, and he says, "Oh, Mr. McGarr has failed to come to your terms."

1906

ROBB v. STAFFORD.

THE CHIEF JUSTICE

If anything depends on the terms of the letter asking for the extension and Marler's answer, it was clearly on Stafford to produce the correspondence which must be presumed, in the circumstances, to have been in part, at least, in his possession or under his control.

On the evidence, it is quite clear to me that on the 18th, when Robb executed the deed to McGarr, Stafford had completed his bargain for the sale of his rights. This is in effect admitted by the letter of the 20th November, when Marler, instructed by Stafford, writes as follows to McGarr's agent:

Montreal, 20th November, 1903.

Messrs. D. W. Ogilvie & Co.,
Montreal.

Dear Sirs,

As I understand that the sale from Mr. Robb to Mr. McGarr has been completed of the property on Drummond Street leased with an option of purchase to Mr. Stafford, will you please let me know when the $5,000 is to be paid in accordance with our agreement?

Yours truly,

(Sgd.) W. DEM. MARLER.

It is quite true that to some extent the evidence is conflicting, but I am of opinion that the finding of the trial judge who heard the witnesses *viva voce*, and had an opportunity to appreciate their demeanour and manner should not be disturbed, and I am clearly satisfied that the judgment of the Court of Appeal is erroneous and should be reversed, and that is the opinion of the court.

Appeal allowed with costs.

Solicitors for the appellant: *White & Buchanan.*

Solicitors for the respondent: *Campbell, Meredith, Macpherson & Hague.*

[S. C. File No. 2597.]

1907

LEIGHTON v. HALE.

*Feb. 27.
*March 13.

Partnership—Evidence—Concurrent findings.

The Supreme Court refused to interfere with concurrent findings as to facts by the courts below.

APPEAL from the Supreme Court of New Brunswick affirming the decision of the equity judge at the trial.

The appellant contended that in the circumstances under which some dealings had been carried out, the relation of co-partners had been constituted between the respondent and him, and that there should be a division of profits on that basis upon accounts to be taken. On the evidence the trial judge found against the appellant and dismissed his bill, this decision being affirmed on appeal to the full court.

Carvell for the appellant.

Gregory, K.C., and *Hartley* for the respondent.

The judgment of the court was delivered by

DUFF, J.—The sole ground upon which the appellant's counsel bases his appeal is that the court below erred on the view that the plaintiff (appellant) had failed to establish the existence of the partnership set up in his bill. Upon this question, I agree with the learned judge of first instance that the facts, as found by him, do not warrant the conclusion that the alleged partnership was created; and I see no sufficient reason for holding that his findings, affirmed as they were by the full court, should be disturbed.

Concerning the other points discussed by the learned trial judge, it is unnecessary to express any opinion.

Appeal dismissed with costs.

Solicitor for the appellant; *F. B. Carvell.*

Solicitor for the respondent; *J. C. Hartley.*

* PRESENT: FITZPATRICK, C.J., and DAVIES, IDINGTON, MACLENNAN and DUFF, JJ.

1907

[S. C. File No. 2604.]

THE NICHOLS CHEMICAL CO. v. FOSTER.

APPEAL from the Court of King's Bench, appeal side, Province of Quebec.

Appeal dismissed for the reasons stated in the court below.

(13th March, 1907.)

1906

*Dec. 13

[S. C. File No. 2605.]

THE HALIFAX AND SOUTHWESTERN RAILWAY CO. v. SHEA.

Negligence — Operation of railway — Dangerous way — Passenger jumping off train.

APPEAL from the Supreme Court of Nova Scotia, affirming the judgment of Russell, J., at the trial, without a jury, Longley, J., dissenting.

The plaintiff jumped off a car of a train of the defendants (appellants) when the train had become derailed. Other passengers who remained on the train were not injured. The charge of negligence was that the company had allowed the ties to become rotten, thus causing the rails to spread and resulting in the derailment. The defence was that if the plaintiff had not unnecessarily jumped off the car he would have escaped injury.

Newcombe, K.C., and *Mellish*, K.C., for the appellants.

J. A. McLean, K.C., and *W. B. A. Ritchie*, K.C., for the respondent.

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* PRESENT: FITZPATRICK, C.J., and DAVIES, IDINGTON, MACLENNAN and DUFF, JJ.

After hearing counsel for the parties, the court reserved judgment and, on a subsequent day, dismissed the appeal with costs.

