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CANADA

CONTAINING JUDGMENTS OF THE COURTS

—OF—

NOVA SCOTIA, NEW BRUNSWICK

AND

PRINCE EDWARD ISLAND

And of the Judicial Committee of the Privy Council in cases arising in such Provinces, Together with a Selection of cases decided in the Exchequer Court of Canada

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DOMINION OF CANADA.

EXCHEQUER COURT. NOVEMBER 2ND, 1910.

REX v. JANE MARY JONES.

Railway—Expropriation of Lands by Commissioners of the National Transcontinental Railway — Compensation — Arbitration under the Provisions of the General Railway Act (R. S. 1906 c. 37)—3 Edw. VII. c. 71—Construction —Jurisdiction of Exchequer Court.

This was a question of jurisdiction raised by the Court before proceeding with the trial of an information for the expropriation of lands.

E. L. Newcombe, K.C., for the Crown, supported the jurisdiction of the Court.

Nem. con.

CASSELS, J.:—The first paragraph of the information reads as follows:—

"1. The Commissioners of the Transcontinental Railway charged under and by virtue of the Act of the Parliament of Canada, 3 Edward VII. chapter 71, with the construction of the eastern division of the National Transcontinental Railway extending from the city of Moncton, in the province of New Brunswick, to the city of Winnipeg, in the province of Manitoba, have by themselves, their engineers, agents, workmen and servants, entered upon and taken possession of certain lands and real property hereinafter described, the same being in the judgment of the said Commissioners neces-

sary for the use, construction and maintenance of the said railway, and for obtaining access thereto, and the said lands and real property have been taken for the use of His Majesty the King, and have been measured off by metes and bounds, and a plan and description of the same, signed by the Chairman of the said Commissioners, and by their Chief Engineer, were deposited of record in the office of the Registrar of Deeds in and for the county of Westmoreland in the province of New Brunswick, in which county the said lands and real property are situate, on the fifteenth day of May, A.D. 1908; and the said lands and real property thereby became and are vested in His Majesty the King."

The second paragraph of the prayer of the information is as follows:—

"2. That it may be declared that the said sum is sufficient and just compensation to the defendant for and in respect of the above described lands and real property so taken as aforesaid, and the aforesaid claim for alleged loss and damage mentioned in the third paragraph of this information."

Special circumstances were shewn as a reason why this and another case should be tried at Moncton, N.B., where all the witnesses reside, and prior to the sitting at St. John, I was asked to hear the evidence at Moncton.

I acceded to the request, but directed the cases to be entered at St. John and the legal question argued as to whether or not the proper method of procedure to ascertain the compensation for the lands is or is not by arbitration under the provisions of the general Railway Act, or under the provisions of the Exchequer Court Act.

On the opening of the case at St. John, counsel for the suppliant and counsel for the respondent asked that this question should be argued in Ottawa, it being a question of considerable importance and affecting numerous cases.

Mr. Newcombe, K.C., argued the case at considerable length, and the view in favour of the Exchequer Court entertaining the action so far as ascertaining the compensation is concerned, was presented very clearly.

I have carefully considered the question and will express my view on the subject.

It is not a technical question, but may be one of very considerable importance to the owners whose lands are expropriated.

Section 50 of the Exchequer Court Act reads as follows:—

"50. The Court shall, in determining the compensation to be made to any person for land taken for or injuriously affected by the construction of any public work, take into account and consideration, by way of set-off, any advantage or benefit, special or general, accrued or likely to accrue, by the construction and operation of such public work, to such person in respect of any lands held by him with the lands so taken or injuriously affected."

Section 198 of the general Railway Act (c. 37, R. S. C.), reads as follows:—

"198. The arbitrators or the sole arbitrator, in deciding on such value or compensation, shall take into consideration the increased value, beyond the increased value common to all lands in the locality, that will be given to any lands of the opposite party through or over which the railway will pass, by reason of the passage of the railway through or over the same, or by reason of the construction of the railway, and shall set off such increased value that will attach to the said lands against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands."

By the Exchequer Court Act, what has to be taken into account by way of set off is any advantage, special or general, accrued or likely to accrue, etc.

Section 198 of the general Railway Act, limits the set off to the increased value beyond the increased value common to all lands in the locality, etc.

Dealing with a case relating to taxation (Nicholls v. Cumming, 1 S. C. R. p. 422), the late Chief Justice Ritchie (then Ritchie, J.), used the following language:—

"The principle of the common law is, that no man shall be condemned in his person or property without an opportunity of being heard. When a statute derogates from a common law right and divests a party of his property, or imposes a burthen on him, every provision of the statute beneficial to the party must be observed. Therefore it has been often held, that acts which impose a charge or a duty upon the subject must be construed strictly, and I think it is equally clear that no provisions for the benefit or protection of the subject can be ignored or rejected."

And Strong, J., at p. 427:—

"Taxation is said to be an exercise by the Sovereign power of the right of eminent domain (Bowyer's Public Law, p. 227), and, as such, it is to be exercised on the same principles as expropriation for purposes of public utility, which is referable to the same paramount right. Then, it needs no reference to specific authorities to authorize the proposition, that in all cases of interference with private rights of property in order to subserve public interest, the authorit conferred by the Sovereign—here the legislature—must be pursued with the utmost exactitude, as regards the compliance with all prerequisites introduced for the benefit of parties whose rights are to be affected, in order that they may have an opportunity of defending themselves (Cooley on Taxation, p. 265; Maxwell on Statutes, pp. 333, 334, 337, 340; Noseworthy v. Buckland in the Moor, L. R. 9 C. P. 233)."

The question in that case was of course different from the one before me, but the language used is apposite.

I will have occasion later to discuss authorities dealing with the question of the jurisdiction of the Courts to assess compensation where a special statutory mode of ascertaining the compensation has been provided.

In the cases of Johnston v. The King and Couse v. The King (not yet reported), I had occasion lately to consider the statutes relating to the National Transcontinental Railway. These were cases relating to contracts entered into by the Commissioners under the provisions of the statute. They were not cases relating to land damages for land expropriated for the use of the railway.

I do not propose to repeat what I wrote in giving my reasons in deciding those cases.

The Statute 3 Edw. VII. c. 71, is "An Act respecting the construction of a National Transcontinental Railway." The preamble recites:—"Whereas, etc., the necessity has arisen for the construction of a National Transcontinental Railway to be operated as a common railway highway across the Dominion of Canada, from ocean to ocean, and wholly within Canadian territory."

It recites the agreement of the 29th July, 1903, between His Majesty the King, of the first part, and Sir Charles Rivers Wilson, G.C.M.G., C.B., and others representing the Grand Trunk Pacific Railway Co., "making provision for the construction and operation of such a railway." "And

whereas it is expedient that Parliament should ratify and confirm the said agreement and should grant authority for the construction in manner hereinafter provided of the eastern division of the said railway," etc.

The statute, by section 2, confirms the agreement and provides that " His Majesty and the company are hereby authorized and empowered to do whatever is necessary in order to give full effect to the agreement and to the provisions of this Act."

The 8th section provides:—

" The Eastern Division of the said Transcontinental Railway, extending from the city of Moncton to the city of Winnipeg, shall be constructed by or for the Government in the manner hereinafter provided, and subject to the terms and provisions of the agreement."

The 9th section of the statute reads as follows:—

" 9. The construction of the Eastern Division and the operation thereof until completed and leased to the company, pursuant to the provisions of the agreement, shall be under the charge and control of three Commissioners, to be appointed by the Governor in Council, who shall hold office during pleasure, and who, and whose successors in office, shall be a body corporate under the name of 'The Commissioners of the Transcontinental Railway,' and are hereinafter called 'the Commissioners.' "

It will be noticed that no mention is made as to the acquisition of land upon which to construct the railway.

The agreement, however, paragraph 15, defines the expression " cost of construction."

It includes all expenditure for right of way and other lands required for the purposes of the railway, etc.

The 10th section of the Act provides for the appointment of a chief engineer.

The 11th section reads as follows:—

" 11. The Commissioners may appoint and employ such engineers (under the chief engineer), and such surveyors and other officers, and also such servants, agents and workmen, as in their discretion they deem necessary and proper for the execution of the powers and duties vested in them under this Act."

The 13th section reads as follows:—

"13. The Commissioners may enter upon and take possession of any lands required for the purposes of the Eastern Division, and they shall lay off such lands by metes and bounds, and deposit or record a description and plan thereof in the office for the registry of deeds, or the land titles office for the county or registration district in which such lands respectively are situate; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown, saving always the lawful claim to compensation of any person interested therein."

The 15th section is important; it reads as follows:—

"15. The Commissioners shall have, in respect to the Eastern Division, in addition to all the rights and powers conferred by this Act, all the rights, powers, remedies and immunities conferred upon a railway company under The Railway Act and amendments thereto, or under any general Railway Act for the time being in force, and the said Act and amendments thereto, or such general Railway Act, in so far as they are applicable to the said railway, and in so far as they are not inconsistent with or contrary to the provisions of this Act, shall be taken and held to be incorporated in this Act."

It may be well at this point to refer to the general Railway Act now found in the Revised Statutes of Canada, 1906, c. 37. The statute was enacted in the same year as the National Transcontinental Railway Act, 3 Edw. VII. c. 71. It provides:—

Section 2: "In this Act, and in any special Act as hereinafter defined, in so far as this Act applies, unless the context otherwise requires."

"4. 'Company,' (a) means a railway company, and includes every such company and any person having authority to construct or operate a railway."

Clause 28 of this section defines the words "Special Act:"—

"28. 'Special Act' means any Act under which the company has authority to construct or operate a railway, or which is enacted with special reference to such railway, and includes (a) all such Acts, (b) with respect to the Grand Trunk Pacific Railway Company, the National Transcontinental Railway Act, and the Act in amendment thereof passed in the fourth year of His Majesty's reign, chapter twenty-four,

intituled an Act to amend the National Transcontinental Railway Act, and the scheduled agreements therein referred to."

I have no doubt that part of the duties of the Commissioners was the acquisition of the lands required for the construction of the railway. They could make agreements with the land-owners, and failing an agreement can arrive at the amount payable under the provisions of the general Railway Act.

Under the 13th section, the lands are vested in the Crown, differing from the general Railway Act, and the words "saving always the lawful claim to compensation of any person interested therein" are to prevent any construction that the land-owner is to be deprived of his lands without compensation.

See Williams v. Corp. of Raleigh (21 S. C. R. 131).

Hereafter it may be necessary to consider if the case ever arises (which is not likely) whether the words have the effect of creating a vendor's lien after the compensation is ascertained by agreement or award. See Norvall v. Canada Southern Ry. Co. (5 Ont. A. R. 13), where specific performance was decreed.

Turning to the agreement of the 29th July, 1903, it recites that a line of railway should be "constructed and operated as a common railway highway." It proceeds to provide for the construction of the railway, leasing, etc.

Now, it seems to me quite clear that the provisions of the general Railway Act as to arbitration are applicable. There is nothing inconsistent between them and any provision of the special Act. The fact that the lands are vested in the Crown does not affect the question. Failing to agree on a price the amount payable must be ascertained in some manner. The whole purview of the statute seem to treat the Transcontinental Railway as something different from an ordinary government railway. I have set out in my former opinion in the Johnston and Couse cases why I think the Commissioners are not to be treated merely as ordinary agents of the Crown, and I referred there at some length to the English authorities.

It is conceded that the Government Railway Act (R. S. C. 1906, c. 36), does not apply to this railway.

Section 2, sub-section (1) interprets "railway:"—

"'Railway' means any railway, and all property and works connected therewith, under the management and direction of the Department."

Sub-section (d) :—" 'Department' means the Department of Railways and Canals."

Section 4:—"This Act applies to all railways which are vested in His Majesty, and which are under the control and management of the Minister."

Looking at The Expropriation Act (R. S. C. 1906, c. 143), we find that by section 2, sub-section (a)—

"'Minister' means the head of the Department charged with the construction and maintenance of the public work."

By sub-section (d), "'public work or works' means and includes . . . 'government railways.'"

I have pointed out that, in my opinion, the Transcontinental Railway is not a government railway within the meaning of the Government Railways Act, nor do I think the provisions of The Expropriation Act apply.

Chapter 39 of R. S. C. 1906, relating to public works, has no application.

The case of National Transcontinental Ry., Ex parte Bouchard (38 N. B. R. 346), is not binding on me. The Court dealt with the matter as if section 5 of the Government Railways Act concluded the question.

In arriving at a decision in this case, the point must not be lost sight of that the Grand Trunk Pacific are interested in the amount of compensation paid, as it forms an element in arriving at the rental and the manner in which such compensation is ascertained. They had stipulated in the agreement that so far as the location, construction and operation of the Western Division is concerned, the Railway Act should apply. (See clause 38 of agreement).

If Parliament has provided a particular tribunal for the ascertainment of compensation, the course prescribed for arriving at the amount payable must be adopted.

The section of the Exchequer Court Act (20) which provides that the Exchequer Court shall have exclusive original jurisdiction to hear and determine the following matters:—

"(a) Every claim against the Crown for property taken for any public purpose;"

and the subsequent clauses do not, in my judgment, affect the question. The statutes referred to were enacted long subsequent to the Exchequer Court Act, and, as I view it, the

tribunal to ascertain the amount payable, failing an agreement, is the arbitration provided by the statute.

It may well be that once the "lawful claim" is ascertained in the manner provided, then the enforcement of it could be had in the Exchequer Court. Yule v. The Queen (6 Ex. C. R. 103, 30 S. C. R. 24), is an entirely different case. In that case the statute conferring right to enforce

> "(d) every claim against the Crown arising under any law of Canada"

was enacted subsequently, and besides the facts in that case were peculiar.

The present case is more like Scott v. Avery (5 H. L. Cas. 811), and numerous other authorities of a similar character. Williams v. Corp. of Raleigh is reported in 14 Ont. Pr. R. 50, 21 S. C. R. 104, (1893) App. Cas. p. 540. It is also reported in full in Clarke & Scully's Drainage Cases, p. 1.

The facts in that case were rather complicated. The action included claims of different character, and there was considerable divergence of opinion among the Judges. The final result of that case was that, so far as what is termed the claim in respect of the Bell drain, the action was dismissed, the remedy being under the provisions of the Drainage Acts to ascertain the amount of compensation payable. This case was a strong one, because a reference had been agreed to. Lord Macnaghten, in his reasons for judgment, states as follows, p. 53:—

"Their Lordships regret that they are unable to affirm the judgment of the Supreme Court in all respects, because they cannot help seeing that the plaintiffs have been seriously injured by the construction of the Bell drain, as well as by the breach of the statutory duty imposed upon the municipality. As far as the evidence goes, there is no reason to suppose that the municipality would have been able to cut down the damages if the respondents had proceeded by arbitration," etc.

The result was that the action, as regards the Bell drain, was dismissed without prejudice to any claim on the part of the respondents to have the amount of the damages to "their property occasioned by . . . the construction of the Bell drain and consequent thereon determined by arbitration."

In Water Commissioners of City of London v. Saunby (34 S. C. R. 650), the same result was arrived at. It is true that this case was reversed in the Privy Council (1906), A. C.

110; but the principle laid down by the Supreme Court was not questioned. The judgment was reversed because their Lordships were of opinion (see p. 115), that the provisions as to arbitration never came into force, the Commissioners not having proceeded in accordance with the Act.

Such cases as Parkdale v. West (12 A. C. 602), were invoked as authorities.

Numerous other authorities in the Ontario Courts on the same lines could be cited.

It was contended that the Crown is not bound by the provisions of the general Railway Act.

I have cited authority in the Johnston and Couse cases to shew if the Commissioners are subject to the general Railway Act, the Crown through them is subject to its provisions.

In this case it is not necessary to rely on this authority, as the statute expressly makes the provisions of the Railway Act applicable.

I have dealt with the question at considerable length, as it is one of importance.

Even if I did not entertain the opinion I have formed as to my jurisdiction, the question is so debatable that I would be loth to entertain jurisdiction until a decisive opinion was passed upon the question by the Supreme Court, or legislation put the matter beyond doubt.

NOVA SCOTIA.

SUPREME COURT. OCTOBER 19TH, 1910.