Appeal dismissed with costs.

1907

HALIFAX AND SOUTH-WESTERN RY. CO. v. SHEA.

[S. C. File No. 2608.)

WRIGHTMAN v. McLEOD.

APPEAL from the Supreme Court of Prince Edward Island.

Dismissed for want of prosecution.

(30th February, 1907.)

[S. C. File No. 2611.]

1906

THE TORONTO RAILWAY CO. v. McKAY.

Appeal—Jurisdiction—New Trial.

APPEAL from the judgment of the Court of Appeal for Ontario refusing an application by the defendants, appellants, for entry of non-suit and ordering a new trial.

On the application, in the reasons against the appeal, the plaintiff urged that if any relief was granted, it should only be a new trial. The Court of Appeal granted a new trial under the judicature rules. The defendants appealed in order to obtain the nonsuit asked for.

The respondent contended that the appeal was not from a judgment on a motion for a new trial under the statute, as no such motion was made; also, that it was made in respect to the exercise of a judicial discretion.

1906

TORONTO RY. CO. v. McKAY.

Appellants claimed that the contention of plaintiff in the Court of Appeal amounted to a motion for a new trial, and that since the amendment to the statute, in 1891, judicial discretion did not enter into the question.

Rose for the respondent, moved to quash the appeal.

Morine, K.C., and *Bain* contra.

After hearing counsel for both parties, the court quashed the appeal without costs.

Appeal quashed without costs.

(29th November, 1906.)

[S. C. File No. 2613.]

JONES ET AL. v. McCONNELL AND LYE.

APPEAL from the judgment of the Court of Appeal for Ontario affirming the trial court judgment granting the plaintiff (respondent) relief sought by him in an action for specific performance of an agreement for the sale of lands and to have the agreement for sale removed from the register.

After hearing counsel for the parties the court reserved judgment and, on a subsequent day, dismissed the appeal with costs. There were no written judgments delivered, Duff, J., however, stated that he agreed with the opinion of Moss, C.J., in the court below.

R. S. Cassels, K.C., and *H. Cassels*, K.C., for the appellants.

Latchford, K.C., for respondent, McConnell.

Nesbitt, K.C., for respondent, Lye.

(5th December, 1906.)

[S. C. File No. 2614.] 1906

LAWTON CO. v. MARITIME COMBINATION RACK CO.

APPEAL from the Court of Appeal for Ontario.

Discontinued with costs.

(27th September, 1906.)

[S. C. Files Nos. 2618, 2622.] 1906

ROCHE v. BORDEN; CARNEY v. O'MULLIN; HALIFAX ELECTION CASES. *Nov. 6

Election law—Amending minutes of judgment—Order as to further proceedings in election court—Commencement of trial—Cross-petitions.

MOTIONS, on behalf of the respondents (Borden and O'Mullin) for an order to vary the minutes of judgment as settled under the decisions in *The Halifax Election Cases* (1), in so far as they directed that the election trials should be proceeded with in regard to the cross-petitions, and to vary them so as to agree with the intention of the judgments by providing that the parties should be sent back to the Controverted Elections Court in the same position as they were before the appeals, and that the said court should be directed, simply, to take such further proceedings as to law and justice might appertain.

Thomson for the motions, contended that such alterations were necessary because trial proceedings on the cross-petitions had never been actually commenced in the court below in so far as the issues thereon were concerned.

Sinclair contra.

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* PRESENT: GIROUARD, DAVIES, IDINGTON, MACLENNAN and DUFF, JJ.

(1) 37 Can. S. C. R. 601.

1906

HALIFAX ELECTION CASES.

After hearing counsel upon the motions and without calling upon the opposing counsel for any argument, the court dismissed the motions with costs, fixed at $25 in each case.

Motions dismissed with costs.

1906

*OCT. 2.

[S. C. File No. 2619.]

THE C. BECK MANUFACTURING COMPANY, (PLAINTIFFS).... APPELLANTS,

AND

THE ONTARIO LUMBER COMPANY (DEFENDANTS).... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Expiration of time for appealing—Special leave—R. S. C. c. 135, s. 29—Jurisdiction.

After the expiration of the sixty days limited for bringing an appeal there is no jurisdiction in the Supreme Court of Canada to grant special leave for appealing. *Canadian Mutual Loan and Investment Co.* v. *Lee*, 34 Can. S. C. R. 224, and *Connell* v. *Connell*, Cam. S. C. Prac. 224, followed.