TRIAL AT INVERNESS.

PITTS v. CAMPBELL ET AL.

Partnership—Insolvency—Action—Subsequent Bill of Sale—Execution Creditor—Seizure of Stock for Rent—Sale by Bailiff—Fraud—Pleading.

Action to set aside a bill of sale and for an accounting.

D. McNeil, for plaintiff.
T. Gallant, for defendants.

LONGLEY, J.:—In December, 1909, the two defendants, Macgillivray and Guihan, entered into a partnership to carry

on business as jewelers and stationers at Inverness. Their store belonged to the defendant Campbell. They had little capital at beginning, and by April, 1910, were undoubtedly insolvent in the sense that they were unable to meet their obligations as they became due, and, in my judgment, had no sufficient assets to meet their liabilities. On the 26th of April the plaintiff sued them for over $300, to which a sham appearance was put in, evidently for delay. On the 5th of May a bill of sale of their entire stock was given to defendant Campbell. On the 13th of May Pitts entered judgment and issued execution. The sheriff went to levy that day, or immediately after, and was told of the bill of sale.

I do not think that the bill of sale, given under these circumstances, can stand for a moment. It was given when defendants were insolvent, and for the obvious purpose of giving Campbell a preference over all other creditors, and although a consideration was shewn, I have to view with considerable suspicion the whole transaction in view of the close relations between Macgillivray and Campbell. Guihan cleared out soon after the bill of sale was given.

Campbell and Macgillivray, being very dubious about the validity of the bill of sale, began to devise other means of getting whatever stock they had in May, 1910, valued at over $400, safely into the hands of Campbell. Under a claim of rent already due Campbell, about May 13th, got out a warrant of distress for over $100, and seized upon the fixtures in the shop, including a safe not included in the bill of sale. These were sold at auction by the bailiff, and the larger part bought in by a creature of Campbell's who was instructed by him to bid in for him.

After the bill of sale was given Macgillivray moved into a room belonging to Campbell, above the shop he had used as a store, at a rental of $5 a month, locked up the store with the goods in it, and allowed the rent of this store to accumulate. At the end of a month another warrant for $25 was issued by Campbell, and under this, seized goods in shop which sold for over $90. Then, after waiting for two months longer, another warrant was issued for two months' rent, and under this all the rest of the goods were seized and sold. Thus Campbell, without resorting to his bill of sale, by a convenient arrangement between Macgillivray and himself, by which this shut up store was still in theory tenanted by Macgillivray, managed to get all the goods under cover of distress for rent.

It should be mentioned that Macgillivray used the room above which he rented as premises for carrying on a watch repairing business.

The plaintiff in his claim, in addition to asking for the setting aside of the bill of sale, makes a further claim against Campbell for an accounting for the moneys received from the sale of these goods under distraint. The defendant Campbell pleads rent due and warrants for distress as justification for his acts.

The counsel for plaintiff took exception to the plea of Campbell No. 7, urging that it was not sufficiently specific and ought, to be effective, to have alleged but one warrant of distress, appraisement, notice of sale, etc. I thought the plea too vague and offered to allow counsel for defendant to amend it. But plaintiff claimed that if a good plea were pleaded he would require postponement, for he had received no notice of such defence and was not then ready to meet it. Whereupon defendant's counsel determined to go on with his plea as it was.

I have some difficulty about the validity of this plea in its present form, but I do not feel disposed to ignore it entirely. I think it is a notice to plaintiff that a sale under warrant for rent was set up, and therefore I am going to treat the plea as good for the purpose of receiving the evidence submitted under it. I have the greatest suspicion of the arrangement between the defendants Macgillivray and Campbell whereby this tenancy was extended without any reason whatever to enable enough rent to accrue to put the whole value of these goods in the hands of Campbell. But I am not quite satisfied that the evidence of fraud is sufficiently clear to enable me to find that it was an act of fraudulent collusion. Macgillivray gave no satisfactory reason why he allowed his tenancy to extend for several months after he had shut up shop and given a bill of sale of all his goods to Campbell. He said he was hoping to make an arrangement with his creditors and resume business. The prospects of any such consummation were extremely slight and not very reasonable, but there is no direct evidence of fraud.

The defendant Campbell, under his plea, has proved all the steps necessary in justification of his several warrants of distress, except that he has proved no notice of sale in any of the cases. If this is an essential step the defence fails.

It has been judicially determined that a bailiff is simply the agent of the landlord, and not an officer of the law, and hence the presumption that he has complied with all preliminary steps necessary to his authority to act does not apply. But the difficulty I have in giving any effect to such alleged irregularities in this case is the tenant seems to me to be the only person who can legally raise such objections. A landlord is not responsible for his conduct of a distress to all the world, but only to his tenant, and I do not think I can give the plaintiff here any advantage of any irregularity in the conduct of the distress.

I give judgment for the plaintiff against all the defendants on the prayer for setting aside the bill of sale, and direct that such bill of sale be set aside as against the law and intended to hinder and delay creditors and constituting a fraudulent preference, and with costs against all the defendants.

As for the claim against Campbell for accounting, I think he has accounted as fully as it is possible to do, and, in my view, I am not able to order the paying over of any part of the money received by him under distress for rent. But under the circumstances I think the plaintiff was justified in making the claim, and I do not think Campbell should have any costs on this prayer.

If the appeal court should reach the conclusion that the 7th plea is insufficient, or the defence under it as proved inadequate, I fix the damages of plaintiff at $350. The goods in the shop, when the chattel mortgage was given, were worth, I think, $400. Macgillivray says he sold and appropriated to his own use about $50 of these goods. Those seized by Campbell were worth about $350.

NOVA SCOTIA.

SUPREME COURT. OCTOBER 19TH, 1910.

TRIAL AT INVERNESS.

A. MONAGHAN & CO. v. McLEAN.

N. S. Liquor License Act—Seizure of Liquors without Warrant by Inspector—Action for Damages — Defence, that Liquors not Property of Plaintiff and that there were no Licenses Issued in the County for the Sale of Liquor—Judgment.

Action for the unlawful conversion of goods.

D. McNeil, for plaintiff.

T. Gallant, for defendant.

LONGLEY, J.: — Plaintiffs are wholesale licensed liquor dealers in the city of Halifax. The defendant is license inspector for the county of Inverness. The claim is that the defendant seized and detained the goods of the plaintiffs consisting of cases of liquors of various kinds at Strathlorne in said county of Inverness. The plaintiffs proved the case clearly.

The only defence offered was that the goods in question were not the plaintiffs' when seized, and that the goods, being intoxicating liquors, were sent into the municipality of Inverness where no licenses were in force under the Liquor License Act, contrary to the provisions of s. 186 of such Liquor License Act, enacted by c. 7 of the Acts of 1907.

As to the first defence I do not think it will avail. The only evidence offered upon this point was that of Frawley, an agent of plaintiffs, who was the only witness for plaintiffs. He says: "These goods" (contained in the bill of lading) "belong to A. Monaghan & Co. These goods were at Strathlorne station."

Cross-examined. "Made negotiations to sell goods to these parties. I simply sold these goods. The goods were sold. Carried on negotiations in Inverness with five different parties. Went round and had interviews with parties. Goods

were to be shipped to the order of A. Monaghan & Co. They gave me a memo in writing and fixed upon the price of the goods. They intimated how they were to be sent; by what particular time; told me what particular station to send them to. Don't know how the goods were labeled. I know they were labeled. This was the label referred to. (Marked A. and B.) on bills of lading and M-3. There was a stamp besides that of the firm. Stamp B. M-1. . . . I cannot say if these liquors were intended for J. J. McLean. Our instructions were to ship them for J. J. McLean. They were for another man. They were shipped to J. J. McLean, Strathlorne. He received a bill of lading. I gave no instructions to the railway people. It was shipped to their (Monaghan's) order. These labels are right. The labels on all the invoices. The goods were to be shipped in accordance with this bill of lading, and the mark is "shipped to the order of A. Monaghan & Co." With the mark X on it. The bill of lading does not shew to whom they were shipped. Know N. S. Liquor License Act in force at that time. Heard it was. . . This is the usual way we ship goods. We ship order and send note to men to come for it, if instructed that way. We were instructed to this effect by the men."

Re-examined. "A. Monaghan & Co. have wholesale and retail licenses. The goods were to be held at Strathlorne subject to order. These orders had not been given in Strathlorne prior to their being taken away. They were to deliver when the bill of lading was presented."

From the evidence it is clear that Monaghan & Co. shipped the goods in question to their own order at Strathlorne, and they were there at the time defendant seized them. It seems to me, therefore, that the plaintiffs still had property in and full control over the goods at the time of their seizure, and therefore have a clear right to bring this action as the lawful owners.

It is quite plain that in shipping these goods into a non-license county the plaintiffs were guilty of a violation of the provisions of c. 7 of the Acts of 1907, and liable to all the pains and penalties which said Act imposes.

But this is not the question before me. No proceedings for the fine or imprisonment which the Act provides have been taken, so far as appears, but the defendant, the inspector, of his own motion, and without any authority whatever, seized these goods and took them into his own charge. When the

plaintiffs demanded their return he said he could do nothing for two months. At the expiration of two months plaintiffs again demanded their goods, and defendant simply refused to give them up.

I cannot help regarding this proceeding of McLean as a high-handed act. The statute says nothing about seizure. There may be provisions in the general Act for seizure of goods of this kind under certain circumstances, but this is to be done under the authority of a stipendiary magistrate, and full provision is made for trial and adjudication by a judicial tribunal. But for an inspector, without any judicial authority, on his own motion, to seize goods in this manner, no greater outrage could be imagined. It would open the door to all imaginable fraud and has no word of law to justify it. No pretence of legal justification was offered by the counsel for defence, and the defendant did not venture to take the stand and subject himself to cross-examination as to the disposition made of these goods. For aught the Court knows he may have appropriated them to his own use or given or sold them to a friend.

The plaintiffs, in my view, are entitled to judgment for the whole value of the goods seized, and it seems to me desirable that the inspectorship of Inverness county be placed in more responsible hands.

NOVA SCOTIA.

SUPREME COURT. OCTOBER 1ST, 1910.

TRIAL AT LUNENBURG.

MILLET v. BEZANSON ET AL.

Trespass to Land—Title—Deed—Description—Locus in quo—Possession—Evidence.

Action claiming damages for trespass to land.

Paton, K.C., for plaintiff.

Mellish, K.C., and Kenny, for defendants.

GRAHAM, E.J., gave judgment as follows:—

The action is trespass for cutting logs on land claimed by the plaintiff, and the question is whether the description in the plaintiff's title covers the locus. In the plaintiff's deeds subsequent to the grant, this is the description:—

"Also those two certain tracts, pieces or parcels of land situate, lying and being between Middle River and the above named division letter B." (the only words in the reference are "in division letter B.") "being lots numbers six and seven in division letter C in the township aforesaid" (i.e., of Chester), "and containing each one hundred acres."

But going back to the grant to George Millet of May 6th, 1815, although it is not referred to in the deeds, for a more full description we have this description, including a lot shortly afterwards conveyed away to one Houghton:—

"Also unto George Millet of Chester aforesaid, farmer, three hundred acres of land, being the lots number five, six and seven, situate, lying and being in the second division of lot block letter 'C,' on the western side of the road leading from Chester to Windsor, and is abutted and bounded as follows, viz.:—Beginning on the eastern bank of Middle River (so called) at the north-western angle of lot number four, from thence to run east two hundred and sixty-seven rods until it meets the rear line of the first division block letter 'B' to a spruce tree; thence north along the rear line of lots numbers sixteen, seventeen and eighteen, one hundred and eighty rods; thence west till it meets the river; thence southerly by the different courses thereof down stream to the place of beginning, and containing in the whole one thousand three hundred and fifty acres, and hath such shape, form and marks as appears by a plan thereof hereunto annexed, etc., etc."

The dispute is about a hundred acre lot, sixty rods in width, which the plaintiff contends is his lot No. 7, while the defendant contends it is his lot No. 8.

Of course the burden is on the plaintiff to shew where lots five, six and seven—or rather the last mentioned—is, for that is the one which he contends covers the locus. No original map or plan or copy shewing the "second division of block letter C" of Chester township, nor of the "first division of block letter B," nor "lots 16, 17 and 18," nor anything indi-

cating them has been put in evidence. That would be the best evidence. The reference in the grant is not satisfied.

Instead of putting in evidence that which the grant calls for, another grant to John M. Kaizer, senior, and junior, of 20th of April, 1814, not called for, and not purporting even to be a representation of it is put in evidence.

I think that the plaintiff gave no evidence to locate this Kaizer grant.

But there is evidence given by the defendants, namely, the testimony of John M. Kaizer, a son of John M. Kaizer, junior, which does tend to locate lots 14, 15 and 16 of that grant altogether by subsequent occupation. And there was handed to me at the hearing the certified copy of a grant to Jacob Kaizer on which it bounds.

The plaintiff gives oral testimony of reputation that the lot of such and such an occupant is such and such a number. But these witnesses are evidently referring to the numbers designated in the J. M. Kaizer grant, which may not be identical with the numbers in the document called for.

And there is evidence tending to shew that the defendants or some of them admitted where lot 18 was, but that must be taken to be lot 18 of the John M. Kaizer grant. And the whole of the statement relied on for an admission must be taken. They also said that lot 8, the one in dispute, was opposite to this lot 18 in the other tier, not 7, as the plaintiff contends.

On such proof as that I have indicated the plaintiff contends that the incidental call in the grant under which he claims, namely, "along the rear line of lots numbers 16, 17 and 18," is located and that it locates his grant and plan which shews lot 7 to be opposite to 18. And thus put it as far north as the locus.

In my opinion the plaintiff's contention is not supported by legal evidence. J. M. Kaizer's grant and the oral testimony are not evidence of the location of this incidental call of the plaintiff's grant. Non constat that the numbers of J. M. Kaizer's grant are identical with the numbers of the instrument called for—the Chester township grant or plan.

One thing certain is, that the description of the J. M. Kaizer grant, which starts with the call of the Jacob Kaizer grant, cannot be consistently with it laid off upon the ground, and its numbers are not the same.

I think that the plaintiff has failed to shew that his title covers the disputed lot.

There is another view, and that is resorted to upon the assumption that there is proof of sorts of the location of the incidental call.

The theory is that in preparing the grant held by plaintiff the numbers 16, 17 and 18 were used by inadvertence for 15, 16 and 17, i.e., that 5, 6 and 7 are opposite to 15, 16 and 17 in the other block.

It requires to make out that theory the use of proof similar to that relied upon by the plaintiff.

If we can establish where the commencement "the north-west angle of lot number 4" is, or the locality of lot 5 which adjoins it, and then where lot No. 9 is, we can properly infer where the intermediate lots are and can reject 16, 17 and 18 as a false demonstration for 15, 16 and 17.

The lots, as I said, are each 100 acres in extent and 60 rods in width.

Dealing with lot 5, in 1816 the grantee, Millet, conveyed it to Houghton. Afterwards it became the property of Elgin Isenor, and he was in occupation of it—to be definite—in the year 1878, the time of the Thomson survey, to which I must refer later. He was an axeman on that survey. Rupert Eldridge purchased it from Eglin Isenor, and is the present owner. He was a witness at the trial for the plaintiff. This lot, which Eglin Isenor and Rupert Eldridge successfully occupied as lot 5, is a lot opposite to ot 15 in the J. M. Kaizer grant. Its south line is a well defined blazed line, and prolonged to the east corresponds with Kaizer's south line of 15. Prolonged to the west it comes within a few feet, "a paddle's length," of the north-east end of Brittain's Island in the Middle River. I refer particularly to the evidence of John Kaizer, 70 years of age, a son of John M. Kaizer, junior, the grantee.

Then, coming to lot No. 9, now owned by Archibald Webber, Webber's deed gives him lot No. 9 and also lot No. 19 in the other tier, and they are opposite to each other. George Bezanson proves that Joseph Webber, a predecessor of Archibald Webber, occupied it fifty years ago.

Now this lot 9 is the space to which the defendants would be driven for their lot 8 in this presumably consecutive enumeration, and these people for a great number of years

have been labouriously conveying lot number 8 when there is no lot number 8.