MOTION for special leave to appeal from the judgment of the Court of Appeal for Ontario affirming the decision of the trial court.

The judgment appealed from was pronounced on the 29th of June, 1906, and, upon motion for special leave to appeal therefrom, the Supreme Court of Canada held that, as more than sixty days had elapsed since the rendering of the judgment sought to be appealed from, it had no jurisdiction to grant the special leave asked for.

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* PRESENT: FITZPATRICK, C.J., and GIROUARD, DAVIES, IDINGTON, MACLENNAN and DUFF, JJ.

1906

C. BECK MFG. CO. v. ONTARIO LUMBER CO.

The motion was accordingly dismissed with costs, following the decisions in *Canadian Mutual Loan and Investment Co.* v. *Lee* (1), and *Connell* v. *Connell* (2).

Motion dismissed with costs.

Morine, K.C., for the motion.

Bethune contra.

NOTE.—Cf. *Ontario and Quebec Railway Co.* v. *Marcheterre* (17 Can. S. C. R. 141).

[S. C. File No. 2620.]

1906

*Oct. 2.

JULES AUDETTE (DEFENDANT).....APPELLANT,

AND

PETER O'CAIN (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Appeal—Jurisdiction—Possessory action—Matter in controversy.

MOTION to quash an appeal from the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Iberville, and maintaining the plaintiff's action with costs.

By his possessory action, the plaintiff prayed that he should be declared the owner of the land in dispute, that the defendant should be enjoined against troubling him in his possession thereof, that he should be awarded damages

* PRESENT: FITZPATRICK, C. J., and GIROUARD, DAVIES, IDINGTON, MACLENNAN and DUFF, JJ.

(1) 34 Can. S. C. R. 224. (2) Cam. S. C. Prac. 224.

1906

AUDETTE v. O'CAIN.

against the defendant, and that the defendant should be ordered to construct his building, adjoining said land, in such a manner as to prevent humidity passing through the walls of an ice-house, or remove it to such a distance from the boundary as to stop the penetration of water therefrom through the soil and into the plaintiff's land.

Bisaillon, K.C., for the motion.

Beaudin, K.C., contra, was not called upon for any argument.

After hearing counsel for the respondent in support of the motion, the court dismissed the motion with costs.

Motion dismissed with costs.

(ED. NOTE.—The appeal was heard on the merits on 16th May, 1907, and judgment was reserved.)

1907

[S. C. Files Nos. 2621, 2632, 2640.]

CRAWFORD v. J. McLEOD; LAWSON v. McLEOD; CRAWFORD v. M. McLEOD.

APPEALS from the Court of Appeal for Ontario.

On an arrangement arrived at during the arguments, the cases were settled out of court and the appeals were dismissed, by consent, without costs in the Supreme Court of Canada or in the courts below.

(4th April, 1907.)

1907

[S. C. File No. 2635.]

THE LAURENTIDE MICA CO. v. FORTIN ET AL.

APPEAL from the Court of King's Bench, appeal side, Province of Quebec.

Appeal dismissed for the reasons stated in the court below.

(9th May, 1907.)

[S. C. File No. 2636.]

ANGERS v. DUGGAN.

Matter in controversy on appeal—Satisfaction of claim—Change in position of parties—Question of costs only—Practice—Quashing appeal.

Appeal from the Court of King's Bench, appeal side, Province of Quebec.

It appeared that the claim of the appellant, an intervenant, had been settled, while proceedings were pending, and that the only remaining dispute between the parties was as to costs incurred.

On motion by the respondent, the appeal was quashed with costs.

(19th February, 1907.)

(See Q. R. 29 S. C. 232.)

1907

[S. C. File No. 2637.]

HAMELIN v. BANNERMAN.

Appeal from the Court of King's Bench, appeal side, Province of Quebec.

The Superior Court maintained respondent's action for further damages caused by the appellant increasing the height of a dam on the North River near Lachute, Que., which was the subject of dispute in a former action decided in 1901 (see 31 Can. S. C. R. 534), and this judgment was affirmed by the judgment appealed from.

After hearing counsel for the parties, the Supreme Court of Canada reserved judgment and, on a subsequent day, dismissed the appeal with costs.

Appeal dismissed with costs.

(13th March, 1907.)

THE END.

INDEX.