Then lot 10, adjoining Webber on the north, owned and occupied by Ainsly Millet (although a confirmatory grant which he has recently taken does not mention it by number), is opposite to lot 20 in the other tier of lots.

Something is to be inferred in such a case from the circumstances of occupation. The successive owners of the paper title of the plaintiff have not, up to five years ago (with the exceptions I shall mention presently), occupied or cut upon the disputed lot as if it was covered by their title. It is in woods, it is true, and unfenced, but there are people who make use of that kind of land.

The exceptions are important.

About fifty-four year ago Isaiah Bezanson, the predecessor in title of the defendants, had cut logs on the lot now in dispute, and they were removed by the late Francis Millet. Millet was brought to task and settled with Isaiah Bezanson, by agreeing to give him from the lot to the south as much wood as he had removed.

Later, about 1878, there was the cutting on this disputed lot by Francis Millet or the present plaintiff in possession as one of his heirs.

It was true the land was under mortgage, but I am disposed to believe that the plaintiff was not in possession under the mortgage.

This cutting resulted in the parties, Isaiah Bezanson and the plaintiff, calling in a surveyor named J. J. Thomson, since deceased. Upon the survey made by him there were taking part the plaintiff, acting as an axeman, Ainsley Millet his brother, and George and Thomas Bezanson and Freeman Pulsifer. His survey established that the Millet grant was in the rear of lots 15, 16 and 17 of the other tier of lots, and that the lot in dispute was Isaiah Bezanson's lot No. 8. There was an arbitration as to what should be paid by Millet to Bezanson for the cutting. The plaintiff's arbitrator, he says, was John Webber. It is not clear that the arbitrators ever settled the damages, but in my opinion a practical location of the land was established. This location was acquiesced in. The plaintiff says: "I never cut after the Thomson survey (1878), until about five years ago."

I refer to what was said by the Judicial Committee of the Privy Council in the case of DesBarres v. Shey, 29 L. T. N. S. 592.

There the effect of a recovery before a magistrate for trespass to land set aside upon certiorari for want of jurisdiction is spoken of. And also the effect of moving off from land in which there had been a recovery in ejectment although not a writ of habere facias.

There is another circumstance to which I wish to refer. Apparently in these old grants the applicant was placed in possession by the surveyor when he surveyed for the grant, and the grant might not follow for years in order that other surveys in the neighbourhood might be included in one grant.

I must refer to the preliminary survey of the Millet lots made by Crandall, a deputy surveyor (i.e., of the Surveyor-General), and produced from the files of the Crown Land Department. I must first cite authority that such a survey is admissible in evidence.

In Bartlett v. Nova Scotia Steel Co., 38 S. C. R. 363, Maclennan, J., says: "And here I may express surprise that there is no mention in the case from first to last of the field notes of that old survey. . . There is a memorandum upon the old plan which might perhaps help a search in the Crown Land department for the field notes of the survey of which it made. . . . But in the absence of field notes, which, if produced might have shewn an error in the scale, I think the plan must be taken to be correct," etc.

I refer also to Evans v. Merthyr Tydfil Urban Council (1899), 1 Ch. 241, at page 252, Chitty, J., and to Ellicott v. Pearl, 10 Pet. 412, at page 441, Story, J., "The survey made by a surveyor, etc." Crandall's survey shews lots Nos. 5, 6, and 7 of the Millet grant to be opposite to lots Nos. 15, 16, and 17 of the "first division lots west side of Windsor road letter B," and lot 8 to be opposite lot 18.

The numbers are written over erased numbers, but the erased numbers are in some instances legible, and are not according to the numbers in the plaintiff's grant. I am satisfied from a comparison that the numbers written over the erasures are in Crandall's handwriting. There is produced from the same file, No. 559, a plan purporting to be an original plan (exhibit O), evidently authentic, which comprises all the lots, both the Fader and Rafuse and the Millet lots of this grant, for they appear to have been the

result of different surveys. This plan, as in the Crandall survey, shews lots 5, 6, and 7 to be opposite to lots 15, 16, and 17.

Coming to the defendant's title to lot No. 8, it is not traced back to the grant of the Chester township, which preceded the grant of which I have been speaking. Because this grant of the plaintiff's was evidently a re-grant, "these lots being vacant and never having been drawn" according to Crandall's survey. But the title goes back to a deed of George Reynolds and Thomas Reynolds in 1826, one of the witnesses being the surveyor Crandall. As far back as 1851 Isaiah Bezanson, the plaintiff's predecessor in title, was shewn to be in possession of this lot in question, and to have had the lines of it run under a deed from William Webber. By a mistake in the deed of that date, the lot conveyed was designated lot No. 6, which lot is not at all in question, instead of lot No. 8, but on the 9th of February, 1880, a correct deed between the same parties was made designating the lot as No. 8. This lot, with the exception of the two instances I have mentioned, has been since 1851, in the possession of Isaiah Bezanson and his successors these defendants. For about four years there was a field about two and a half acres on the lot still known as Bezanson's clearing, which produced potatoes, buckwheat and oats, and then was seeded down to timothy. And during this period it was fenced. During Isaiah Bezanson's occupancy of the lot there was taken from it from time to time hoop poles, hemlock bark and logs. The importance of these acts where there is a paper title will be seen upon reading the case of DesBarres v. Shey, already cited.

I hope it will not be supposed that I am trying to shew that the defendants have a title by mere possession as against the plaintiff's title in case it covers the lot in question. I am only endeavouring to shew that these acts and conveyance together with the plaintiff not being in occupation tend to prove that the plaintiff never claimed that his title covered the locus, but only the three lots below it, and that the call of the grant was a mere mistake in the enumeration, and that he acquiesced in that view, and that the defendants and Isaiah Bezanson, under whom they claimed, owned that land.

On the whole case I am of opinion that the plaintiff has shewn no title to the lot, and that the action should be dismissed, and with costs.

NEW BRUNSWICK.

SUPREME COURT, CHANCERY DIVISION. SEPT. 20TH, 1910.

JONES v. SAINT STEPHEN'S CHURCH, ET AL.

Will—Construction—Charitable Bequest—Uncertainty—Intention.

Barnhill, Ewing & Sanford, for the plaintiff.

W. B. Wallace, K.C., and Macrae, Sinclair & Macrae, for defendants.

M. G. Teed, K.C., and Homer D. Forbes, for defendants.

J. Roy Campbell, for defendants.

BARKER, C.J.:—The testatrix Catherine Murdoch died on the 26th October, 1909, having made a will bearing date November 27th, 1905, which was duly proved, and letters testamentary of which were duly granted to Mr. Jones the executor named in it. The legacies with the exception of the one involved in this suit have all been paid, and it appears that after payment of all the legacies testamentary and all other expenses and debts there will be a substantial residuary estate which the testatrix disposed of as follows,—"I give, devise, and bequeath all the rest and residue of my estate, real and personal, unto the trustees of Saint Stephens Presbyterian Church in the city of Saint John, and the Saint John Natural History Society, to be divided between them share and share alike." These legacies were all to be paid free of succession duty, and in case of the death during the lifetime of the testatrix, of any person named as a legatee, the legacy was not to lapse, but it was to be paid to the next of kin of the person so dying. All of these legacies with the exception of four are given to individual legatees. These four are as follows: "I give and bequeath unto Pioneer Lodge of Odd Fellows, in the said city of St. John, the sum of $500, to be used and applied for the benefit of widows and orphans of members of that lodge." A legacy in similar terms of $500 to the trustees of St. Andrews Society, of St. John, to be used for charitable purposes. A legacy of $1,000 to the New Brunswick Society for the prevention of Cruelty to Animals. And the legacy over which this controversy has arisen which is

given as follows: "I give and bequeath the sum of one thousand dollars to be paid by my said executor to the Aged and Infirm Ministers Fund in connection with Saint Stephen's Presbyterian Church in the city of Saint John." This legacy is claimed by the defendants "Saint Stephen's Church in the city of Saint John," the corporate name of that Church as fixed by 61 Vic. c. 74 (1898). It is also claimed by the defendants "The Board of Trustees of the Presbyterian Church in Canada eastern section," a corporation created by 7 Ed. VII. c. 79 (1907). These two defendants also claim that if neither of them is able by reason of the uncertainty of the devise to establish a right to be paid the legacy, it is a charitable bequest which would not be allowed to fail for want of a trustee, and that it would be administered by this Court for the benefit of the fund mentioned. The defendants "The Natural History Society of New Brunswick" a corporation created by 46 Vic. c. 29 (1883), claim not only that the other defendants are not entitled and that the bequest is not a charitable gift, but that it is void for uncertainty and becomes a part of the residuary estate which in that case both the defendants, the Natural History Society and the Saint Stephen's Church claim as residuary legatees notwithstanding the difference between their corporate names and their names as designated in the residuary devise. This bill has been filed for a declaration of the parties rights.

The evidence shews there is not now and there never has been any Aged and Infirm Ministers Fund in connection with St. Stephen's Presbyterian Church in the sense of a fund for the benefit of the ministers of that Church, or of a fund of that character administered by that church or under its control. There has however been a fund connected with the Presbyterian Church in Canada known as the Aged and Infirm Ministers Fund in which all the ministers of that Church, including the ministers of St. Stephen's Church, have a right to participate subject to the rules and regulations made for its management. There are various branches of church work organized and maintained by these various Presbyterian Churches, and among them is the maintenance of this fund for aged and infirm ministers. Collections in the various congregations are taken up during the year, and each contributor may, if he wishes, designate the particular scheme of work to which he wishes his offering

to be devoted. Once a year these contributions for general purposes are divided by the officers of the particular congregation, and allotted to the several funds, so much for missions, so much for the Aged and Infirm Minister's Fund and so on, always regarding any special purpose indicated by contributors. These funds are then remitted according to the present practice, as I understand it, to an official of the church at Halifax who accounts for it and remits it to the proper officer of the Presbyterian Church in Canada whose office is at Toronto, where they are carried to the credit of the several funds as the yearly contribution of the particular congregation. These funds are managed and administered by committees appointed for the purpose by the Presbyterian Church of Canada. The precise details as to the transmission of the money may have varied from time to time in some immaterial particulars but whether they did or not is unimportant because (using St. Stephen's Church by way of illustration) whatever amount was allotted by the officers of that church as a contribution to the Aged and Infirm Ministers Fund, came into the hands of the proper official at Toronto and became a part of the general fund to be managed and used according to the rules and regulations provided in reference to it. The fund is maintained by interest from invested funds, private contributions and the congregational offerings I have mentioned. For the purposes of administration and making a distribution of the fund equitable in view of the different conditions prevailing in the western part of Canada from those to be found in the east, there seems to have been at one time what was called an eastern and a western section of the church. There was however but the one fund and since 1904, there has not been any division even nominally. By the rules and regulations by which this fund is governed the minister of St. Stephen's Church was entitled to participate provided he himself contributed to the fund an annual fee of $8. And under the regulations the Rev. Dr. McRae did receive for some time previous to his death $400 a year. Stated generally every Presbyterian minister in Canada has a right on complying with the conditions and requirements laid down by the church as to age, contributions, and service, to receive an allowance which comes to him from the Toronto office. Mr. Willitt who is fully conversant with its object and the details of its working by an experience covering a long number of years aptly describes it. He says: "It is a superannuation fund, an insurance fund on

superannuation principles, and they (i.e., the ministers) contribute among themselves and the congregation, and well-disposed people help the funds as well. It is purely for the purpose of aged and infirm ministers on an insurance basis, complying with the rules of the church." The scheme serves the same purpose for the ministers of the Presbyterian Church that the Civil Service Superannuation Act does for the civil service officials, and the similar organizations maintained in connection with the larger banking institutions of the present day do for their officers and clerks. Whether this legacy could under these circumstances be regarded as a charitable bequest even under the legal definition of that term, I shall not stop to consider for I think the case may be disposed of on another ground.

The evidence shews that the testatrix was a member of the congregation of St. Stephen's Church, and always a regular and generous contributor to all these schemes of church work, not forgetting them even when abroad, but sending her gifts when absent from home. That she in fact intended this particular fund to benefit by the legacy there cannot I think be any doubt. Has she expressed that intention with sufficient clearness to give it effect? For there is ample authority for holding that a devise will not fail for uncertainty if the Court can arrive at a reasonable degree of certainty as to the person intended to be benefited (Adams v. Jones, 9 Hare 485; Tyrrell v. Senior, 20 Ont. App. 156). When you find that the fund referred to is a fund for the Aged and Infirm Ministers Fund in connection with St. Stephen's Presbyterian Church in the city of Saint John, and that the fund in question is the only fund of the kind with which St. Stephen's Church has any connection, and that the connection is of the substantial character I have described and the same as that of all the Presbyterian Churches in Canada, there is no difficulty in fixing on this fund as the one intended to be benefited by the testatrix. The fact that she had contributed generously and regularly to its support during her life time is not necessary for the conclusion as to her intention though it supports it. To whom then is the legacy to be paid? There is no legatee named as in the case of the other legacies. "I give and bequeath the sum of $1,000 to be paid by my said executor to the Aged and Infirm Ministers Fund," &c. The language is very similar to that in Lockhart v. Ray, 20 N. B. R. 129, which was as fol-

lows, "I bequeath to the worn out Preachers and Widows Fund in connection with the Wesleyan Conference here the sum of £1,250 to be paid out of the moneys due me by Robert Chestnut of Fredericton." No question was made as to the payment being made to the corporate body having and controlling that fund (see same case on appeal, 6 S. C. R. at page 322). It cannot be said in the present case that the testatrix intended to give this fund to the St. Stephen's Church. She has rather shewn an intention not to do so, because in disposing of the residuary estate she expressly gives one-half to that church by what I assume she supposed to be its corporate name, and no doubt will be accepted as such. The only object the testatrix had in using the words "in connection with St. Stephen's Church, &c.," was thereby to identify the particular Ministers' Fund which she wished to benefit. It is equally true that the testatrix did not in terms specify any individual or society or corporation as legatee and we are left therefore to ascertain what corporate body represents the fund and can take it so that it may reach its destination. I think the defendants, "The Board of Trustees of the Presbyterian Church in Canada, eastern section," sufficiently represent the fund and that payment may be made to them. That body was incorporated in 1907 by an Act of the Provincial Legislature, 7 Edward VII. c 79. Section 2 provides as follows: "All gifts, devises, conveyances or transfers of any lands or tenements or interests therein and all assignments, gifts and bequests of personal estate in this province, which have been or shall hereafter be made to or intended for the Presbyterian Church in Canada, eastern section, or any of the trusts in connection with the said church, and any of the religious or charitable schemes of the said church by the name thereof, except any trusts, schemes or institutions connected with the said church which are now or may hereafter be incorporated, shall rest in the said board of trustees as fully and effectually as if the assignment, gift, devise, bequest, conveyance, or transfer had been made to it, and shall be held by the said board of trustees for the benefit of the said church of the particular scheme of the said church or of any of the said trusts in connection therewith to or for which the said real estate has been or may be bought, given, devised or bequeathed." The part of Canada comprising what the Presbyterian Church in Canada called the "Eastern section," included the three Maritime

Provinces, and Newfoundland, so that St. Stephen's Church in Saint John was one of the churches. And there can be no doubt that this bequest was intended for one of the religious or charitable schemes of that church, and as the fund was not incorporated, it by virtue of this section vests in this corporation for the benefit of the scheme mentioned. Section 3 makes provision for the appropriation and application of the money, and section 12 authorizes this Board of Trustees under the corporate seal, to give a discharge on payment. The evidence does not make it very clear whether the distinction between the eastern and western sections is still kept up or whether it existed or not at the time the will was made. This seems to me to be unimportant. The fund was the same whether for the convenient management or application of it there were two divisions or sections or one. In either case it was the Aged and Infirm Ministers Fund in connection with St. Stephen's Church in the city of St. John and should, I think, be paid to the defendants, the Board of Trustees of the Presbyterian Church in Canada, Eastern section, for the Aged and Infirm Ministers Fund.

Costs out of residuary estate. Plaintiffs costs to be taxed as between solicitor and client.

NEW BRUNSWICK.

SUPREME COURT, CHANCERY DIVISION. OCT. 18TH, 1910.

TILLEY v. DEFOREST ET AL.

Specific Performance — General Assignment — Goodwill of Business—Trade-mark.

M. G. Teed, K.C., for the plaintiff.

Daniel Mullin, K.C., for the defendant J. Harry W. deForest.

Amon A. Wilson, K.C., for the defendant J. Harvey Brown.

BARKER, C.J.:—This case lies within a very narrow compass, and the facts upon which its decision rests are substantially not disputed.

Previous to the year 1894 the firm of George S. deForest & Sons consisting at that time of the defendant Harry W. deForest and his brother Clarence W. deForest, carried on a general wholesale grocery business at Saint John dealing among other things largely in teas. They eventually put upon the market a particular blend of tea under the name of

the "Union Blend," consisting of a blend of Indian and Ceylon teas, under a formula made by the defendant Harry W. deForest. This tea seems to have acquired quite a reputation not only in New Brunswick but in other provinces. On the 14th March, 1894, the firm of George S. deForest & Sons (which at that time consisted of the defendant and his brother Clarence) applied in the firm's name to the minister of agriculture under the provisions of the "Trade-mark and Design Act," for the registry of a certain label as a specific trade-mark, and on this application the trade-mark was registered on the 22nd March, 1894. It is described in the certificate of registry as follows: "This is to certify that this trade-mark (specific) to be applied to the sale of tea, and which consists of a red label having printed on it in gold the words, &c., 'Union Blend selected from first pickings of choicest new seasons teas—a figure formed of two triangles and containing initials G. S. deF. & S., &c.,' has been registered by George S. deForest & Sons of the city of Saint John, province of New Brunswick on the 22nd day of March A.D. 1894." By an assignment under seal Clarence W. deForest on the 1st May, 1901, assigned his interest in the trade-mark as registered to the defendant Harry deForest. In 1908 the defendant registered the trade-mark in the United States in his own name. Sometime after Clarence deForest assigned his interest in the trade-mark he seems to have gone out of the partnership and the defendant Harry deForest continued the business in his own name. He established a branch in Saint Johns, Newfoundland, and later on in Boston. He continued to use the trade-mark—he spent large sums of money in advertising the tea sold as the "Union Blend," and his sales were made not only in the Maritime Provinces, but in Newfoundland and in parts of Maine and in Boston. In May, 1908, the business was put into a joint stock company under the Provincial Act, under the name of "Harry W. deForest, Limited." The capital stock was $99,000 divided into 990 shares of $100 each, of which 542 shares were subscribed: Harry W. deForest taking 500 shares, and the other 42 were divided as follows: Charles W. Howell and Noel F. Sheraton each 10 shares, Clarence W. deForest, 2 shares, and Annie E. W. deForest, 20 shares. These 42 shares were to be paid for in cash, and the 500 shares taken by the defendant were to be paid for in full by the transfer by him to the company of his interest (speaking generally) in the business, which he valued at $50,000

over and above the liabilities which the company were to assume. In the petition for incorporation the applicants whom I have just mentioned say as follows: "The objects and purposes for which incorporation of the said company is sought are as follows: (a) 'To purchase or otherwise acquire and take over all the stock-in-trade, merchandise and property of all and singular the tea business now carried on and engaged in by Harry W. deForest of the city of Saint John, together with the offices and buildings now occupied by the said Harry W. deForest as a tea office and warehouse in the city of Saint John and the land and appurtenances thereto belonging or appertaining.' (b) 'To carry on and continue the tea business now owned and conducted by the said Harry W. deForest, and to buy, sell, import, export, purchase and acquire tea and to carry on a wholesale and retail business." The sixth section of the petition is as follows: "The said company as one of its objects and purposes as above stated seeks authority to purchase, acquire and take over, hold and own the tea business heretofore carried on by Henry W. deForest, one of your petitioners, at the said city of Saint John, together with the good-will, stock-in-trade, business, property, assets, rights and credits, subject to the said debts and liabilities as aforesaid, which said good-will, stock-in-trade, business, property, assets, rights and credits aforesaid are valued at and worth $50,000, and are necessary to the business of the said company, and good value to the said company at the said sum of $50,000." Section twelve of the petition, which is verified by an affidavit of the defendant, states the terms upon which he was to pay for his stock by transferring to the company when incorporated "all the good-will, stock-in-trade, goods, wares and merchandise, chattels, estate, property and effects, rights and credits owned by him in connection with the business, &c.," for which he was to receive 500 paid-up shares of the capital stock, and the company was to assume the liabilities of the defendant arising out of the business. After the letters patent of incorporation had been issued the defendant executed an assignment of the property, which under the arrangement, he was to hand over as representing the $50,000, the par value of the shares, he agreed to take. This assignment is dated June 29th, 1908, and after reciting the various terms of the arrangement it proceeds thus: "Now this indenture witnesseth that the said Harry W. deForest for and in consideration of the issue to him of five hundred shares of the capital stock of the said Harry W. deForest, Limited, and in further consideration

of the sum of one dollar of lawful money of Canada to him in hand well and truly paid, &c., has assigned, transferred, &c., all his right, title and interest in and to the said mentioned and described land, and premises situate on the corner of Union and Mill Streets aforesaid, with the buildings and appurtenances thereto belonging or appertaining, and all the goods, wares, merchandise, money, chattels, and effects, machinery, warehouse supplies, horses, sleds, waggons, harness, book debts and all personal property of whatsoever nature and description owned by the said Harry W. deForest in connection with the business of the said Harry W. deForest together with the good-will of the business of the said Harry W. deForest." The assignment contains the following covenant: "And the said Harry W. deForest hereby covenants and agrees to and with the said Harry W. deForest, Limited, that he will execute and deliver all necessary papers or documents in order to convey and give a perfect title to the said property hereinbefore referred to and intended to be conveyed to the said Harry W. deForest, Limited."

On the delivery of this assignment the certificates for the five hundred paid-up shares were issued to the defendant. The company was organized. The defendant was elected president, and the business was carried on by the company chiefly under his management. There were no new books opened, but the business carried on by H. W. deForest in his name before the incorporation, was continued by the company in its name afterwards. Of the $50,000 carried to his credit in stock account, $35,434 represented the estimated value of the trade-mark or good-will of the business. It continued to be used by the company as it had been originally by the firm of George deForest & Company, and later by H. W. deForest, when he carried on the business in his own name. Large sums were spent after the incorporation in advertising. The parties differ as to the amount, but it must have exceeded $20,000. The business had been extended—it had been for many years limited to teas, and the sales in 1905 amounted to about seven hundred thousand pounds of which the principal quantity was "Union Blend."

In May last it was discovered that the company's financial position was such that it could not carry on its business, and accordingly it made an assignment to the plaintiff on the 3rd of May, in pursuance of c. 141, Con. Stat., 1903, N.B., respecting assignments by insolvent persons. On investigating the company's affairs the assignee found that the

assignment of trade-mark from Clarence deForest had not been registered, and there was no specific assignment to the company which could conveniently if at all be used for registry under the Trade-mark Act. The plaintiff thereupon applied to the defendant to execute a transfer, not only in order to carry out his intentions as to the property, but also his covenant to execute such further conveyances as might be necessary for the completion of the title. This the defendant refused to do for a reason so altogether insufficient that it is not worth discussing. The plaintiff then brought this action to compel the defendant to execute the necessary assignment.

Assuming the trade-mark to be assignable, it passed I think under the assignment from the defendant to the company. The words used are in my opinion amply comprehensive to pass the trade-mark and thus carry out what was beyond all doubt intended by the defendant as by everyone who had anything to do with the transaction. Gage v. Canada Publishing Company, 6 Ont. Rep. 68, 11 Ont. App. 402, 11 S. C. R. 306. In Lecouturier v. Rey, 1910, App. Cas. at p. 273, the Lord Chancellor treated the trade-mark as property situated in England, and therefore regulated in accordance with the law of England. The object of organizing the company was to transfer the assets and business of the defendant to the company, so that the business should be continued and carried on by it. That is what in fact was done. It would be a strained construction of the conveyance to hold that under such circumstances such words as "assets," "property" and "good-will" did not include the principal asset of the whole business. Without it the business could not be continued or carried on as before. It is in that way quite within the rule mentioned by Fry, L.J., in Pinto v. Badman, 8 R. P. C. 181, mentioned in the case I have just cited. He says: "It has been laid down by the clearest authority that a trade-mark can be assigned when it is transferred together with, to use Lord Cranmouth's language, the manufactory of the goods on which the mark has been used to be affixed." Viewed as a question between the defendant and the creditors of the company in which he held nearly all of the subscribed shares, which he had himself organized and promoted for the purpose of taking over and continuing the business, and to which he had made the assignment I have already referred to, it seems difficult to suggest any good reason for his refusing to perfect the title to the trade-mark as he has been requested to do. It seems to have been regarded by him as the most valuable part of the assets; he had received a large sum for

its transfer, and it is fair to assume that it was a chief factor in enabling the company to obtain so large a credit as $100,000 which the evidence shews to have been its indebtedness at the time of its failure. The case relied on by the defendant's counsel is Leconturier v. Rey, 1910, A. C., already mentioned. All that case decides is this, that where a foreign manufacturer had acquired a reputation in England, it is beyond the power of a foreign Court or foreign legislature to prevent the manufacturers from availing themselves in England of the benefit of that reputation. As I have already pointed out, the benefit of the reputation is, as Lord Loreburn there says, not only property, but property in England, and therefore subject to English law. There does not seem to me any analogy between that case and this. The "Chartreuse" manufactured solely by the Carthusian monks was made according to a formula known for a long period only by two or three of the order. Under the legislation which took place in France in 1901 known as the Law of Associations, and which was directed against unlicensed religious associations, the monastery of La Grande Chartreuse was dissolved and their property in France including their distillery and French trade-marks were confiscated and sold. This however it was held did not include either the secret of the manufacture or the benefit of the reputation which the liqueur had acquired in England. Had these monks done what the defendant did with his business they would have stood in a different position. Had they organized a joint stock company for the purpose of taking over their business of making and manufacturing the "Chartreuse" made and manufactured by them for the benefit of the company in which they were, or might be interested, the company could scarcely carry out its purpose without using by right the word 'Chartreuse" as indicating the article for sale, or without owning the right to use the process of manufacture which up to that time had remained a well guarded secret known only to two or three people at any one time. The case relied on by the defendant has not any bearing on this case, which is simply the case of assigning a registered trade-mark. This brings me to the Act of Parliament under which the mark was registered (c. 71, R. S. C. 1906). Section 13 provides that the proprietor of a trade-mark may on complying with certain regulations have it registered for his own exclusive use, and "thereafter such proprietor shall have the exclusive right to use the trade-mark to designate articles manu-

factured or sold by them." Section 15 provides that "Every trade-mark registered in the office of the minister shall be assignable in law." There is no limitation here as there is in section 70 of the English Act (c. 57, 1883), which is as follows: "A trade-mark when registered shall be assigned and transmitted only in connection with the good-will of the business concerned in the particular goods or classes of goods for which it has been registered, and shall be determinable with that good-will." The good-will was sold and assigned in this case. Section 19 of our statute gives the proprietor of a registered trade-mark a right of action against any person using it, or any fraudulent imitation of it, or any person who sells any article bearing the trade-mark.

Stated shortly, the defendant, who was the proprietor of this trade-mark, sold it with the good-will of his business to the company for a valuable consideration which he received—he made an assignment of the property, not specifically mentioning the trade-mark, but by words in my opinion amply sufficient for the purpose of transferring it—he and the company used it, and for the two years which the company existed treated it as the company's property, and he, as a part of the arrangement under which the company was organized, gave a covenant that he would execute all papers necessary to give a perfect title to the property. The plaintiff as the assignee of the company required a specific assignment of the trade-mark by name, in order to have it registered under the statute, and the rights protected. He asked the defendant to do this at his expense. He has refused for reasons which seems to me altogether insufficient.

The plaintiff must have a decree with costs.

NEW BRUNSWICK.

SUPREME COURT, CHANCERY DIVISION. OCT. 4TH, 1910.

KENNEDY v. SLATER.

Originating Summons—Practice — Concurrent Jurisdiction with Probate Court—Con. Stat. of N. B. (1903), c. 161, s. 2.

W. B. Jones, K.C., for the plaintiff.
M. G. Teed, K.C., for the defendant.

BARKER, C.J.:—This matter comes before me by way of originating summons and arises out of the following

facts. David Kennedy died intestate on the 21st February, 1907, possessed of certain real and personal property, and leaving one son and three daughters surviving (his wife having predeceased him) and one granddaughter, Helena M. Slater, child of Jennie H. Slater, who was a daughter of David Kennedy, and died in 1902. Helena M. Slater died March 31st, 1910. The question for determination is whether she was entitled at the time of her death to a share in the surplus of the personal estate of her grandfather David Kennedy. This involves the construction to be placed on section 2 of chapter 161 (Con. Stat. of N. B. 1903) relating to intestate estates, and will arise in the ordinary course of procedure when a distribution of the personal property is made by the Judge of Probate. It is unnecessary for me to refer to the argument of Mr. Jones, because for reasons which I shall give, I do not intend entertaining the application. Two objections were taken to the proceeding, one, that the case is not one intended to be disposed of on an originating summons, and the other, that in view of the jurisdiction of the Probate Court, this Court, though it has full jurisdiction, would refuse to hear it.

The application is not for the administration of the estate, but simply to determine whether or not this grandchild is entitled to participate in the surplus. It is not necessary to decide the question, but as at present advised I think the proceeding is correct, though some amendment may have been required as to the parties. In fact, In re Natt, 37 Ch. D. 517, relied on by the plaintiff as sustaining his contention, arose on an originating summons. See Order 55, Rule 3 (a) and (b).

Without in any way interfering with the jurisdiction of this Court as to the administration of intestate estates, the legislature has created a Probate Court for each county, whose jurisdiction has been from time to time increased, so that it can now deal with trustees' accounts and other matters quite beyond the original area of its jurisdiction. It has always been vested with the power of passing estate accounts and ordering the distribution of the surplusage of the personal property. Section 2 of c. 161, to which I have just referred, enacts thus: "Subject to the provisions of the next following section, the surplusage of the personal estate of the intestate shall be distributed by the Judge of Probate in manner following, &c." Section 50 of "The Probate Courts Act," c. 118 (Con. Stat. N. B. 1903), provides for

a distribution of the surplus of the personal estate to be made after the lapse of eighteen months from the time of granting letters of administration. This can be compelled on the application of any heir or next of kin, and upon the hearing the Judge of Probate is to make a decree for the payment of the distributive share. And the bond which the administrator is obliged to give on his appointment, binds him after having his accounts of administration filed and allowed, to pay the surplus as the Probate Court or other competent Court by decree shall adjudge. There is of course the appeal to the Supreme Court as there is from actions in this division. Within a few years the Probate Courts' jurisdiction has been extended to matters relating to trustees which before that came exclusively within this Court's control. Their accounts are passed and allowed with the same effect as if allowed by this Court (s. 58). A trustee may be removed in certain cases, and a new trustee appointed in his place, and if the estate is in danger of being wasted the Judge of Probate may require additional security (s. 73). I think this extended jurisdiction to the Probate Court must have been intended by the legislature to relieve this Court from the obligation to act, where there exists no special reason why the Probate Court should not act, and where considerations of convenience and expense are in favour of that course being adopted. It has been said that the Probate Court is not a Court of construction, and the late Mr. Justice Palmer acted on that principle in Parks v. Parks, N. B. Eq. Cases 382. That case however involved the construction of a will, and it was held that an order of the Court to pay a legacy, which was made under an erroneous view of the meaning of the will, was no protection to the executor who paid the legacy as directed. That however is an entirely different case from this. It arises under a long established practice and jurisdiction. The plaintiff must go to the Probate Court and pass his accounts in order to determine what the surplus personal estate is which the Judge of Probate is required to distribute or to make a decree for that purpose, and the question involved here can thus be easily and inexpensively settled. Under these circumstances I think I should decline to act and leave the matter for the Probate Court.

I have consulted Mr. Justice McLeod as to the course I intended to take, and I am authorized to say that he concurs in it. There will therefore be no order made, as the matter will drop, and there will be no order as to costs.